Answers to House of Lords Select Committee questions on behalf the Criminal Bar Association:

1. Does the UK's extradition law provide just outcomes?

1. It is somewhat difficult to answer such a broad question. Some observations follow:

2. There are some aspects of extradition law, particularly in the context of EAW cases as well as some Part 2 cases that do not require a prima facie case, where there is a perception that individual rights are not adequately protected (see the stance of Liberty, for example). The amendments to the 2003 Act are, in the large part, concerned with the rights of the individual (such as the proportionality test and forum bar), but it is yet to be seen how they will be applied in practice.

3. The fact that some countries issue EAWs without any prosecutorial discretion is capable of leading to unjust outcomes and an unjust process. Whilst the court is required to conduct a balancing exercise in the context of Article 8 and a proportionality assessment for accusation cases, this does not prevent a requested person from being remanded in custody awaiting a decision for (sometimes a considerable) period of time. Moreover, the extradition court is overwhelmingly likely to decide that absent compelling circumstances it has an obligation to honour extradition arrangements even where the case has all the hallmarks of being a request issued without any qualitative assessment of the facts.

4. Great weight is attached to the fact that countries in the EAW scheme are signatories of the European Convention on Human Rights. Whilst that may often be appropriate, time has shown that the criminal justice system of European countries operate with some serious problems. Very very long delays are one example - the recent accession of Croatia to the EU and thus the EAW system was met with much positive comment and commitment to the scheme. Yet of the two Croatian EAW requests being processed by the courts both have involved delays of almost a year as the courts have adjourned the cases repeatedly to allow the Croatian Court to provide clarification. In one, extradition was refused and in the other, the same decision is expected imminently. Another example is of prison conditions. These vary considerably across Europe and recent cases involving Lithuania and Romania in particular have shown that the presumption that prison conditions are acceptable was misplaced.

5. Means tested legal aid can also lead to injustice in the proceedings- a requested person may spend on remand in custody awaiting a decision on legal aid before the proceedings can get started.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

6. Some of the applicable concepts are awkward to deal with and thus potentially lead to some injustice where the offence itself is multijurisdictional. Assessing offence equivalence in relation to fraud offences where information may be limited and the law complex is notoriously difficult and of this is compounded by issues of forum.

7. Many aspects of the system are also hopelessly out of date; communication from a court takes and is accepted to take one month; the request is drafted, translated and sent via the NCA and Interpol to the relevant court. When the response is drafted the reverse is then necessary.

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

8. Yes, extradition is often used as a first resort before looking at alternatives. In particular, little use appears to be made of the provisions for payment of fines (via the Framework Decision on the mutual recognition of financial penalties) though there have been plenty of examples where that would have been appropriate, assuming law in the issuing state could accommodate. These include primarily criminal proceedings in respect of low value frauds or thefts, often where a fine has formed part of the punishment.

9. Potential use of the principles behind the Framework decision on the mutual recognition of probation issues would also represent an alternative to use of an EAW. Numerous cases, particular Polish request, relate to instances where someone has lost contact with probation or come to this country with the permission of probation but not of the court and automatically/in default an EAW is issued. In many cases the only condition placed on the person sought was not to commit further offences and to stay in regular contact.

10. The amendment in s21A to the 2003 Act (consideration of less-coercive measures in proportionality) is apparently designed to try to redress this problem, particularly, when taken in conjunction with s21B (temporary transfer, etc), which allows extradition proceedings to be put on hold whilst the requested person and the court / prosecutor / judicial authority speak to one another.

11. Whilst it hasn't yet been used, it would appear that s21B is aimed at exploring the possibilities of alternative measures. Section 21B does not place any restrictions on the purposes for which temporary transfer or a conversation can be used for. The aim of the section therefore appears to focus on enabling a conversation to take place which could lead to a more efficient resolution of some of the issues which arise during the course of extradition. One can envisage this section being popular with countries such as Poland where the authorities can often be persuaded to withdraw an EAW where certain conditions are met.

European Arrest Warrant

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

- Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

12. No- this causes one of the most prominent problems. The Framework Decision tries to accommodate the differing justice system across the member countries and there are marked differences between them. Poland is a prime example- they operate a system where there is no prosecutorial discretion in enforcing their proceedings and sentences, which results in such a high number of requests in comparison to other member states. This is coupled with the sentencing regime where suspended sentences are activated when a person leaves the country, even if other conditions (ie. payment of damages and a period of probation have been complied with). This was the main reason behind the proportionality bar. This causes a tension between two aims of the Framework on one hand respecting member state's justice systems, where the seriousness or gravity attributed to a certain type of offending can vary greatly, as against the desire to reserve extradition proceedings for the more serious offences.

- How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

13. Two main impacts will be that this will permit cases to go to the European Court of Justice- so more case law and Commission will have the ability to bring enforcement proceedings.

Prima Facie Case

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

- Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

14. The vast majority of Part 2 extradition request do not require a prima facie case to be presented. All signatories to the European Convention on Extradition 1957, plus a number of members of the Commonwealth and the USA are dealt with on this basis. This process has not stopped abuse by a number of jurisdictions but in particular Russia, Ukraine, Turkey and Azerbaijan. The UK court do however frequently discharge extradition requests to the jurisdictions. For instance there has been only one individual surrendered to each of Russia and Ukraine and both were by consent. Human Rights concerns become more difficult to examine outside the Council of Europe because there are not the same monitoring bodies such as the European Committee for the Prevention of Torture. The UK courts do frequently discharge requests to Part 2 territories on the grounds of abuse of process and human rights breaches so the bars and human rights protections do provide

sufficient protection. However, it is difficult to analyse the underlying conduct which is sometimes fabricated without the need for prima facie evidence.

15. There are no territories that are not already designated that should be. If anything a number of states should be required to provide more evidence not less. The designation and signing of extradition treaties is by is nature an immensely political issue. For instance the UK now has an extradition treaty with Libya which co-incidentally coincided closely with the removal of Mr. al Magrahi (the Lockerbie Bomber) whilst in reality because of the political and human rights situation in Libya there is no prospect of the UK surrendering any individual there.

UK/US Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?
- Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?

16. The UK's extradition arrangements with the US are not unbalanced. The tests are the same; neither party has to provide prima facie evidence. This area has been reviewed and debated at length but there is no evidence to show that the arrangements are better or worse than those with for instance Russia (other than the fact that the UK actually extradites individuals to the US).

17. The factor that always brings this issue into public debate is that US prosecutors are far better resourced and political that those in the UK and far more willing to prosecute a multi-jurisdictional crime that touches the US even when most of the conduct occurs in the UK.

18. Public discourse is skewed away from the horrors of former CIS states and Turkey to the US because the cases are given better publicity and discussion and often involve UK nationals.

Political and Policy Implications of Extradition BK

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?
-To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

19. The changes only came into effect in July 2014 and only touch a small proportion of cases so it is difficult to tell. It is only those cases that involve asylum claims and the case of Gary McKinnon in which the Home Secretary has had any significant input into under the 2003 Act so it is unlikely that there will be any change.

20. It is imperative that the Home Office retain some input into the Extradition process otherwise the use of assurances but the UK or the monitoring of assurances in foreign jurisdictions is impossible to properly assess.

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

21. This can only be answered fully by those making such decisions. However, from experience there are few but growing number of cases that this impacts upon and the influence of Eurojust in that decision making process seems critical within the EU and the cooperation between the SFO and US Department of Justice in US Cases in US cases.

Human Rights Bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

22. The Human Rights bar incorporates the ECHR into the Extradition Act and needs no amendment. The implementation by the courts is an ever evolving process and there has rightly been a sea change in the analysis of article 8 cases which has led to more just outcomes. The use of assurances is the main problem when examining prospective Human rights breaches in EAW cases.

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?
- What factors should the courts take into account when considering assurances?
- Do these factors receive adequate consideration at the moment?
- To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

23. The use of assurances must be of real concern.

24. No European legal instrument expressly provides for reliance on diplomatic assurances as a safeguard to a States' obligations not to return a person to the risk of ill-treatment.

25. The preamble to the E.U. Framework Decision adopting the EAW scheme reaffirms the absolute nature of the prohibitions against the death penalty, torture, and returns to torture or ill-treatment. The decision explicitly provides for the use of assurances **only** with respect to the opportunity of a retrial in cases of judgements or orders handed down in absentia, and for the review of life-sentences. The European Convention on Extradition 1957 provides for the use of assurances, but only with respect to the death penalty. Its Second Additional Protocol provides for the use of assurances in the context of a right to retrial. Article 4 of the Protocol amending the 2003 European Convention on the Suppression of Terrorism,

obliges Contracting States to seek assurances **only if** a person concerned risks being exposed to the death penalty.

26. The guidelines elaborated by the Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on July 15, 2002, reaffirm the absolute prohibition against torture in all circumstances and permit states to seek assurances that a person subject to surrender will not be subject to the death penalty. As above, no express provision is made for states to seek diplomatic assurances that a person subject to surrender will not be at risk for torture.

27. International, UN and European Intergovernmental Institutions and NGOs have consistently stressed the problems of recourse of assurances as inherently unreliable and often ineffective and that concern is repeated here. Receiving states are already under a duty not to torture or ill-treat detainees having ratified legally binding treaties, thus non binding diplomatic assurances provide no additional protection to returnees whilst simultaneously sanctioning the poor human rights conduct of the state outside the remit of the assuance/s. There may be little proper enforcement mechanism of the assurance for the person concerned or legal recourse if the assurances are breached or independent review (at any time and without notice) and post transfer monitoring.[1]

28. Thus the Courts here rely heavily on the trust between nations.

29. In that context a limited number of cases since case ***Soering***, have considered assurances in context of deportation or extradition.

30. Where considered, the ECHR has invariably referred to the inherent weakness of their use, namely that where there is a need for such assurances, there is an acknowledged risk of ill treatment. As such, even if diplomatic assurances have been given they are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices contrary to the principles of the Convention.

31. It is noteworthy that in 2005 a Committee created by the European Council's Steering Committee for Human Rights refused to draft guidelines for the adoption of a common instrument on diplomatic assurances because, inter alia, such an instrument would weaken the absolute nature of the prohibition and could be an inducement to resort to assurances.[2]

[1] UN Special Rapporteur on Torture, the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees, the UN Human Rights Committee, the European Council Parliamentary Assembly and Commissioner for Human Rights, and the European Committee for the Prevention of Torture. See, for example, Ismoilov v Russia.

[2] DH-S-TER(2006)005, Steering Committee for Human Rights, Group of Specialists on Human Rights and the Fight Against Terrorism, Meeting Report, Strasbourg, 29-31 March 2006. http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2006_005_en.pdf

32. In ***Othman v UK*** (2012) 55 E.H.R.R. 1 the Court reviewed caselaw arising in relation to the status of assurances. It noted at para 187, that:

> "In a case where assurances have been provided by the receiving state, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time."

33. The ECtHR set out a non exhaustive list of factors relevant to assessing the practical application of assurances and determining what weight is to be given to them:

> "189… the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:
> (1) whether the terms of the assurances have been disclosed to the Court ;
> (2) whether the assurances are specific or are general and vague;
> (3) who has given the assurances and whether that person can bind the receiving state ;
> (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them
> (5) whether the assurances concerns treatment which is legal or illegal in the receiving state ;
> (6) whether they have been given by a Contracting State;
> (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
> (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers ;
> (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
> (10) whether the applicant has previously been ill-treated in the receiving state ; and
> (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

34. It is the experience of this team that the Courts do not review the assurances methodically by reference to those criteria. Perhaps more importantly, no debate is really entertained about the ethical use of such assurances and how they impact on the wider human rights issues in the country concerned. Nor, of course, is there any

real mechanism by which those assurances are monitored or results fed back to this court – partly because there is no funding for that to happen.

35. The history behind the recent High Court case of A and Ors v Lithuania showed how clearly the approach of the court which accepted the assurance 'without hesitation' was inappropriate. The Court felt it inconceivable the Respondent might not implement or renegade on what they purported to be promising. The reality was very different as it became clear that the assurance had not been disseminated within the country, so the relevant staff across the CJS did not know about it, and that its terms were then breached.

36. It is only a practice that can grow and that is to the detriment of the overall criminal justice system.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

37. The Forum bar as implemented will lead to considerable additional litigation and is unlikely to lead to any significant change in the number of extraditions.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

38. There is likely to be very little impact of the proportionality bar because it is worded in a way that prevents an overall merits based assessment and so requires a higher threshold than article 8 of the ECHR meaning that it is unlikely to have any significant impact.

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

39. Extradition proceedings under the Extradition Act 2003 are unusually complex and high profile. They constitute some of the most difficult and specialised proceedings in the Magistrates' Court. For this reason first instance proceedings are restricted to Westminster Magistrates' Court before a team of highly trained District Judges, Legal Advisors, Prosecution Counsel and specialist Duty Solicitors. Cases concern the full range of criminal offences from shoplifting to murder and terrorism. However, it is the seriousness of the consequences for Defendants and Governments that makes the cases so complex. Nowhere else in the criminal law must a judge consider whether a foreign state will deliberately torture a Defendant or whether the allegations are fabricated for political motives.

40. The small team of District Judges at Westminster Magistrates' Court require a specific extradition training and "ticket" and benefit from direct guidance by the Chief Magistrate, Senior District Judge Riddle, and Deputy Chief Magistrate, Deputy

Senior District Judge Arbuthnot. The full proceedings and all evidence must be heard by Westminster Magistrates' Court with statutory appeals to the Administrative court constituting a form of review not a re-hearing. Jurisprudence has repeatedly emphasised this point[3].

41. Extradition on legal aid is presently remunerated under the non-standard fee scheme, which has seen cuts in recent years, for instance by the removal of travel and waiting time, an estimated 30% cut. Extradition work was specifically excluded from the introduction of fixed fees in the Magistrates Court, because it was accepted that it was a highly specialised area. This is the only area remaining where Queen's Counsel can be instructed under the legal aid scheme in the Magistrates' Court. Leading Counsel are instructed a number of times a year in important and high profile cases. This is also one of the few areas where it is frequently necessary to have representation by litigator and advocate to represent in "grave and difficult cases".

42. In the past year there have been 5 cases before the Supreme Court relating to extradition and it contributes a significant amount to the jurisprudence of the UK and the European Court of Human Rights.

43. The volume of extradition work fluctuates beyond the control of the UK government and judiciary. There are presently over 1600 cases per annum. It is clear that the last year's work is not going to indicative of next year's case load, nor for the next 3 or 5 years. The field is extremely small in comparison to general Magistrates' Court crime.

44. Police station work does not apply to extradition.

45. Economies of scale cannot apply in the same way to extradition and instead threaten to result in cases taking longer and costing more by way of Court time at first instance and on appeal.

46. Where representation orders are granted, the system presently works and is not in need of funding changes beyond the laws already being reformed. These cases simply will not work under a fixed fee scheme.

47. Many cases involve separate counsel and experts. The actual duration of cases can be anything between 1 ½ hours for a short case to 10 days for a long case.

48. In each contested case the Court routinely issues strict directions for a set of detailed signed witness statements, written submissions and an agreed joint paginated bundle. Properly presenting these cases requires careful research which is already beyond the scope of the current Legal Aid Agency guidelines. In addition expert evidence and liaison with international lawyers is necessary for competent representation. There is often a direction made for full supplementary written submissions in order to reduce the Court time spent on a case.

[3] *Szombathely City Court and Others v Fenyvesi and Fenyvesi* [2009] EWHC 231 (Admin)

49. An exclusive group of London firms specialise in extradition. These firms have strong reputations and expertise developed over a number of years. The majority of firms work collaboratively in order to expedite cases and minimise costs by receiving referrals and requests for assistance from the court as well as other firms. The inability to choose a lawyer is a fundamental flaw in the proposal and will lead to massive injustice as clients are not allowed to choose a specialist in their area, be it extradition, fraud or corporate manslaughter. Similarly, there are only a handful of advocates who conduct the majority of cases and that expertise will be lost in the so-called "economies of scope". Given the specialist rules of law and procedure solicitors and barristers work extremely closely in this area of law.

50. The expertise necessary to conduct extradition proceedings is reflected by the Extradition Lawyer's Association and the decision of the LAA in association with the LCCSA and the Chief Magistrate to create a separate specialist Duty Rota.

51. The CPS prosecutes extradition cases as if they were VHCC cases, instructing independent Counsel in the majority of contested matters with individual paid preparation hours. For similar reasons, the CPS Special Crime and Counter Terrorism Division deal with all extradition cases at Westminster Magistrates' Court. The obvious inequality of arms should these reforms be implemented demonstrates their inappropriate breadth. The Treasury Solicitor and NCA never act without Counsel, in the Magistrates Court or Appeal Courts.

RECENT CASE STUDIES

52. Below are just three examples of the complexity of different extradition cases.

Azerbaijan v AM

Mr AM was requested by the government of Azerbaijan in 2010 to face a charge of fraud allegedly committed in 1999. Mr AM was arrested in February 2010 and at the outset explained that he had been granted asylum on the basis that he was a member of the Azerbaijani Democratic Party, and a vocal opponent of the incumbent government. He had been granted asylum in 2000 and then naturalised as a UK citizen in 2007. He was unable to avail himself of the protection of the Refugee Convention because he was now a UK citizen. The basis on which the SoS had given him asylum originally was political, but the SoS still decided to certify the request.

The Extradition proceedings meant that he had to reveal to the Azerbaijan government that he had asylum in the UK and was a UK citizen. Thereby giving his oppressors details of not only his location but activities. In December 2011 the Defendant was discharged from the extradition on the grounds that the extradition was made because of his political views rather than to prosecute him for an offence, that he would be tortured on return to Azerbaijan and that he would not receive a fair trial. For the defence were Queens Counsel, Junior counsel, experienced solicitor and a human rights expert. The substantive hearing took 5 days and very large degree of preparation.

Czech Republic v JH

On the papers this was a straightforward European Arrest Warrant ("EAW") case relating to convictions in absentia and accusations for dishonesty offences. However it transpired from instructions that there was an element of duress to the extradition offences and that JH had subsequently been trafficked to the UK and effectively imprisoned here for a long period of time. Europol confirmed some of JH's account. Consequently this case concerned the intersection of international law obligations (anti trafficking conventions such as (Palermo Protocol and European Human Trafficking Convention).
The case also involved expert evidence. This was crucial in showing that the requested person was effectively a victim of systemic abuse in Czech Republic and this country, the likelihood of his treatment on return, but most importantly the state of the Czech Police investigation and Europol coordination of the same investigation. The fact that Europol was involved in this case demonstrates the seriousness of the context. The expert evidence was vital to assess the impact of Human Trafficking and slavery on the requested person. The vulnerability of the requested person also added complexity to the case.
The documentation generated by the case also demonstrated the complexity of the issues: No less than 5 bundles, of 500 pages were necessary in order to properly litigate the issues. The extradition request was found to be at odds with the extradition scheme, in that it should be adjourned in order for JH to be processed through the National Referral Mechanism, otherwise it would abuse the good faith of the CPS and the Court.
The CPS deemed the case so complex that they changed Counsel (and were permitted to do so by the District Judge) mid-way through proceedings. In sum, the case was extremely complicated.

Portugal v P
P was arrested and produced for an initial hearing at Westminster Magistrates' Court the next day. The EAW requesting his return related to 3 accusations of robbery, attempted blackmail and abduction. P initially did not consent to extradition and wanted further advice about the possibility of resisting extradition. After a conference where P was fully advised about the merits of any possible arguments and the procedural consequences, the case was concluded 10 days later via an uncontested extradition hearing which was not appealed. The benefits of timely comprehensive and specialist advice in this case are obvious.

-What has been the impact of the removal of the automatic right to appeal extradition?

53. This provision has not been implemented. It is anticipated that it will complicate rather than simply proceedings as unrepresented Defendants have to comply with more steps, not fewer.

Devolution
14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?
- How might further devolution or Scottish independence affect extradition law and practice?

54. We are unable to assist with this question.

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