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Inquiry on

EXTRADITION LAW

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Witnesses: Daniel Sternberg, Ben Keith and Paul Garlick QC

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Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-Under-Heywood
Lord Empey
Baroness Hamwee
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witnesses

Daniel Sternberg, Barrister, 9-12 Bell Yard, **Ben Keith**, Barrister, 5 St Andrew's Hill, and **Paul Garlick QC**, Barrister, Furnival Chambers

Q106 The Chairman: I extend a warm welcome to our three legal witnesses, all members of the Bar, who are, from left to right as I am looking, Ben Keith, Paul Garlick and Daniel Sternberg. Thank you for coming and apologies for keeping you waiting a tiny bit. As practitioners, clearly we are interested to hear what your perspective will be on the points we are talking about. Before we start your evidence could you tell us who you are for record? Secondly, if anybody has a brief opening statement they want to make before we go into the questioning proper, we would be very pleased to hear from you.

Ben Keith: My name is Ben Keith. I am a barrister and I practise from chambers at 5 St Andrew's Hill. My practice is almost exclusively in extradition, both for the prosecution and defence.

Paul Garlick: My name is Paul Garlick. I am also a barrister, at Furnival Chambers. I have practised in extradition for about 20 years now, beginning with the Soering case, and have seen all three regimes of extradition under the various Acts. I hope I can assist on the historical development as well.

Daniel Sternberg: I am Daniel Sternberg. I am also a barrister, at 9-12 Bell Yard. I specialise in extradition cases, both prosecuting and defending.

Q107 The Chairman: Thank you. I will open with a very general question. Each of you can answer, but if you do not have anything extra to say, do not feel you need to come in. To what extent do you think a swift and efficient extradition process allows for the examination of human rights concerns? Is there a tension between them that is fundamentally flawed?

Ben Keith: In general, the way that our courts operate in human rights works quite effectively. The swift process by which the European framework decision works—which is meant to be 21 days—is not something that operates in this country; we almost never comply with that 21-day time limit where it is a contested hearing. However, if you are able to show an arguable case, most judges will allow you to argue your human rights bars unless there is absolutely no merit whatever.

Daniel Sternberg: I would certainly agree with that. Our court process privileges the argument of human rights over the speedy time limits in which we are supposed to comply with the framework on the EAW, but that is not necessarily a bad thing. There are perhaps a more complex set of issues in relation to the EU Charter of Fundamental Rights and Freedoms, but for the most part those issues do not arise in extradition cases. People tend to argue primarily under the European Convention on Human Rights.

Paul Garlick: I have little to add except to say that the questions of swift extradition and efficient extradition are not necessarily the same. To ask the question of to what extent swift and efficient extradition allows for the examination of human rights depends on the human rights bar that is being argued. Most of my cases have been involving Article 3 rather than Article 8, and I certainly defer to my two colleagues on the Article 8 cases. I imagine, though, in Article 8 cases there will inevitably be some delays that are caused by obtaining the evidence, particularly, for dealing with a family situation. You have to get reports from social

services, and that is notoriously difficult. They will often want to argue public interest immunity and the like, so getting the evidence for those cases may take a little time.

As I say, my experience has been more with Article 3 cases. My view on this is that, at the court at Westminster, the judges who are involved in extradition have a very keen judgment about which arguments are real arguments and which arguments are specious arguments. They are very good at weeding those out at an early stage and certainly, on the first or second hearing, pressing defence counsel as to what the issues are and whether there is an arguable point. Where they are satisfied that there is an arguable point they will allow sufficient time for proper evidence to be obtained. Where they think the matter is completely specious they are less likely to allow unreasonable delays. In real cases where there are real arguments, particularly as to Article 3—which of course are the most grave human rights violations—my experience is that the judges at Westminster are acutely aware of the difficulties and will extend quite a lot of time in proper cases to obtain the evidence.

That is not inconsistent with efficient extradition. In fact it is quite the opposite. It is consistent with a proper application of the law but it does make extradition less swift. Of course in Article 3 cases in particular, where the risks of torture or degrading treatment are involved, swift extradition is not something that can be brought into the equation fairly.

The Chairman: I understand that. So the general conclusion, from the remarks the three of you are making, is that in the real world that we live in our system is working pretty well?

Paul Garlick: Yes.

Daniel Sternberg: Yes, most of the time.

Paul Garlick: I think that is largely due to the fact that we have a specialist panel of judges who are extremely well trained now and have a great deal of experience.

The Chairman: Lord Brown, do you want to come in?

Q108 Lord Brown of Eaton-under-Heywood: Yes, it follows on quite neatly from that, and was something that I was going to ask the three of you. I rather get the impression that, therefore, none of you think that the human rights protection under the Act is "theoretical and illusionary"; you accept that it is real and substantial. So far as Article 3 is concerned, the UK has refused extradition to a number of countries of late on Article 3 grounds. I would imagine they are almost all prison grounds, are they—the circumstances of incarceration if you extradite? Are those mostly what the Article 3 grounds are?

Ben Keith: I did a little research to remind myself that most of the cases, yes, involve general prison conditions. There are specific instances of torture cases, in particular Turkey. I know that Paul, having worked in Turkey, has a lot more expertise on that. Turkey, Ukraine, Russia and Moldova have serious issues with torture and of mistreatment of prisoners by police services, security services and prison guards, rather than just generalised conditions. The arguments in relation to a lot of the EU states are to do with general conditions rather than specific instances of torture.

Lord Brown of Eaton-under-Heywood: Was it mostly the torture cases, Mr Garlick, that you were referring to when you said how the District Judges at Westminster are able to distil speedily which are the serious cases and which are not?

Paul Garlick: If you go before a judge at Westminster and tell the judge—certainly as counsel, and counsel who is well known to the court as an extradition practitioner—that you have an Article 3 argument they will always allow you to raise that because of the consequences. The Article 3 cases that I have been involved in have mainly involved torture, particularly in Turkey. In all those cases, we have always been given adequate opportunity to obtain the evidence and the court has listened extremely carefully. In fact, it has discharged most prisoners in those cases. The evidence has taken a great deal of time to obtain. It has not just been general evidence of international consensus—to go to one of the other problems—

but is usually direct evidence, if one can obtain it. In those sorts of cases the courts are usually compelled by that evidence. Certainly, so far as the torture cases I have been involved with, I think that the protection that the Westminster court has given has been far from illusory; it has been very real. I have never had to appeal a case on an Article 3 torture.

Q109 Lord Brown of Eaton-under-Heywood: We have been shown cases where the principle has been evolved that something approaching a sort of international consensus has to be established before you can sustain an Article 3 argument. Is that in relation to prison conditions or more generally in relation to torture? Is there international consensus on torture?

Paul Garlick: I do not want to pre-empt what Mr Keith or Mr Sternberg are going to say, but there are two ways of approaching an extradition case. One is by referring to material that is in the public domain, such as international material from the courts and the international consensus. To do that you have to have a great deal of material to make a compelling argument. The other is by direct evidence.

In cases where there is direct evidence of either torture or degrading treatment or punishment, there is no question of an international consensus; the court looks at the actual evidence in the case. Certainly, in the Turkish cases I have been involved with, we have been fortunate to be in a position where other prisoners, from the same prison at the same time, have been able to give extremely cogent evidence of torture. In those cases, there is no question of international consensus arising. The court looks at the particular case on a fact basis and says, "We are satisfied in this case that this defendant, if returned, is at real risk of torture", and they apply that very effectively.

Lord Brown of Eaton-under-Heywood: Is there an international consensus that you do not send people back to Turkey?

Daniel Sternberg: There is not at the moment.

Paul Garlick: No, there is not.

Lord Brown of Eaton-under-Heywood: Roughly, what proportion of those who challenge extradition to Turkey on these grounds would succeed in their challenge?

Paul Garlick: If it is a Kurdish case, there is a much higher likelihood that they will succeed. In the two cases I have been involved in, there has been cogent evidence of torture, both by prison staff and by the police before they arrive in the prison, and in those cases the incidence of success is very high.

The Chairman: One small technical point: presumably, when we are talking about imprisonment in this context, that covers police custody before any sentence has been conferred?

Paul Garlick: In the cases I have been involved with, the torture has been both in the investigation stage and in the prison. Particularly in those cases involving Turkey where there have been riots in the prison by the Kurdish inmates, the violence in the prison, which has been extremely well documented and videoed, has been extensive. Certainly in Turkey, and from my experience also in cases such as Azerbaijan, there is a real endemic problem of torture during investigation and interrogation. I spent four months working in Azerbaijan for the Organization for Security and Co-operation in Europe monitoring a series of trials, and the evidence that was given during the trials by some of the witnesses—some of whom were prosecution witnesses—was about how they had been tortured in the investigative stage of the proceedings, as prosecution witnesses, and wanted to resile from their evidence. It was quite shocking and very credible.

Ben Keith: To say that it is prisoners in police stations assumes that they have the same system as we do. In a lot of post-Soviet states and Turkey, going to the remand prison, or even to the main prison, does not necessarily mean that you will not be taken back to the police station in the early stages for further questioning, interrogation or torture, even while you are technically remanded in that prison. Throughout eastern Europe, in particular, that is a

common practice. So, while you are in the remand prison, you can be taken back to a police station for further questioning while the investigatory stage of the case takes place. The worse the human rights record, the more likely that that country is to produce torture; Azerbaijan and Moldova are particularly horrific examples.

Daniel Sternberg: Coming back to the international consensus test for a moment, I wish to emphasise that that test applies in relation to EU member states and other countries operating the European Arrest Warrant. It does not apply to each and every extradition partner that we have, albeit I have seen some extension of it to countries that are members of the Council of Europe or aspirant EU member states, such as Albania and to a lesser extent—given what has just been said—Turkey. I should also say that I have been involved in Turkish extradition cases where there is not specific evidence of torture and the court has ultimately decided extradition should go ahead.

Q110 Lord Brown of Eaton-under-Heywood: There are a lot of supplementary questions that one could ask here. Are there problems with legal aid? Are there occasions when in fact it would be valuable to have an expert to examine the situation in the foreign country but, on legal aid, you cannot have that expert?

Daniel Sternberg: I will give way to Mr Keith in just a minute. The real problem with legal aid is getting it in the first place. That is where the real delay is. I have cases—both prosecuting and defending—where cases are fixed and then taken out many times because the defendant does not have legal aid.

Lord Brown of Eaton-under-Heywood: I think we are alive to that, but this is in terms of getting authority for an expert to look abroad, once you have it.

Daniel Sternberg: Getting authority for an expert in itself is something that happens fairly frequently, but the problem is finding an expert who is willing to work for legal aid rates. I think Mr Keith probably has much more experience of this and I will defer to him.

Ben Keith: I have not done an Article 3 case where I have not been able to find an expert who is prepared to give evidence on our behalf. It is sometimes the quality of expert that is difficult to find for those rates. Some of the very best experts will work for legal aid rates, because they have been doing it for so long and they are genuinely interested in the topic. It is when you are trying to deal with a new jurisdiction that it can take an awful lot of research. Once you have legal aid, and you have enough time, you will be able to find a suitable academic to assist you.

It also goes back to Paul's point on the difference between direct evidence and expert evidence. I do not think the international consensus test is applied terribly well. The test that is applied very well is the real risk test, the Chahal test, and that is applied very well across the board by the magistrates' court and the High Court. The international consensus test is really used in some respects to beat the defence down when you are trying to say, "All prisons in a particular jurisdiction are non-compliant with Article 3", and that is understandable. I know Professor Morgan is going to give evidence to you later. He has inspected a number of prisons over the years in these cases and has found some of them to be compliant and some of them to be non-compliant. There is a difference with the international consensus, which is very difficult to show because you have to have some evidence from the European Court of Human Rights, which involves a five-year turnaround to get a body of case law that shows that consensus, or from the European Committee for the Prevention of Torture reports, which need to show serious systematic breaches probably not over one report but a number of reports in a row. Once you have that, then you probably have the start of an international consensus.

The easiest way to do it is to look at specific areas or specific prisons where people might be held and to try to show that. Obviously you then come up with the problem that, when you

show there is an Article 3 breach, you have to be sure that a jurisdiction is able to keep its promises as to where they are going to keep somebody.

Lord Brown of Eaton-under-Heywood: Mr Garlick, what you were going to say?

Paul Garlick: Lord Brown, I was merely going to add that it is also jurisdiction-specific in the European cases where you have a whole mechanism, like the European Committee on the Prevention of Torture. At least there is a body of expertise available. I did a case last year involving Ghana, where it was much more difficult. One of the difficulties is that there are so many practitioners practising extradition that there is—I am going to phrase my words carefully—a variable level of expertise being used. In a serious case, you will need someone who has experience at the Bar of conducting the cases but also has contacts and knows where to go to get the expertise.

For example, Mr Keith and I have both been in cases where Professor Bowring has been our expert and is well known. In Ghana, it was very much more difficult. I had to do a great deal of research through Ghanaian contacts to find someone who was properly qualified to opine on the conditions in Ghana. Fortunately, he had been a member of the prison inspectorate in Ghana and was prepared to come to the United Kingdom to give evidence. In that case, he was not being paid legal aid rates; it was a privately funded case. I am very doubtful that the legal aid fund would have funded the cost of his flight. His evidence was accepted entirely before the judges at Westminster.

Q111 Lord Brown of Eaton-under-Heywood: Overall, I get the sense that you, representing the Bar, are reasonably satisfied with the way the courts give effect to and protect Article 3 rights.

Paul Garlick: Yes, we are.

Lord Brown of Eaton-under-Heywood: Thank you.

The Chairman: Are there any particular cases where it has perhaps gone wrong that you think ought to be drawn to our attention?

Paul Garlick: It is very difficult to separate your personal opinion from a professional judgment, but I will try to do that. In the Ghanaian case I was involved in, one of the difficulties we faced was that we had a wealth of evidence from the professor from Accra in relation to prisons generally and one particular prison where the prisoner would usually have been housed on remand pending his trial, probably for a period of two to three years. The conditions in that prison can properly be described as absolutely appalling—some of the worst prison conditions I have ever seen in 20 years at the extradition Bar.

On the day of the hearing, the Ghanaians—through not even a diplomatic note but just a fax to the Crown Prosecution Service—informed the court that they would assure the court that if returned, the prisoner would not be housed in that prison but another prison. That caused us to have to completely rejig the case. We were granted an adjournment of course, and the professor then had to go and visit the new prison and prepare another report. The conditions in that prison were still in my judgment—this was a personal judgment—woefully inadequate and plainly a breach of Article 3. That defendant was returned to Ghana after an unsuccessful appeal to the High Court. He has been in that prison waiting for a trial for nearly two years now.

Lord Rowlands: What was the nature of his offence?

Paul Garlick: It was a serious offence. It was attempted murder. It was an accusation case, though, and of course in accusation cases there would be a trial when he was returned. In that particular case—I will not go into details of the prison conditions—there were 10 people in his cell, where they have one square metre and a lavatory that was just one yard from one of the beds. They were in bunk beds. Perhaps worst of all was an infestation of mosquitoes,

where even the prison officers said to our witness, "I wish we had mosquito nets". It was really deplorable.

The Chairman: These were the improved conditions.

Paul Garlick: They were the improved conditions; the mark 2 conditions.

Daniel Sternberg: I am not sure I agree entirely with Mr Garlick on that. I only say that because I was involved in a separate Ghanaian case where there was evidence from Ghana—I should say at a much earlier stage than the day of the full hearing—about what the Ghanaians considered to be a modern high-security prison they had constructed. It had facilities that were maybe not the same as one would find in a prison in this jurisdiction but were certainly comparable, and ultimately that issue was not the one on which the case failed. There is some difference between us in terms of personal and professional experiences, and among practitioners experiences and views will vary.

Lord Mackay of Drumadoon: I have one small question, which is just a one liner. You refer to the extradition Bar. Do I understand from what you are saying that most members of the extradition Bar appear on different sides of the cases?

Paul Garlick: Yes, I think so, Lord Mackay. The Crown Prosecution Service, certainly at the junior Bar, have a system where they rotate and they send out briefs to all recognised practitioners, particularly those who have been on secondment to the Crown Prosecution Service. A lot of the members of the Bar here in London now from various chambers go on a 12-month secondment to the Crown Prosecution Service to deal with extradition cases. It is absolutely excellent training for them and then, when they return to the Bar, they are regularly briefed by the Crown Prosecution Service and by the defence. There is a well established extradition Bar in London.

Q112 Lord Mackay of Drumadoon: Can we move on to Article 8? The factors relevant to determining Article 8 claims have been set out by Lady Hale in HH, with which I anticipate

you will be familiar. Some witnesses have argued that they present too high a hurdle. Others argue that, since HH, an increasing number of extraditions are being discharged on Article 8 grounds. Which view is the more accurate?

Ben Keith: There has been what I would describe as a sea change in Article 8 cases since the summer of 2012. Since then there have been numerous discharges by the High Court, which has now filtered down to the magistrates' court. I did a case this year where one of the district judges said to me, "If this case had been before me two years ago I would have ordered your extradition. However, having looked at what is happening in the High Court, I do not think it is proportionate and so I am going to order your discharge". My experience is that Article 8 is now winnable and a good use of proportionality whereas, prior to HH, you had to be basically on death's door or have a terminally ill relative, and there were very few discharges. Now there is a proper proportionality exercise undertaken both by Westminster and the High Court.

Daniel Sternberg: I would add that the other area in which there has been growth since the decision in HH is the concept of private life as being a factor that can defeat extradition. Before HH I was not aware of any cases in which private life had successfully been the basis to resist extradition. I would not say it is being used as a backdoor proportionality test, but it is certainly being used by persons who may have committed very minor offences, such as shoplifting or minor road traffic offences. Although they may not have children in this jurisdiction, the fact that they have established themselves here is a basis on which extradition is being refused.

The Chairman: Paul Garlick is the one who has seen this the longest. Is regime that is being operated becoming slightly more liberal—using the word in a non-political sense—than was the case previously?

Paul Garlick: Lord Inglewood, I think we have seen a moving of the sands both ways. I first started practising extradition back in the 1970s. In those days, under the old extradition Acts,

there were not the human rights safeguards—it was long before the Human Rights Act—but there were other safeguards. Oppression was much more widely interpreted under the old Act, so one could argue that it would be oppressive to send a fugitive back under the old legislation. Delay was much more widely construed. It was much easier to prevent extradition and then there was a tightening of that through case law. Then we had the new Extradition Act, the 2003 Act, which was the sea change. The grounds upon which you could resist extradition narrowed dramatically but of course one had the human rights bar, which has now become the most important field in extradition. In the case law, I think there was a hardening: "We do not want to have the human rights bars resulting in no extraditions taking place". So there was a hardening, first of all, in the magistrates' court and also in the High Court. Then I think we have seen a softening of that approach, led by tremendously important judgments like HH in the House of Lords, which is now feeding back down. In my judgment we have it about right at the moment.

The Chairman: If you bring the various factors involved in thinking about this from a perspective of justice as an abstract concept, you think it is about where it ought to be?

Paul Garlick: I think it is, perhaps with one small exception, which is that under the old law, one could successfully resist extradition on the basis that it would be oppressive to extradite or that the application for extradition was not made in good faith. That was a very useful save-all protection and in some cases, which we were involved in, the courts were persuaded that the application was not made in good faith. I certainly recall back in the 1990s being involved in a number of Indian cases for the prosecution. During the course of a lengthy extradition hearing, where we had to take evidence in India, it did become abundantly clear that the application—which on paper looked faultless—was being made in bad faith by the Mumbai police. Fortunately, although I was for the prosecution, the High Court refused extradition.

Lord Rowlands: Given your immense experience, do you think Parliament should have been more prescriptive in legislating rather than allowing case law to basically define the law?

Paul Garlick: That is a difficult question because it depends how one limits by legislation the avenues for appeal, although case law will always be important. If there are blanket restrictions then of course case law will never arise. As we have it at the moment, we have the very good gateway of the Human Rights Act, human rights violations or any Convention rights, and case law can very effectively interpret how those gateways are going to be used. So I think Parliament has got it right and the way the High Court—and of course the Supreme Court now—is interpreting it is about the right balance.

There are one or two cases that I am still concerned with where you might not be able to wheedle out cases that are being brought in bad faith, particularly some of the Russian cases that I was involved with arising from Yukos oil case. I can well remember that it was difficult but we were successful in resisting those extraditions.

Lord Rowlands: You cannot actually argue bad faith here then?

Daniel Sternberg: All I was going to say is bad faith does remain arguable in the context of abuse of process, which is an area that is judge-made law, and the High Court has established there is an abuse of process jurisdiction under the 2003 Extradition Act. It is invoked regularly and it does succeed sometimes.

Q113 Baroness Hamwee: Mr Sternberg, in your written evidence on human rights—I think you may have been talking specifically about Article 8—you used the terms, "fluid, evolving and dynamic". In your view, has the situation now plateaued or is there a continuing evolution—or are we too close to 2012 to know?

Daniel Sternberg: It is like watching a lake into which a very large rock has been thrown. Ripples are still reaching the edges but the surface of the water is starting to settle. Perhaps underneath there is a little more furious paddling.

Paul Garlick: I wish I could have put that so eloquently.

The Chairman: Before we move on—we want to talk a bit about assurances—we have not heard much evidence from anybody about Articles 5 and 6 of the ECHR. In reality, do they seem to play much of a part in your professional life?

Ben Keith: I do not think I have ever run an Article 5 case that is not tacked on to the end of an Article 6 case or an abuse of process. I do not think Article 5 extradition is something we examine very well or is argued very well, because it is very difficult to show what pre-trial detention should or should not be in another jurisdiction. Particularly with different court systems—I will come on to Article 6 in a moment—it means that an investigatory stage after charge can take a considerable amount of time, say a year or 18 months, during which stage somebody is technically charged and technically on bail or is in custody. It is difficult to compare that to our own system. It is also very difficult for there to have been a flagrant breach of Article 5, because it is a legal test and there are usually remedies, particularly in Europe; there is a legal remedy for Article 5 in a particular jurisdiction. Poland does not have a terribly good record on Article 5. People spend a lot of time in pre-trial detention awaiting trial, but the European Court of Human Rights knows that and deals with that when people apply to them for issues under Article 5.

In relation to Article 6 it is almost the same, in that we are common-law lawyers and we have a particular view of how our system works. We are the only ones in Europe who work on that sort of basis. In Article 6 there is a much greater margin of appreciation from the convention than anywhere else, because it is difficult to say, "Our jury trials are fair, your judge-led trials are fair, your prosecutor-led trials are fair and your magistrate-led trials are fair, but they all follow completely different systems". Within Europe it is very difficult to say that that is going to be unfair as a system because they have signed up to the conventions. It is possible on occasion to show that specific people in political cases will not receive a fair trial, but that

is direct evidence rather than systemic breach. In non-European countries, although it is not easier to argue Article 6—it is always very hard to argue—it is easier to show in some respects. Again, with the political cases in Russia, Ukraine, Azerbaijan, Moldova, Turkey and the United Arab Emirates, it is almost impossible to fathom how their trial system works for a common lawyer. There is monitoring of those by various international organisations who try to work out whether somebody is getting a fair trial or not, but it is very difficult to compare. To show a flagrant breach, in my experience it really only goes to those cases that have specific facts or specific political influences where the Government are behind a political prosecution, such as those cases involving associates of Yulia Tymoshenko in Ukraine or those persons who might be opposed to Vladimir Putin from Russia. You cannot say the whole of the Russian system or the whole of the Ukrainian system is broken, because that is too difficult to show, but you can show that those specific people are unlikely to get a fair trial because of the influence of the Government or of the FSB or whichever security service in whichever jurisdiction service it is.

Q114 Baroness Jay of Paddington: Mr Garlick, even before your very vivid example, we were concerned with the problem of getting assurances from different jurisdictions. Even though you seem pretty confident about the way the system is operating in our courts, do you feel—individually and collectively—equally confident about the methods of seeking assurances about people's treatment, how that is handled and what the processes of verification are? I think we received slightly contrasting written evidence from Mr Keith and Mr Sternberg, for example, about the operation of what I am going to call the "Abu Qatada rules"—the 11 provisions that might be looked at—and I would be grateful for your reflections on that and, as I say, more general points about assurances.

Paul Garlick: Assurances have always been given by requesting states. Formerly, they were given by way of a diplomatic note of assurance, and the courts regarded them highly.

Baroness Jay of Paddington: Sorry, just to interject immediately, does that mean that every case has an element of assurances? One of the things we were trying to establish was in how many cases this was an important or relevant factor.

Paul Garlick: I think a small number.

Baroness Jay of Paddington: A small number.

The Chairman: For clarification, in this context, we have sometimes had references to assurances and sometimes to undertakings—are they the same or are they in fact legally different?

Paul Garlick: They are the same. An undertaking is the perhaps more contemporary description of it. Assurances were given by way of a diplomatic note.

The Chairman: Yes, fine.

Baroness Jay of Paddington: Are we talking about a small number of cases?

Paul Garlick: A small number of cases. They usually go to questions of the admission of evidence that may have been obtained by torture—that is more of a contemporary problem—but are primarily about conditions on return. The first case I was involved in with an assurance was, of course, the Soering case, where eventually the American Government did give an undertaking that Soering would not be liable to the death penalty if he was convicted of murder. That took litigation all the way to Strasbourg before they would give that assurance. I can well recall appearing for the American Government in what then was the House of Lords on an application to appeal to the House of Lords, and there was no assurance. Of course that was before we signed the protocol, so a person could be returned to a foreign jurisdiction where they would be liable to the death sentence.

Within the domestic jurisdiction, at that time there was no abhorrence about this; there was no feeling that that would be completely wrong to send someone back to a jurisdiction where the death sentence might be applied. Of course, that has changed; there has been a complete sea

change. The problem very evident in Soering was that you get an assurance but, first of all, who you are getting the assurance from and, secondly, are you able to monitor it?

Baroness Jay of Paddington: Exactly, and the verification process is the one that I think is of most interest.

Paul Garlick: I quite agree. There was a problem with Soering because, of course, the question of the death penalty was not a matter for the federal Government but for the state Government. It is very difficult to get an assurance from a state prosecutor—particularly a prosecutor who might be facing re-election by quite a right-wing community—that something will or will not happen to a particular person when returned. In Soering's case the assurance that was given was stuck to by the American Government.

In other jurisdictions, there are problems. One of the problems in a case—I know that Mr Summers will be giving evidence in a later session today—called Gomes and Goodyer, where I appeared for Mr Gomes, again involved prison conditions, in Trinidad and Tobago; on the island of Trinidad in fact. There were assurances before return that both Mr Gomes and Mr Goodyer—they were separate cases but they were joined in the House of Lords—would only be returned to a certain prison. Mr Goodyer was returned to Trinidad before Mr Gomes, because the litigation for my client, Mr Gomes, was continuing. When Goodyer was returned to Trinidad, the message had not got through to the local prison services, and Goodyer was incarcerated in the wrong prison. As soon as that was found out in this country, it was corrected, because they knew that if it was not corrected there would be no further extraditions to Trinidad and Mr Gomes would not go. But there was a problem there. There was a lack of communication. It had not filtered through to the prison authorities. The assurances were not disobeyed, they just did not have any knowledge of them.

In other jurisdictions, there are concerns where someone may be facing a very long period of imprisonment on their return—for example, an allegation in Mr Ridge's case of attempted

murder, or in, I know, Mr Sternberg's case where the allegation was actually murder where, if there is a conviction, there are going to be very lengthy periods of detention, possibly whole life sentences. It is very difficult to rest assured that an undertaking will continue for the whole of a life sentence. There could be a change of Government. There could be a change of political attitudes to someone in a foreign jurisdiction and of course, once they are back, there is no means of obtaining their return to this jurisdiction. Those are the worrying cases in some jurisdictions. I am not just pointing the finger at Ghana, as there are other jurisdictions, such as Russia, for example.

Q115 Baroness Jay of Paddington: That is very helpful. I am also interested in the point of whether or not our courts are giving sufficient weight to these apparently established 11 principles.

Paul Garlick: I have not been involved in a sufficient number of cases since the 11 principles to be able to answer that. Historically, the courts have always regarded an assurance by a requesting state as sufficient unless there is a real reason to doubt them, like a rebuttable presumption.

Baroness Jay of Paddington: Mr Sternberg, you look as though you not sure about that.

Daniel Sternberg: I think I would disagree actually. I would say that assurances, where there is real doubt about compliance with human rights, are necessary but not sufficient. The giving of an assurance in itself is something that will give confidence to the magistrate or to the High Court, but that is not enough. You have to show that that assurance will be implemented and will be carried out. I know Mr Keith has talked about a number of countries, including Ukraine and Azerbaijan. If a country gives an assurance that says, "This person will have a fair trial and will be held in conditions that do not violate their Article 3 rights" but all the evidence that is available internationally goes the other way, then it can clearly be shown that that assurance is one that will be either very difficult or impossible to honour. I think the

courts take a realistic approach to assurances. If they are being promised the moon, they will be sceptical about it.

Baroness Jay of Paddington: Mr Keith, what is your view?

Ben Keith: It depends on who is giving the assurance. The Othman criteria are all well and good, and if it is an EU state then, in general, it will be believed. The thing we have not been able to look at, particularly in prison condition cases, is whether you can monitor that and see whether it is a realistic assurance. Nobody is going to allege that Italy or other jurisdictions might give an assurance in bad faith. It is just that, in reality, they might not be able to detain somebody in compliant conditions, even if they want to.

Baroness Jay of Paddington: May I interrupt you? Our attention was drawn to examples where there was general concern—for example, about Italian prison conditions—but where there was a specific reference, rather like in the Trinidad case, to a particular prison when the extradition was granted. How on earth would the District Judges at Westminster be able to identify the conditions in a specific Italian prison?

Daniel Sternberg: I can answer that because I was doing an Italian extradition case yesterday. On that occasion I was in fact defending. The Italians had said that the defendant would be in one of four named prisons. The Italian Ministry of Justice places on its website statistics of the occupancy of each prison, so I was able to show the court that each prison to which it was being proposed this person should be returned was in fact overcrowded now. But that is specific to Italy.

Ben Keith: I have had Ukrainian cases where the extradition request says, "This request is not politically motivated", and the fact that you have to put that in your extradition request usually starts to ring alarm bells. They have been discharged on those bases because, in spite of the assurance given by Ukraine that they would be kept in compliant conditions or given a fair trial, when looking at the background to the case and the political involvement of the

defendants and the prosecution witnesses, it was clear that it was politically motivated. There was no prospect of a fair trial and, tagged on to that, prison conditions were horrendous and no assurance that was given could be relied upon. It is the same with Russia. They might say, "We will not torture somebody", but we know from looking at Sergei Magnitsky, who was killed by the FSB, and at Mikhail Khodorkovsky, who was recently released from Russia and is now living in the United States, that if you stand up to the regime in Russia—or if you are linked to those who stand up to the regime in Russia, which is more important—you will be punished, So if there is a high-profile person who is against a particular jurisdiction and you happen to have worked for them, there is a high probability that, if you get involved, extradition will be requested. That is not because you have committed a crime but because you could have pressure put on you and be tortured in order to give evidence against them to discredit them. Mr Garlick may be able to correct me, but I think that is a lot of what Yukos was about.

Paul Garlick: It was. Interestingly, there are three categories of territories that might give us your answers. In the EU categories, there is quite a good framework for monitoring. Certainly, we would always be given access to prison conditions within EU member states.

The larger body of the Council of Europe is more worrying. Certainly, I know from personal experience that in countries like Azerbaijan—where I spent four months sitting in courts and seeing prison conditions—it is so difficult to monitor what is going on, even if you are actually in the country. As a member of the OSCE, at the Baku office in Azerbaijan, it would probably take you weeks to get access to a prison, despite actually being there and having the political momentum of the OSCE behind you. It is almost impossible properly to monitor prison conditions or, indeed, trial conditions in countries like Azerbaijan. Some of the trial procedures in Azerbaijan have improved since my first report, which was in 2007. Some certainly have not, and it is very variable between court and court.

It is very difficult to even get in to a court in Azerbaijan. During one political trial that I was monitoring in Baku, the hearings would be cancelled. You would have to wait outside court for many hours, not knowing whether there was going to be a hearing that day. Hearings would not be posted publicly on the court doors. Often, you would have to wait for days—literally days—before you would be admitted to a hearing. Then there was the difficulty of having the right papers to be admitted to a hearing. Where you have a situation like that, where it is so difficult to monitor either the trial process or the prison conditions which someone might have to endure after a conviction, it is very difficult to test an assurance, to be absolutely sure you can rely upon it. Although they are members of the Council of Europe, there is a machinery and often courts will say, "Well, of course, they are all members of the Council of Europe. There are standards", in reality, it is almost impossible to properly monitor the conditions in countries like that.

Baroness Jay of Paddington: Then you go beyond, to your third category, Ghana, and so on?

Paul Garlick: Yes, where you do not even have the Council of Europe mechanism.

Lord Brown of Eaton-under-Heywood: I rather think I wrote the judgment on Gomes. Is that not a case where Lord Ramsbotham went out and saw the prison?

Paul Garlick: Yes, it was indeed. He kindly went out and did that, and came back and opined that the conditions in that one particular prison were Article 3 compliant.

Lord Brown of Eaton-under-Heywood: They got him in to the wrong one by mistake.

Paul Garlick: They got in to the wrong one, yes.

Q116 Lord Empey: I suppose Mr Garlick touched on this issue. You go to a third country, where presumably there are language issues and you run into all sorts of things. In the absence of a support group, which some people who are being extradited do have, is the Foreign and Commonwealth Office, through our embassy network, helpful in these matters?

Are they under any obligation? Should they be under an obligation? What other reach would the courts have in order to follow up, other than sending out a specific individual with that specific task?

Paul Garlick: Lord Empey, that is a very important question, because the consular role of our embassies abroad would only extend to UK citizens. The majority of people who are going to be extradited back may not be UK citizens, so the Foreign and Commonwealth Office and our local consular services would not be available to them. I will be corrected by my colleague, but I do not think there is any procedure whereby the Foreign and Commonwealth Office will undertake to monitor assurances that are given by requesting states. They are overwhelmed with their consular activities as it is. So I do not think there is any machinery in place for a non-UK citizen, who is returned to a common jurisdiction, whereby our Foreign and Commonwealth Office could monitor that properly.

Lord Empey: Does that therefore mean that, at the very least, there are going to be two tiers of monitoring: for those who do have support groups that can verify the situation or at least raise the alarm on behalf of an extradited person, and those who are on their own, perhaps without legal aid and without a support group when they go out there. Is it a case of out of sight, out of mind?

Paul Garlick: I think in many cases it is case of out of sight, out of mind. It is a very lonely existence for a prisoner in a foreign jurisdiction who is suffering and cannot get the message out.

Lord Rowlands: In most cases, being non-nationals they would not be British nationals?

Paul Garlick: If they are British nationals, and if they can get a message to the local consular office, then I am sure that the local consul will give such assistance as they can.

Lord Empey: What is your collective experience? Would you have any suggestion to the Committee as to how this process could be strengthened to the point that the court could, if

requested, have a mechanism to underpin the decision that it took to justify what it has done or to prove that there is a question of doubt? That would obviously have an impact on future cases but it could also have a diplomatic implication, if the United Kingdom Government were able to say to a foreign Government, "Look, we extradited X in good faith. We are now satisfied that that has not been implemented accordingly. Can you kindly correct it?"?

Paul Garlick: I think that the resources of the Foreign and Commonwealth Office will be tested, but there are two possibilities. One could either have an ad hoc scheme where, in particular cases, where a particular assurance has been given by a requesting state, as part of that assurance within that mechanism there should be clear assurances that the Foreign and Commonwealth Office, or the local consular offices, will be given access on a continuing basis. Then of course that is a continuing assurance that can be monitored, and if the Foreign and Commonwealth Office are refused entry to a prison, they can report back to London and steps can be taken diplomatically. To the prisoner within the prison, it is still a very remote remedy. That is the ad hoc method.

The alternatives that we have are part of either a legislative or a practical mandate. We could have a mandate on the Foreign and Commonwealth Office to monitor, as a matter of fact, the position within a prison of anyone who is extradited, whether or not they are United Kingdom citizens. I think that is maybe asking a lot of the Foreign and Commonwealth Office, and I am not sure what jurisdiction in the requesting state they would actually use to get access to a non-UK citizen within a prison.

The Chairman: Is there a Strasbourg court ruling that indicates that we have a legal responsibility towards those our legal system extradites, even if they are not UK citizens?

Paul Garlick: The obligation would extend to not extraditing them.

The Chairman: If you extradite and they subsequently find their human rights are breached in the destination, as far as you know, do we or do we not have any ongoing legal

responsibility towards them? It was something that I thought— theoretically, let me put it that way—that we did?

Paul Garlick: There are two aspects. First, in non-EU cases and non-Council of Europe cases, if the prisoner is extradited outside the territory of the contracting state to the European Convention, they do not have the protection of the European Convention, so it would be difficult to place an obligation on us to enforce it.

The Chairman: I agree it would be difficult, yes.

Paul Garlick: However, we certainly have a positive obligation, under Article 3, not to extradite someone where we know that they may be tortured or suffer degrading treatment. Arguably, that positive obligation may continue if someone is extradited to a non-Council of Europe state.

Daniel Sternberg: I was going to say that, legally, the only examples I can think of where that has been done, which is not an extradition example, is where habeas corpus has been sought in the case of a detainee who was held in Afghanistan. A writ was issued eventually. But I think the High Court in this jurisdiction would be very reluctant to extend habeas corpus to every prison in every country with whom we have extradition relations.

Ben Keith: We simply do not have the locus to do anything, apart from to write. The problem with the process of international law is that it is very much done on goodwill, and so the Home Secretary, the Foreign Secretary or the Prime Minister can write to representatives of the other country and say, "Stop mistreating the extraditee" but, unless we are prepared to sanction or to take military action, therein is the end of our jurisdiction.

Q117 Lord Rowlands: You have given us some very good examples of Turkey and Azerbaijan. In recent years, how many people have we extradited to these two countries?

Ben Keith: One case of extradition to Azerbaijan was reported. There were two gentlemen—one was called Ramil but I cannot remember the other gentleman's name. They were extradited.

Lord Rowlands: Out of how many?

Ben Keith: Three or four. The rest have been discharged. From the statistics from the Scott Baker report and in my recent experience, we have only extradited a handful of people to Turkey, overall.

The Chairman: Discharged them?

Ben Keith: We only extradited a handful of people. Most people that Turkey requested have been discharged.

Daniel Sternberg: This is purely anecdotal, but my experience with Turkey is actually the other way. I have personally been involved in three or four Turkish cases, all of whom—save for one that is ongoing—have been extradited eventually.

Paul Garlick: Interesting. Did they involve Kurds?

Daniel Sternberg: Some of them did, yes.

Paul Garlick: One of the other matters of concern—I am sorry to dwell on Azerbaijan, but it is certainly my best area of expertise—is that with extradition to Azerbaijan now, they do not even have to establish a prima facie case. I am certainly able to say that, if a request was made, I would certainly want a prima facie case from states like Azerbaijan because the trial process when you get back is pretty horrendous.

Lord Rowlands: We cannot do it apparently, can we? There is no means by which we can do that.

Paul Garlick: No.

Q118 The Chairman: Is there any means by which we can achieve the same, through the various other provisions that do bite in those circumstances, for example if you have such systemic evidence that the trial is not going to be fair?

Paul Garlick: That might amount to a complete nullification of the very essence of a right to a fair trial under the Othman test. In a sense we all know what the difficulty is with torture: it does not take place on the streets, but always takes place at night, normally in a basement, and it is very difficult to see. It is very difficult to deal with that.

Leaving aside torture, in these other jurisdictions the actual judicial process is so closed—although they do have people who can come in—that it is very difficult to follow and very disjointed. Getting the evidence together to show a judge at Westminster to say, "This man cannot possibly get a fair trial in Azerbaijan" is extremely difficult.

Ben Keith: It is almost impossible to get information out of Azerbaijan, because all NGOs are monitored. It is quite a dangerous place for anybody to operate who is trying to promote human rights. I am always slightly conflicted about the prima facie case argument, because I am not sure it necessarily provides a much greater protection than the European convention because, in fact, all the political cases I have done have involved the 1957 convention, so countries have not had to prove a prima facie case. Even if they did, Russia would just make up the evidence anyway. It is shorter document for them to make up than lots of different witness statements. The United Arab Emirates do not have their systems right for producing witness statements. I know the Indian prima facie cases, because they take witness statements in a very different way—the police officers take it down in logbooks rather than in witness statements—what you get is almost incomprehensible to us; a sort of narrative of what has happened in the case through the Indian evidence and it is quite difficult to analyse. For my part I am not sure, acting for either side, that the necessary prima facie case adds any

particularly greater protection than the 1957 convention. It is more about which country we are dealing with and how much we trust them, as to whether we believe what they are saying.

Paul Garlick: I agree with Mr Keith and I was not arguing that the prima facie case would solve the remedy. What is concerning is that someone could be returned to a jurisdiction like Azerbaijan where we do not have adequate monitoring facilities. They could be returned in a situation where there was not even a prima facie case. That is what really concerns me.

Lord Brown of Eaton-under-Heywood: Has an extradition ever been refused specifically on Article 6 grounds?

Ben Keith: Yes. The High Court refused it in the Rwandan genocide case, which I know is now restarting again.

Lord Brown of Eaton-under-Heywood: Was that just on Article 6 grounds?

Ben Keith: Yes, that was Article 6, because the International Criminal Tribunal for Rwanda said that they would remand in the domestic court, which at that stage was not compliant with Article 6. I had an Article 6 discharge last year in the magistrates' court in relation to Ukraine, as well as an Article 6 in relation to Azerbaijan. They do not often get to the High Court because if you manage to find enough evidence to show that a system or a particular person is not going to get a fair trial, it is very difficult to come back from that, as with the Russian cases and I think the Ukraine cases. With Turkish cases it happened only where you went to the special military court, which was non-Article 6 compliant, rather than the domestic court. There is a handful of cases, but they are in non-EU states. There was one case that I did years ago for the CPS, a particular Hungarian case that was in breach of Article 6. Again, that was on very specific facts for that particular locality and those particular defendants, based on the fact that they would not receive a fair trial on the evidence before that court, rather than on a systemic breach.

Lord Empey: Chairman, can I just ask one supplementary?

The Chairman: Yes. We must wrap up quickly.

Q119 Lord Empey: Is there any merit in exploring the extraterritorial jurisdiction act type of principle, whereby someone could ultimately be tried here?

Daniel Sternberg: We traditionally take a very limited approach to extraterritoriality, usually only applying it to British citizens and for very limited categories of offences. Off the top of my head, the only one I can think of is murder.

Lord Empey: We have an extraterritorial jurisdiction Act with Ireland, which we used to use. Is there any traction in that?

Daniel Sternberg: As a Committee, I know you have heard a lot of evidence in relation to the forum bar. If there is simply no connection to the UK, the difficulty would be in having to import all of the evidence, prosecution witnesses and documentary evidence and in trying a case in a British court at cost to the British taxpayer. That would seem very odd to a lot of people who would say, "Why are we trying someone for something that has no connection to the UK at all?".

The Chairman: It may be poor chairmanship, but I fear we have already substantially overrun the time, so I think we ought to draw this bit of the session to a conclusion. Before thanking you, is there anything any of you would like to say that we have not touched on that you think matters to us?

Paul Garlick: No, I would just like to thank the Committee. I think it is an absolutely laudable attempt to look at extradition in the broadest terms, and it is very important.

Ben Keith: I echo my learned friend's thanks. One thing that I think this Committee might want to look at, which has not yet really been tackled, is the interaction between asylum proceedings and extradition proceedings, because that does not work. It only occurs in a very few cases because it is almost exclusively non-EU cases, but there is still no proper procedure

or proper analysis of the proper interaction when somebody who has asylum from a jurisdiction has a current extradition case.

Paul Garlick: I am so pleased that Mr Keith raised that because there is a real and practical difficulty, which exposes some people to a great deal of danger. For example, I was involved in a Turkish case just this year where, in order to make good the case of torture, we had to call witnesses who were in the process of obtaining asylum and, of course, there are all the difficulties involved with that. The Turkish requesting state was obviously the respondent in the asylum case and the Home Office is dealing with both aspects: the extradition and the asylum. They have very good Chinese walls to make sure that information that is disclosed during the course of an extradition hearing will not be sent back to the requesting state, because others might be tortured back in the requesting state. But when it comes to court and the evidence is given, witnesses come along and they are exposing their family, if not themselves, to a real risk of similar treatment in Turkey.

Lord Brown of Eaton-under-Heywood: Is the Supreme Court about to hear a case about this? Do you know about that?

Paul Garlick: I do not, Lord Brown, I am sorry.

Lord Brown of Eaton-under-Heywood: I may be hallucinating but I rather think I have been told they were.

Paul Garlick: I am sure you are right.

Ben Keith: You might be thinking about VB v Rwanda, which is the second round in the genocide case. I think that deals with, I think, anonymous witnesses. The asylum tribunal is generally considered as the expert tribunal and it is closed proceedings, so you can call all that evidence that might put other people in danger. Whereas the extradition proceedings you obviously have the requesting state there and they are party to it, so it becomes very difficult to put forward a case that might place your client, his family—who might still be in the

requesting state—or any of your witnesses in danger because of the evidence they might give. There are various case law mechanisms that sometimes work and sometimes do not, and it is always a massive struggle to work out how the extradition and immigration proceedings interact.

The Chairman: That is a good point, most interesting and well made, so if I can thank each of you very much indeed.