

Recent Developments in Extradition Law—Some Practical Implications

Rosemary Davidson

Barrister, 6 KBW College Hill

Ben Lloyd

Barrister, 6 KBW College Hill

Adam Payter

Barrister, 6 KBW College Hill

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This article examines recent developments in extradition law and practice, it focuses on the new bars, art.8 and assurances in human rights cases.

In the 11 years since the Extradition Act 2003 (the 2003 Act) came into force, UK extradition law and practice has changed dramatically. High profile cases such as the “Natwest Three”¹; Gary McKinnon²; Abu Hamza³; Julian Assange⁴; and Shrien Dewani⁵ (to name but a few) have ensured that extradition cases have remained in the headlines and on the political agenda. At least three reviews have taken place in recent years: The Scott Baker *Review of the United Kingdom’s Extradition Arrangements*⁶ in 2011; and two Reports from the House of Lords Select Committee on Extradition in 2014 and 2015.⁷

Partly as a result of ongoing criticisms of the 2003 Act, a number of new provisions have been inserted. These include new bars of proportionality⁸ and “trial readiness”⁹ (Pt 1 cases only), and forum¹⁰ (Pt 1 and Pt 2 cases); and a new requirement for leave to appeal.¹¹ After a brief description of the structure of the Act, this article will consider the way in which these new provisions operate in

¹ *R. (on the application of Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin); [2007] Q.B. 727.

² *McKinnon v United States* [2008] UKHL 59; [2008] 1 W.L.R. 1739.

³ *Mustafa v United States* [2008] EWHC 1357 (Admin); [2008] 1 W.L.R. 2760.

⁴ *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 A.C. 471.

⁵ *South Africa v Dewani* [2014] EWHC 153 (Admin); [2014] 1 W.L.R. 3220.

⁶ Sir Scott Baker, *A Review of the United Kingdom’s Extradition Arrangements* (September 30, 2011).

⁷ House of Lords Select Committee on Extradition, First Report, *The European Arrest Warrant Opt-In* (November 7, 2014); House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice* (February 25, 2015).

⁸ Extradition Act 2003 s.21A.

⁹ Extradition Act 2003 s.12A.

¹⁰ Extradition Act 2003 ss.19B–19F and 83A–83E.

¹¹ Extradition Act 2003 s.26(5) in force from April 15, 2015.

practice, as well as two issues currently occupying much of the High Court's time in extradition cases: the correct test to be applied on appeal in a case concerning art.8 of the European Convention on Human Rights (the Convention), and the extent to which assurances in human rights cases provide an adequate level of protection for requested persons.

The structure of the Extradition Act 2003

The 2003 Act is divided into two parts. Part 1 applies to extradition requests made by states designated as “category 1 territories” which, in practice, are the EU Member States and Gibraltar.¹² Extradition requests under Pt 1 of the Act are in the form of a European Arrest Warrant (EAW). All other states with whom the UK has formal extradition relations are designated as “category 2 territories” and are dealt with in Pt 2 of the 2003 Act.¹³ Contested extradition hearings are heard by a designated District Judge sitting at the Westminster Magistrates' Court, and appeals are to the High Court.

Under Pt 1 of the Act the District Judge must decide whether the offences in the EAW are extradition offences; whether any of the statutory bars to extradition apply; and whether extradition would be proportionate (in accusation cases) and consistent with the requested person's rights under the Convention. In Pt 2 cases, the District Judge must decide whether the offence is an extradition offence and whether extradition would be consistent with the requested person's Convention rights, but consideration of the statutory bars is divided between the District Judge and the Home Secretary.

The new proportionality bar

By definition, the consequence of extradition is to remove the requested person from the country in which he is currently present, which is very often the country in which he is residing and has made a home for himself. It is therefore unsurprising that in the majority of contested extradition cases the sole or main issue is the right to private and family life under art.8 of the Convention. Such issues can be particularly acute in cases in which the offence for which extradition is sought is not particularly serious.

Prior to 2004 extradition was typically only sought in cases involving serious offences. However, the implementation of the UK's obligations under the Framework Decision on the European Arrest Warrant¹⁴ through Pt 1 of the 2003 Act has resulted in a huge increase in extradition requests to the UK,¹⁵ with a significant increase in requests relating to less serious offending.

The excessive use of the EAW scheme for relatively minor offences has led the European Council, the European Commission, the Scott Baker Review and even the Supreme Court to call for EU-level reform to introduce a requirement for a

¹² Extradition Act 2003 (Designation of Part 1 Territories) Order (SI 2003/3333).

¹³ Extradition Act 2003 (Designation of Part 2 Territories) Order (SI 2003/3334).

¹⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹⁵ The number of EAWs received by the UK has more than doubled between 2006–2007 (3,515) and 2013–2014 (7,881) (House of Lords Select Committee on Extradition, Second Report, *Extradition: UK law and practice*, para.99).

proportionality check at the point of issuance of an EAW.¹⁶ In the absence of the sort of legislative action called for at EU-level, Parliament has introduced a new standalone proportionality bar in s.21A of the 2003 Act.

Section 21A of the Extradition Act 2003

The new bar operates in two ways. First, at the point that an accusation EAW is certified, the National Crime Agency (NCA) is required to anticipate whether the judge would be required to order a requested person's discharge on the basis that surrender would be disproportionate within the meaning of the new bar.¹⁷ The Lord Chief Justice has issued guidance to assist the NCA (and judges) with that exercise.¹⁸

Secondly, s.21A requires the judge to consider not only the proportionality of extradition in accusation cases by reference to art.8 of the Convention, but also whether the extradition would be disproportionate having regard to three specified matters (and nothing else) insofar as the judge thinks it is appropriate to do so.¹⁹ The three matters are: (a) the seriousness of the conduct alleged to constitute the extradition offence; (b) the likely penalty that would be imposed if the requested person was found guilty of the extradition offence; (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the requested person.²⁰

In the first two and a half months of the provisions being in force, the NCA refused to certify a mere 14 EAWs.²¹ It is expected that the number will increase now that the Divisional Court (Pitchford LJ; Collins J) in *Miraszewski*²² has provided some guidance as to its operation.

The first point to note is that, depending on the circumstances of the case, each of the three specified matters, alone or in combination, could lead a judge to find it would be disproportionate to order surrender. So, as the Divisional Court found in *Miraszewski*, the judge may conclude that "extradition would be disproportionate" if: (a) the conduct is not serious; and/or (b) a custodial penalty is unlikely; and/or (c) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances.²³

Although there is no hierarchy of importance between the three factors, in most cases the seriousness of the offence will be determinative of the likely sentence and, for that reason, of proportionality.²⁴ Judges are required to take account of each of the three specified matters, but the caveat "so far as the judge thinks it appropriate to do so" means that the weight to be attributed to each factor will depend on the circumstances of each case.²⁵

¹⁶ Council of the EU's *Final Report on the fourth round of mutual evaluations* (8302/1/09 Rev 4, May 28, 2009, para.3.9) and the Commission's *Report on the Implementation of the Framework Decision* (COM (2011) 175 Final, April 11, 2011, paras 5–6); *Assange v Swedish Prosecution Authority* [2012] 2 A.C. 471 at [87]–[90]; Sir Scott Baker, *A Review of the United Kingdom's Extradition Arrangements* (September 30, 2011), para.11.21.

¹⁷ Extradition Act 2003 s.2(7A).

¹⁸ The guidance is issued pursuant to s.2(7A) of the 2003 Act by means of *Criminal Practice Directions Amendment No.2* [2014] EWCA Crim 1569.

¹⁹ Extradition Act 2003 s.21A(2).

²⁰ Extradition Act 2003 s.21A(3).

²¹ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice* (February 25, 2015), para.108.

²² *Miraszewski v Poland* [2014] EWHC 4261 (Admin).

²³ *Miraszewski* [2014] EWHC 4261 (Admin) at [31].

²⁴ *Miraszewski* [2014] EWHC 4261 (Admin) at [32].

²⁵ *Miraszewski* [2014] EWHC 4261 (Admin) at [33].

The LCJ's guidance identifies several categories of offences (for example, theft of food from a supermarket) in which, absent exceptional circumstances (for example, previous convictions, multiple offences, etc.), judges should determine that extradition would be disproportionate on the basis of seriousness alone. The appellant in *Mirazewski* criticised the LCJ's guidance as establishing a very low threshold of seriousness, but the Divisional Court accepted that it was a "floor rather than a ceiling", which is deliberately aimed at offences about which it is unlikely there could be any dispute were trivial, even allowing for different attitudes across the EU. It is open to judges to find that surrender would be disproportionate for more serious offences, particularly when the second and third specified matters are taken into account.

As the introduction of the LCJ's guidance suggests, the "seriousness of the conduct" factor is to be judged against domestic standards, although the views of the requesting state will be respected if they are offered.²⁶ In reality those views are usually not available and this is therefore a significant development. The courts have generally been cautious not to impose domestic assessments of seriousness on requesting states.²⁷ However, the new bar has given such an assessment a statutory footing. In practice, it may lead to less speculation as to whether, for example, the theft of a chicken is viewed more seriously in a particular country.²⁸ If that is the case, then the requesting state will have to provide further information (although the Divisional Court did not envisage judges adjourning for that purpose).

The "likely penalty" on conviction is focused on the question of whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial penalty in the requesting state. When specific information from the requesting state is absent, a judge is entitled to draw inferences from the content of the EAW and have regard to *domestic* sentencing practice. The fact that a custodial penalty is unlikely does not necessarily mean extradition would be disproportionate. It is not difficult to envisage environmental or corporate offences for which alternative sentences, such as substantial fines, would not result in surrender being considered disproportionate.

It has been suggested that the standalone bar is too prescriptive in restricting the consideration of proportionality to the three specified matters.²⁹ However, in assessing the "likely penalty", the requested person will be able to identify personal factors which the sentencing court in the requesting state would be obliged to have regard in the sentencing exercise³⁰; for example, if the requested person is a sole carer for three children the penalty on conviction is likely to be lower regardless of which Member State is requesting extradition. The Court in *Miraszewski* did not address that issue specifically, but accepted that another non-specified matter, delay in issuing an EAW, could be relevant to the new bar to the extent it informed the specified matters. It should also not be forgotten that the standalone proportionality bar also provides the possibility for requested persons who do not have families or established lives in the UK to be discharged, something that could

²⁶ *Miraszewski* [2014] EWHC 4261 (Admin) at [36].

²⁷ *R. (on the application of HH) v Westminster City Magistrates' Court* [2012] UKSC 25; [2013] 1 A.C. at [132] per Lord Judge.

²⁸ See, for example, the old triviality bar case *Sandru v Romania* [2009] EWHC 2879 (Admin).

²⁹ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, paras 109–110.

³⁰ Article 49(3) of the Charter of Fundamental Rights of the EU requires that the severity of penalties must not be disproportionate to the criminal offence.

not happen when art.8 was the sole medium through which proportionality could be assessed.

The “less coercive measures” factor is concerned with an examination of whether there are reasonably available and appropriate measures to secure the attendance in the court of the requesting state. The suggested measures identified in *Miraszewski* included attendance at pre-trial proceedings through video link, by telephone or via mutual legal assistance; attendance voluntarily without the need for surrender; or attendance on issue of a summons or on bail under the “Euro Bail scheme”, otherwise known as the European Supervision Order.

European Supervision Order

This is the less coercive measure with the most potential to affect extradition proceedings. The scheme was introduced in the Framework Decision on supervision measures in 2009³¹ and finally brought into force in the UK on December 3, 2014 following the decision by the Government to opt back into 35 EU criminal justice measures.³² The scheme introduces the possibility of transferring a pre-trial non-custodial supervision measure (such as release on bail) from the Member State where a non-resident is suspected of having committed an offence, to the Member State where he is normally resident. This will allow an accused person to be on bail in the UK until the trial takes place in the requesting state, rather than being held in lengthy pre-trial detention.

Whether such a possibility will come to fruition will depend on a number of practical factors. The Scott Baker Review suggested that a requested person would have to be extradited before they could hope to be subjected to supervision measures.³³ This approach is consistent with the general reluctance of the UK courts to adjourn proceedings to allow the requested person to make efforts to have the EAW withdrawn in the requesting state.³⁴ Moreover, the Framework Decision introducing the European Supervision Order provides that where an EAW has been issued the person should be surrendered in accordance with the Framework Decision on the EAW.³⁵ Notwithstanding that requirement, it is arguable that a requested person should be entitled to an adjournment in the extradition proceedings (for at least the 60 day period envisaged for surrender in art.17 of the Framework Decision on the EAW) to instruct a lawyer in the requesting state to apply for bail and supervision measures. It may well be that had the requesting state known the location of the requested person then supervision measures rather than an EAW would have been pursued. The obstacle, as ever, will be the availability of funding for such applications to be made.

So far 12 other countries,³⁶ including Poland and countries with severe prison condition issues such as Romania and Hungary, have implemented the measures.

³¹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

³² Part 7 and Schedule 6 of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014.

³³ Sir Scott Baker, *A Review of the United Kingdom's Extradition Arrangements*, 30 September 2011, at para 5.153.

³⁴ *Baghishyan v Poland* [2011] EWHC 1297 (Admin).

³⁵ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, art.21(1).

³⁶ Austria, Czech Republic, Denmark, Finland, Croatia, Hungary, Latvia, Netherlands, Poland, Romania, Slovenia, Slovakia.

Under the new proportionality bar, in relying on the third specified matter a requested person will not only be able to argue for an adjournment for less coercive measures to extradition to be considered, but also on a further reform, introduced in s.21B of the 2003 Act: temporary transfer.

Temporary transfer

The “temporary transfer” provisions allow the requesting state or the requested person to apply to the court for the requested person’s temporary return to the requesting state or for communication to take place between the parties and their representatives.

Section 21B(4) provides that an adjournment must be granted if the judge thinks it is necessary to enable the requested person or the requesting state to consider whether to consent to the temporary transfer request. It is frustrating that the adjournment under subs.(4) can only be for seven days, although there is a possibility of multiple adjournments under subs.(4) and if the issue is raised at an initial hearing or shortly thereafter then there is likely to be more time available for such a request to be considered before any final extradition hearing.

Temporary transfer has the potential to be used in conjunction with the “less coercive measures” factor to delay or avoid surrender without the requested person evading justice entirely (as would follow from discharge). As a consequence, the reforms provide benefits for requested persons and requesting states alike. For example, a statutory mechanism now exists for the sort of request recently made by the Swedish prosecutor in the *Assange* case to be addressed.³⁷

The future of the proportionality bar

The current proportionality bar applies to accusation cases only. The House of Lords Select Committee could “see no reason why the proportionality bar should not be extended to conviction cases given the number of EAWs received for trivial matters”. One reason is that legitimate concerns about a relativist approach that imposes UK judges’ views on other countries and trespasses on the role of their courts are likely to be more acute in circumstances in which a person has been convicted and sentenced. Having said that, both the Fugitive Offenders Act 1967 and the Extradition Act 1989 included triviality bars, which applied in both accusation and conviction cases. There are also a significant number of cases in which the requested person has been convicted in his absence through no fault of their own and who are presently deprived of the bar. As the political sensitivity about our extradition arrangements shows no sign of abating, it would not be surprising if the proportionality bar were extended to conviction cases in the future.

The new trial readiness bar

The inquisitorial nature of criminal procedures in civil law systems often results in a long pre-trial investigative stage during which, to common lawyers, it can be difficult to discern at what point the subject of the investigation stopped being a

³⁷ The Swedish prosecutor has requested that Assange be interviewed and his DNA taken while he remains in London (<http://www.bbc.co.uk/news/world-europe-31867829> [Accessed April 28, 2015]).

suspect and became an accused person. Article 1(1) of the Framework Decision on the EAW as implemented in s.2(3)(b) and (5)(b) of the 2003 Act is clear: EAWs are only available “for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order”. Therefore, for an EAW to be a valid warrant it must have been issued for the surrender of an “accused” person (rather than a suspect) and their surrender must be sought for “for the purpose of being prosecuted for the offence” (rather than for an investigation).³⁸ Extradition for any other purpose, such as obtaining evidence, “is not a legitimate purpose of an arrest warrant”.³⁹

Until recently, any issue as to whether a person against whom an EAW had been issued was wanted to stand trial in the requesting state would be litigated within the parameters of s.2 of the 2003 Act. However, in practice the protection afforded to requested persons by s.2 has been limited. The courts have consistently held that it is necessary to take a cosmopolitan approach to foreign criminal justice systems. It is not permissible simply to view civil law systems through the eyes of the domestic common law.⁴⁰ While that is undoubtedly correct, there has been a concern that the EAW has been used as an investigative tool. Notwithstanding the finding of the Scott Baker Review that there was no widespread evidence to support that conclusion,⁴¹ the Government, following the lead of Ireland and Gibraltar, introduced a new “trial readiness” bar.

The new bar in s.12A

The bar is referred to in s.12A of the 2003 Act as the “absence of a prosecution decision”.⁴² It was enacted with the aim of ensuring surrendered persons are not held in pre-trial detention for lengthy periods in the requesting state while investigations continue.⁴³ However, when considering the provisions it is helpful to remember that this reform, like many of the others, was a political response to criticisms of the EAW scheme.⁴⁴ Consequently, s.12A is not based directly on the European Framework decision on the EAW.⁴⁵

The bar is intended to ensure that, in cases in which the person is wanted to stand trial, extradition can only go ahead where the issuing State has made a decision to charge the person *and* a decision to try the person, unless the requested person’s absence is the sole reason for the failure to take those steps. One of those decisions alone will not be enough.

The requested person bears the initial burden of demonstrating that there are reasonable grounds for believing that at least one of the two decisions have not been taken and then, if necessary, that the absence of the requested person from

³⁸ *Aszlatos v Hungary* [2010] EWHC 237 (Admin); [2011] 1 W.L.R. 252.

³⁹ *Office of the King’s Prosecutor (Brussels) v Cando Armas* [2005] UKHL 67; [2006] 2 A.C. 1.

⁴⁰ *Re Ismail* [1999] 1 A.C. 320; *Belgium v Bartlett* [2010] EWHC 1390 (Admin).

⁴¹ Sir Scott Baker, *A Review of the United Kingdom’s Extradition Arrangements* (September 30, 2011), para.5.163.

⁴² The bar came into force on July 21, 2014.

⁴³ See the Explanatory Note to the Anti-Social Behaviour, Crime and Policing Act 2014 s.156, para.462.

⁴⁴ See the remarks of the Secretary of State for the Home Department, who has also claimed that the new section provides “extra safeguards for British citizens”: *Hansard*, HC, col.779 (July 15, 2013).

⁴⁵ There is a risk that the European Commission could initiate enforcement proceedings against the UK for introducing bars to surrender in addition to those in the FD on the EAW; or that the CJEU might be asked to rule on their legality as a matter of EU law following a preliminary reference pursuant to art.267 Treaty on the Functioning of the European Union (see, for example, *Melloni v Ministerio Fiscal* (C-399/11) [2013] 3 W.L.R. 717; [2013] 2 C.M.L.R. 43).

the requesting territory is not the sole reason for the lack of a decision (“the first stage”).⁴⁶ If the requested person discharges that burden then the requesting State will have to satisfy the judge that both of the decisions have been made or, if not, that the defendant’s absence is the sole reason for the lack of decision (“the second stage”).⁴⁷ If the burden shifts to the requesting state, then it will have to satisfy the judge to the criminal standard of proof.⁴⁸ If the requesting state cannot prove those matters then the requested person’s surrender will be barred.

On its face, s.12A appears to contradict the cosmopolitan approach that has been taken to s.2 of the 2003 Act. The new bar relies on concepts of charging and trying which are English terms of art not further defined in the 2003 Act. In many Member States the criminal process is not as linear as the UK’s distinct stages of investigation, followed by charge and then trial. For example, in many civil law jurisdictions post-charge questioning of a defendant is often required before a decision to try can be made. In order to ensure that defendants benefit from the protections of art.6 from the beginning of a criminal investigation, including any interview stage, the European Court of Human Rights (ECtHR) has adopted a broad definition of the term “charge” which can be said to include when a defendant is first interviewed as a suspect or when arrest is ordered.⁴⁹

In *Kandola*⁵⁰ the Divisional Court, in considering the new bar, found that the default position would be that the two decisions have been taken in the requesting state. For the requested person to meet the first stage, the appropriate judge would have to form an objective view that there are reasonable grounds for believing that one or both of the two decisions have not been met.⁵¹ “Reasonable grounds for believing” involves something less than proof on the balance of probabilities, but more than a simple assertion or a fanciful view. In order to form a view, the judge will often not have to look beyond the terms of the EAW read as a whole. Where the EAW is not clear, then the judge is entitled to look at extraneous evidence. The Divisional Court held that it is neither appropriate nor necessary for requesting states to provide further evidence as it is for the requested person to produce cogent evidence at the first stage. However, a bare assertion by the requested person will not be sufficient.⁵² In reality, and despite the Divisional Court’s attempt to discourage the use of “elaborate” expert evidence,⁵³ in order to succeed under the first stage, requested persons will have to rely on evidence on foreign law and procedure. That position will continue in the short term until there exists a body of High Court decisions concerning the procedures in the jurisdictions which most commonly request surrender from the UK.

If the requested person meets the first stage, then the requesting State will have to provide a short clear, statement answering the requirements of s.12A. The Divisional Court recognised that the statements will be subject to challenge by requested persons, but expressed (what is likely to be a vain) hope that this would not lead to complex and lengthy proceedings.

⁴⁶ Extradition Act 2003 s.12A(1)(a)(i) and (ii).

⁴⁷ Extradition Act 2003 s.12A(1)(b)(i) and (ii).

⁴⁸ Extradition Act 2003 s.206(2) and (3)(b).

⁴⁹ *Deweert v Belgium* [1980] E.C.C. 169; (1979–80) 2 E.H.R.R. 439.

⁵⁰ *Kandola Germany* [2015] EWHC 619 (Admin).

⁵¹ *Kandola* [2015] EWHC 619 (Admin) at [30].

⁵² *Kandola* [2015] EWHC 619 (Admin) at [33].

⁵³ *Kandola* [2015] EWHC 619 (Admin) at [32].

The future of the trial readiness bar

The factual application of the general guidance in *Kandola* provides an insight into the future of the trial readiness bar and its potential for preventing extradition. The case concerned German and Italian EAWs. In relation to Germany, it is clear that an EAW can be issued before or after a person has been charged. In the specific case of *Kandola* the investigation had not concluded because the prosecutor had not heard from the requested person. It was suggested that this could have been done through a Mutual Legal Assistance (MLA) request or by “temporary transfer” pursuant to s.21B of the 2003 Act.

The availability of MLA did not stop the Court concluding that the sole reason for the failure to take the decisions to charge and try were because the requested person was absent from Germany. The Court accepted that the German judicial authority had considered the possibility of MLA, but had reasonably dismissed it on the basis that the requested person was a flight-risk.⁵⁴ The Court did not engage with the suggested possibility of temporary transfer, or the question of whether MLA could be used *now* (while a requested person was remanded in custody or on bail in the extradition proceedings), rather than prior to the issuance of the EAW. Nothing in s.12A says that the decisions or the failure to make them should be assessed at the time the EAW was issued, rather than at the time of the extradition hearing.

In relation to the Italy, the EAW repeatedly referred to “investigations”, which is a common feature in many EAWs. That alone was sufficient for the requested person to meet the first stage and for the burden to pass to the requesting state. The CPS accepted that there had not been a decision to charge or to try because the investigation was still continuing. The judgment did not contain the sort of detailed analysis of Italian procedural law that was present in relation to Germany, but it was accepted that it is not a requirement for a requested person to be in Italy in order for the relevant decisions to be made. Consequently, it could not be proved that the sole reason for the decisions not being made was the requested person’s absence.

The effect of s.12A, and the ruling in the Italian *Kandola* case, is significant. During the course of the proceedings the CPS indicated that all Italian accusation warrants (80–85 per cent of all Italian requests) would fail as a result of the new bar. It is not difficult to find examples from other jurisdictions (prior to the introduction of the bar), which may have been decided differently had s.12A been in force.⁵⁵

Given the potential scale of the problem for some requesting states, the trial readiness bar may lead to an increased use of MLA as an alternative to surrender. Once in force, the European Investigation Order (EIO) will replace the current schemes of MLA with a single unified instrument covering all types of evidence and introducing standard request forms. The UK opted in to the EIO on July 27, 2010 and the European Council adopted the final version of the Directive on March

⁵⁴ *Kandola* [2015] EWHC 619 (Admin) at [43].

⁵⁵ See, for example, *Dowd v Spain* [2013] EWHC 1515 (Admin) in relation to Spain. In that case, the Spanish judicial authority said, “the decision whether to charge them for the ... offence has not been made ...”. In terms of the mischief at which s.12A is aimed, it is of note that at the time the appellant was surrendered to Spain, his co-defendant, who had been surrendered some two years earlier from the UK, had still not been tried.

14, 2014.⁵⁶ Article 1 of the EIO makes it clear that it is an instrument for “gathering evidence” and the objective is to facilitate the fair determination of criminal charges throughout the EU by ensuring that the trial court has all the relevant available evidence, wherever that evidence might be located.

The forum bar

Historically, the extradition courts have not concerned themselves with “forum”. In cases that involve offences committed across national borders it has hitherto not been open to a defendant to argue that, despite being prosecuted in country A, he ought in fact to be prosecuted in country B. The question of the most convenient or appropriate place for legal proceedings to be brought is one traditionally that has been for the relevant prosecuting authorities alone. However, in 2013 a “forum bar” was brought into force and its scope was litigated earlier this year in the High Court.

Forum—recent history

Following high profile cases such as that of “the Natwest Three” there was public debate as to the “injustice” of cases in which extradition was sought in respect of conduct that had primarily occurred in the UK. As a result, in 2006 the Government inserted a forum bar into the 2003 Act (by virtue of the Police and Justice Act 2006). However, despite the public pressure, and the subsequent amendment to the legislation, the 2006 forum bar was never brought into force.

The Scott Baker Review⁵⁷ considered amongst other important issues the question whether the forum bar should be brought into force. It concluded that a forum bar would “create delay and has the potential to generate satellite litigation” and that “prosecutors are far better equipped to deal with the factors that go into making a decision on forum than the courts.”⁵⁸ Despite that warning, the Government in October 2013 brought a forum bar into force, albeit in a different form to that enacted in 2006.

The test

The new forum provisions⁵⁹ were brought into force on October 14, 2013. It is important to note that they are not based on the EU Framework decision of 2002, which created the European Arrest Warrant scheme (which is given effect to by Pt 1 of the Act), nor is a forum bar expressly found in any of the UK’s extradition treaties (where outward extradition from the UK is governed by Pt 2 of the Act). The High Court has confirmed that the provisions only apply to accusation cases.⁶⁰

Extradition of a person from the UK to another state (“the requesting State”) is barred by reason of forum if the extradition would not be in the “interests of justice.” Extradition would not be in the interests of justice if the judge: (a) decides

⁵⁶ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters.

⁵⁷ Sir Scott Baker, *A Review of the United Kingdom’s Extradition Arrangements*.

⁵⁸ Sir Scott Baker, *A Review of the United Kingdom’s Extradition Arrangements*, p.13.

⁵⁹ Which are contained in ss.19B–19F of Pt 1 of the 2003 Act and ss.83A–83E of Pt 2 of the 2003 Act inserted into the 2003 Act by the Crime and Courts Act 2013.

⁶⁰ *Belbin v France* [2015] EWHC 149 (Admin).

that a substantial measure of the defendant's relevant activity was performed in the UK (which is essentially a matter of fact for the judge)⁶¹; and (b) decides, having regard to the specified matters relating to the interests of justice (and *only* those matters), that the extradition should not take place. A defendant's "relevant activity" means activity which is material to the commission of the extradition offence and is alleged to have been performed by the defendant. The "specified matters" include more obvious factors, such as the place where most of the loss or harm occurred or was intended to occur; the availability of evidence; and the interests of victims and witnesses, but they also include, any *belief* of a prosecutor that the United Kingdom is not the most appropriate jurisdiction in which to prosecute the defendant. In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material that is subject to restrictions on disclosure in the requesting State concerned.

The forum bar that has now been introduced contains a significant provision that had not been included in the 2006 amendment, and that is the so-called "prosecutor's certificate".

The prosecutor's "trump card"

In cases in which the relevant prosecuting authority is concerned to ensure that a requested person is not discharged on the basis of forum, a prosecutor is entitled to issue a "prosecutor's certificate". The effect of such a certificate is that the District Judge hearing the extradition proceedings *must* then decide that extradition is not barred by reason of forum. A "prosecutor's certificate" given by a designated prosecutor must certify that a responsible prosecutor has considered the offences for which D could be prosecuted in the UK, or a part of the UK, in respect of the conduct constituting the extradition offence⁶²; and that there are one or more such offences that correspond to the extradition offence (the "corresponding offences").⁶³ The prosecutor must then certify either: (i) that the responsible prosecutor has made a formal decision that the defendant should not be prosecuted for the corresponding offences, and the basis for that decision is a belief that there would be insufficient admissible evidence for the prosecution or the prosecution would not be in the public interest⁶⁴; or (ii) that the prosecutor believes that the defendant should not be prosecuted for the corresponding offences because there are concerns about the disclosure of sensitive material⁶⁵ in the prosecution of the defendant for the corresponding offences, or in any other proceedings.⁶⁶

A prosecutor cannot be required to consider any matter relevant to giving a prosecutor's certificate or be required to issue a prosecutor's certificate.

⁶¹ *Astrakevic v Lithuania* [2015] EWHC 131 (Admin) at [13].

⁶² Matter A.

⁶³ Matter B.

⁶⁴ Matter C.

⁶⁵ "Sensitive material" means material which appears to the responsible prosecutor to be sensitive, including material appearing to be sensitive on grounds relating to: (a) national security; (b) international relations; or (c) the prevention or detection of crime (including grounds relating to the identification or activities of witnesses, informants or any other persons supplying information to the police or any other law enforcement agency who may be in danger if their identities are revealed).

⁶⁶ Matter D.

No doubt the purpose of the prosecutor's certificate is to ensure that the prosecutor retains the ultimate decision as to the appropriate forum for a prosecution. If a prosecutor issues a certificate then the District Judge must determine forum against the requested person. On first reading, this provision appears to have the potential to dramatically reduce the scope and effectiveness of the forum bar: whatever arguments a defendant may feel he or she has to support a forum argument, they can ultimately be trumped by a prosecutor.

However, it remains to be seen in practice how often prosecuting authorities decide to issue prosecutor's certificates. Despite the intention to ensure that prosecutors retain their discretion, the issuance of a certificate can be challenged by way of a statutory appeal to the High Court pursuant to the 2003 Act. The Court, on such an appeal, is required to apply the procedures and principles that would be applied on an application for judicial review.

The forum bar in practice and some issues that will arise

In determining the interests of justice the District Judge must consider each of the specified matters and it is a matter for him or her how much weight to give each of the factors in an individual case.⁶⁷ Whilst the prosecutor's belief is just one of the factors to be considered, no doubt where such a belief is expressed it will be given significant weight by the District Judge. The courts traditionally have paid deference to the decisions of prosecutors in bringing proceedings and there is no reason to consider that that will change by reason of the forum bar. As the High Court recently noted in *Dibden*

“section 19B(3)(c) was not intended to invite a review of the prosecutor's belief as to the more appropriate jurisdiction on grounds short of irrationality. It was certainly not intended to invite a debate with demands for documents justifying the belief.”⁶⁸

Despite the High Court's attempts to reduce the scope for litigating the “prosecutor's belief”, this will be an area of law that will continue to evolve and develop. A tension has already developed between two recent decisions of the Court. In *Dibden*, the High Court sought to restrict the appellant's “demands for documents” in seeking to challenge a prosecutor's belief. Yet, in another recent decision, *Piotrowicz*,⁶⁹ the Court appeared to accept that “enquiries to establish, in round terms, what the basis of the belief may be, will be entirely appropriate.”⁷⁰ Therefore, there is plainly scope for requested persons to continue to press prosecutors to justify the basis for any belief that might be expressed as to forum and to seek to litigate that issue before the High Court.

The courts have so far taken a highly restrictive approach to the issue of the “belief of a prosecutor”. The prosecutor in question is a domestic prosecutor at the CPS (or SFO or FCA) and it has been held that if no such belief has been formed by the time of the extradition hearing then the provisions do not

⁶⁷ *Astrakevic* [2015] EWHC 131 (Admin).

⁶⁸ *Dibden v France* [2014] EWHC 3074 (Admin).

⁶⁹ *Piotrowicz v Poland* [2014] EWHC 3884 (Admin).

⁷⁰ *Piotrowicz* [2014] EWHC 3884 (Admin).

“require that any party or the court should demand that a prosecutor must then take steps to create a ‘belief’ on the part of the prosecutor. The initiative to declare ‘a belief’ or not lies with the domestic CPS. There is no statutory mechanism that enables the court to compel further investigation by the CPS so as to put it in a position to have a ‘belief’. That view of the construction of this factor is consistent with the rule, applicable in extradition cases, that a decision by domestic authorities not to investigate whether there should be a criminal prosecution in the UK is not susceptible to judicial review except in wholly exceptional circumstances such as bad faith ...”⁷¹

Furthermore, the High Court has so far not been required to address precisely how a prosecutor properly arrives at such a belief and what test or approach should be applied. If, as the courts have acknowledged, an irrational belief is susceptible to challenge, then there must be criteria to assess such a belief against. Furthermore, unless a defendant knows how a prosecutor has arrived at a belief, then he or she can have no fair way of addressing it. Such a restriction may itself give rise to procedural unfairness.

If a prosecutor explains to a court that the prosecuting agency has not arrived at any belief because it has no material or there has been no investigation in the UK, then there would be nothing to prevent a defendant from volunteering to be interviewed in the UK with a view to making admissions to an offence. It remains to be seen how a prosecutor would react to such a proposal, but a defendant may feel it a better option to seek to admit an offence in the UK rather than risk extradition. Again, it is not known at this stage how the courts would view such an approach. In *Wright v Government of Argentina*,⁷² the appellant was accused of attempting to board a flight from Argentina to the UK with cocaine in her luggage. She fled Argentina and returned to the UK, from where her extradition was subsequently sought. During the course of her appeal to the High Court, the appellant through counsel indicated that she wished to be tried in the UK and that she would plead guilty to a charge of attempting to import cocaine into the UK if charged in the UK. Her counsel gave undertakings to that effect before the High Court. The High Court allowed her appeal against the order for her extradition on the basis of art.3 of the Convention. In so doing, the Court remarked however that, in the light of her undertakings, the Crown Prosecution Service would be free to bring proceedings against the appellant in the UK. It is not known whether the appellant was then prosecuted in the UK. However, it must be open to defendants in other cases in which forum is raised to invite the CPS to prosecute him or her in the UK on the basis of their own admissions of guilt.

Moreover, it is also apparent that the High Court will give considerable deference to the findings of a District Judge in relation to forum and it will prove very difficult in practice to appeal a first instance decision. In *Astrakevic*,⁷³ the High Court emphasised that the District Judge has to make a “value judgment” in relation to the interests of justice test, and that an appeal can only be mounted on traditional public law grounds. In doing so, the High Court has sent a clear message: appeals against forum decisions are unlikely to be successful and will plainly not involve

⁷¹ *Astrakevic* [2015] EWHC 131 (Admin) at [37].

⁷² *Wright v Commissioner of Police of the Metropolis* [2012] EWHC 669 (QB).

⁷³ *Astrakevic* [2015] EWHC 131 (Admin) at [34].

the High Court simply substituting its own view of a decision for that of the District Judge.

To date, there has been no appeal in relation to a prosecutor's certificate. Despite the obvious desire of the courts to take a narrow and restrictive approach to the forum bar, it is inevitable that a challenge to a certificate will have to involve some consideration of the prosecutor's decision-making process, the approach the prosecutor has taken, and the material that the prosecutor has taken into account. Again, it may be for that reason that prosecutors will remain very reluctant to issue a certificate and will continue to take the more cautious option of simply expressing a belief as to the appropriate forum.

Conclusion on forum

Notwithstanding the wide discretion conferred upon the District Judge by the forum provisions, the early signs are that the Courts will continue to pay due deference to the views of prosecutors as to the appropriate venue for a criminal trial. Moreover, the High Court has already sought to restrict the grounds upon which a "prosecutor's belief" can be scrutinised and challenged. However, it is unlikely to be too long before another *NatWest Three* type case is litigated. The UK courts, whilst seeking to pay deference to the views of the prosecutors, will uniquely have to decide upon the appropriate forum for a criminal trial.

The new requirement of leave to appeal and the test to be applied on appeal in art.8 cases

Since the landmark decision of the Supreme Court in *HH*⁷⁴ there has been a marked increase in the willingness of the High Court to discharge extradition cases on appeal,⁷⁵ taking into consideration more factors in the balancing exercise than ever before. As a result, there is a perception amongst extradition lawyers that art.8 arguments made on behalf of requested persons are more likely to succeed on appeal. Two recent developments present a challenge to that view.

First, as of April 15, 2015,⁷⁶ the automatic right to appeal in extradition cases is to be replaced by a permission stage.⁷⁷ The threshold for leave to appeal will be that an arguable case can be made.⁷⁸ The Government hopes that this will lead to fewer unmeritorious appeals. However, if a written application for permission is refused, the application can be renewed.⁷⁹ The benefit is therefore likely to be limited and, unless the issues with automatic entitlement to legal aid are resolved, could lead to arguable appeals not being heard.⁸⁰

Secondly, the Divisional Court has recently considered what the proper approach of an appellate court should be when a challenge is made to the proportionality of an extradition order under art.8. There are three conceivable approaches: (i) a full re-hearing; (ii) a re-consideration of the proportionality decision; or (iii) a review

⁷⁴ *R (on the application of HH) v Westminster City Magistrates' Court* [2012] UKSC 25; [2013] 1 A.C. 338.

⁷⁵ See the comments of Blake J in *Matuszewski v Poland* [2014] EWHC 357 (Admin) at [20].

⁷⁶ Anti-social Behaviour, Crime & Policing Act 2014 (Commencement No.9 and Transitional Provisions) Order 2015.

⁷⁷ Anti-social Behaviour, Crime and Policing Act 2014 s.160.

⁷⁸ Extradition Act 2003 s.6(5).

⁷⁹ Criminal Procedure Rules r.17.22.

⁸⁰ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, para.274.

of the District Judge's decision at first instance. The first approach has never been adopted and can be discounted, not least because of the restrictive statutory provisions on the admission of fresh evidence on appeal.⁸¹ The second approach has been adopted in some cases on the basis that the appellate court is a public body with its own responsibilities to consider fundamental rights under s.6 of the Human Rights Act 1998. However, when it comes to appeals of judicial rulings, rather than executive or administrative decisions, the appellate court has only ever been required to conduct a review of the lower court's decision.⁸²

As a result, in *Belbin*,⁸³ the Divisional Court held that the proper approach on an extradition appeal of a proportionality decision is one of review. As to the standard of that review, the Court concluded that a successful challenge to a proportionality decision could only succeed if the judge: (i) misapplied the law; (ii) made an unreasonable finding of fact; (iii) failed to take into account a relevant factor or took account of an irrelevant factor; or (iv) reached an overall conclusion that was irrational or perverse.

The latter category appears to require *Wednesbury* unreasonableness for a successful appeal. The decision in *Belbin* was founded on the Supreme Court decision in *Re B (A Child) (FC)*.⁸⁴ Clarke SCJ made clear that the Supreme Court's decision did *not* mean that the judge will only be held to be wrong if he or she has made a decision which no reasonable judge could have come to.⁸⁵ In doing so, Clarke SCJ endorsed the more nuanced approach adopted by Neuberger SCJ in the leading judgment. Lord Neuberger identified seven possible conclusions that an appellate judge could reach on the first instance decision on proportionality. Four of the categories would lead to the appeal being dismissed and three would lead to the appeal being allowed.⁸⁶ The extent to which the first instance judge heard oral evidence will be a significant factor in determining in which category the decision falls and the outcome of the appeal.⁸⁷

The "standard of review", and in particular the fourth category identified in *Belbin*, has been the subject of a further appeal recently heard by the Lord Chief Justice.⁸⁸ The judgment is pending, but in conjunction with the permission stage it may have significant implications for the volume of future extradition appeals.

The use of assurances in human rights cases

In recent years the use of assurances in extradition cases has become far more common, in part because of the huge increase in extradition requests received by the UK since the introduction of the European Arrest Warrant in 2004. The topic

⁸¹ *Hungary v Fenyvesi* [2009] EWHC 231 (Admin) at [32].

⁸² See, in relation to executive decisions, *R. (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15; [2007] 1 A.C. 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 W.L.R.

⁸³ *Belbin* [2015] EWHC 149 (Admin) at [66], fn.57.

⁸⁴ *Re: B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33; [2013] 1 W.L.R. 1911.

⁸⁵ *Re: B (A Child)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 at [140].

⁸⁶ *Re B (A Child)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 at [93]: "An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii)."

⁸⁷ *Re B (A Child)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 at [95].

⁸⁸ *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin); [2015] W.L.R. (D) 207.

was recently considered by the House of Lords Select Committee on Extradition (the Select Committee),⁸⁹ who raised concerns about the extent to which the assurances could be monitored and effectively enforced.

The current approach to assurances

The approach of the ECtHR is that the question of enforcement of the assurances is only relevant once it has been established that there is a real risk that the assurances will be breached.⁹⁰ Where the requesting state has a good record of compliance with diplomatic assurances, the domestic courts have been slow to conclude that there was a real risk of breach.⁹¹ The flaw in this approach is that, in the absence of effective monitoring arrangements, it is impossible for a court to assess whether or not, in practice, a particular state's record of compliance with assurances is good; in all but the very high profile cases, there is simply no information as to whether assurances given prior to extradition have been honoured on surrender.

Anecdotally there are examples of cases in which assurances have been breached, some of which were heard by the Select Committee during the evidence sessions for the report *UK Extradition Law and Practice*. In two of those examples the witnesses considered that the breach derived from administrative error or oversight rather than a deliberate flouting of the assurances.⁹²

The case of *Aleksynas*⁹³ gives an insight into the difficulties that requesting states have in practice in ensuring that assurances can be honoured. In that case the Divisional Court heard that there was a lack of clarity as to the categories of requested person to whom the assurances applied; confusion as to whether the assurances could be applied retrospectively; and local prosecutors (and presumably police and prison staff) did not know about the existence of the assurances because they were set out in restricted documents. Although these problems resulted in three breaches of the assurances that were put before the Court, the Divisional Court nonetheless concluded that the breaches arose as a result of “teething problems” and that there was no real risk that the assurances would not be honoured in the cases of the appellants.

The House of Lords Select Committee Recommendations

As a result of the evidence that they heard, the Select Committee concluded that the current monitoring arrangements in relation to assurances were flawed. This was because there was no effective way to assess whether an assurance had been breached and therefore no effective remedy for a requested person in circumstances in which a breach occurred.⁹⁴ The Select Committee further recommended that,

⁸⁹ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*.

⁹⁰ *Ahmad v United Kingdom (Admissibility)* (2010) 51 E.H.R.R. SE6 at [108].

⁹¹ *Hilali v Spain* [2006] EWHC 1239 (Admin); *Mustafa v United States* [2008] EWHC 1357 (Admin); [2008] 1 W.L.R. 2760 at [62].

⁹² House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, paras 67 and 79.

⁹³ *Aleksynas v Lithuania* [2014] EWHC 437 (Admin).

⁹⁴ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, paras 88–89.

amongst other things, consideration be given to including, within the assurances themselves, details of how they should be monitored.⁹⁵

Monitoring mechanisms

The Select Committee received evidence on a number of practical ways in which extradition assurances could be monitored. One proposal was to only accept assurances from signatories to the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which requires signatory states to have a “national preventative mechanism” which is an independent body capable of visiting places of detention.⁹⁶

This approach was considered in *Florea*⁹⁷ in which Blake J concluded that that mechanisms required by the Optional Protocol did not set a minimum standard in this area and that, while independent monitoring bodies could contribute to effective monitoring, non-independent bodies such as national ombudsmen and the judge who gave the assurances could provide “national monitoring”.

The difficulty with the “national monitoring” approach is twofold. First, in order for it to take place the judge who gave the assurances, or an ombudsman, would need to be aware both of the assurances and of the practical arrangements for the person’s detention following return. This in turn would depend on the nature of the administrative arrangements in the requesting state, and the extent to which the requested person was willing and able to complain of any breaches, neither of which can be assumed. Secondly, even if national monitoring were to be effective in that any breaches were identified and corrected within the requesting state, this would not necessarily address the concern raised by the Select Committee which is that the reliability of future assurances cannot be accurately assessed unless the breaches are also reported to the UK authorities.

A further monitoring method suggested in evidence before the Select Committee was to require the UK Government to take a greater role in the monitoring of assurances, although the witnesses before the Committee differed on the extent to which the UK Government had power to monitor the implementation of assurances in third countries in respect of non-British citizens held in detention there.⁹⁸ The Home Office is currently undertaking a review to see whether “there are any measures that need to be taken to give greater assurance to the assurances”.⁹⁹ Given the lack of clarity in whether the UK Government would have any locus to undertake consular type visits to non-British nationals held in detention abroad, and how resource-intensive such in-person monitoring of assurances would be, monitoring by the UK government is unlikely to be a complete answer to the concerns raised by the Select Committee.

It is submitted that another possible monitoring mechanism, at least in relation to assurances given by Pt 1 territories, would be to give the UK court who received

⁹⁵ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, paras 90–93.

⁹⁶ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, para 81.

⁹⁷ *Florea v Romania* [2014] EWHC 4367 (Admin) at [25].

⁹⁸ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, para.82.

⁹⁹ House of Lords Select Committee on Extradition, Second Report, *Extradition Law and Practice*, para.84.

the assurances, or the NCA,¹⁰⁰ a greater role in monitoring compliance. Such an approach would require requesting authorities to report back on whether or not the assurances had been complied with. This would not be an effective guard against a deliberate breach of the assurances, but it would help to identify and therefore resolve breaches that arose from practical administrative problems in complying with the assurances. While the UK courts or the NCA would have no power to act if a judicial authority simply refused to provide the required confirmation, such a refusal or failure to provide the necessary confirmation could be taken into consideration by courts when deciding whether future assurances could be relied on by the Member State in question.

Conclusion on assurances

While there is clearly a need for effective monitoring arrangements to ensure that assurances given in human rights cases truly are an effective mechanism by which the requested person's rights can be protected, there is unlikely to be a "one size fits all" solution. This is because of the range of matters in respect of which assurances are given in extradition cases, and the disparity between the human rights records of the states with which the UK has extradition arrangements. There may be some cases, as can arise in the deportation with assurances context, in which only monitoring by an independent body will be sufficient. There will be many other cases in which monitoring by UK courts, the NCA or the UK Government will be sufficient. The Select Committee recommendation of including the monitoring mechanisms within the assurances themselves is a good starting point as it is flexible enough to ensure that the monitoring mechanism is appropriate to the circumstances of the case. It remains to be seen whether, in practice, and in light of the Select Committee recommendations, the UK courts will subject monitoring mechanisms, or the lack of them, to greater scrutiny.

Postscript

In *Celinski*, the Divisional Court (Lord Thomas of Cwmgiedd CJ, Ryder LJ and Ouseley J) endorsed the *Belbin* approach to the standard of review in art.8 appeals, but considered

“that application of that approach by use of the analysis in the judgment of Lord Neuberger [in *Re B*] is likely to achieve a more consistent approach that is compliant with Article 8 and the provisions of the 2003 Act dealing with appeals”.

¹⁰⁰ As the UK's designated authority under the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA the NCA has responsibility for communicating with judicial authorities who issue European Arrest Warrants.