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TAKEN BEFORE

THE JOINT COMMITTEE ON HUMAN RIGHTS

THE HUMAN RIGHTS IMPLICATIONS OF UK EXTRADITION POLICY

TUESDAY 29 MARCH 2011

Mr Keir Starmer QC

Baroness Neville-Jones and Ms Fenella Tayler

Evidence heard in Public Questions 165 - 240

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Members Present

Dr Hywel Francis (Chairman)
Lord Bowness
Rehman Chishti
Lord Dubs
Dr Julian Huppert
Lord Morris of Handsworth
Mr Dominic Raab
Mr Virendra Sharma
Baroness Stowell of Beeston

Examination of Witness

Mr Keir Starmer QC [Director of Public Prosecutions, Crown Prosecution Service].

Q165 The Chairman: Good afternoon and welcome to the Joint Committee on Human Rights session today dealing with the human rights implications of UK extradition policy. For the record, could you introduce yourself please?

Mr Keir Starmer QC: Keir Starmer QC, Director of Public Prosecutions.

Q166 The Chairman: I understand that the flowcharts that you have very kindly made available to committee members are also available to the public who are present and that they will be made available to view on the committee website shortly. Thank you for that. We have a great deal to cover. It would be rude of me to say that we expect all our witnesses to be concise and to the point, but I hope that you would take that in the spirit in which it was given. I begin by asking a general question on extradition procedure. In your view, what are the main differences in the role of the CPS in the extradition process under Part 1, which concerns extradition

under the EAW procedure, and under Part 2, which concerns extradition to non-EU countries?

Mr Keir Starmer QC: As I tried to depict in the flow diagrams, the role of the CPS is, in a sense, slightly earlier in Part 1 extradition proceedings than in Part 2, because the major difference between Part 1 and Part 2 is the involvement of judicial authority to judicial authority rather than Secretary of State to Secretary of State. That means that the CPS comes in a little earlier in the proceedings. I hope that the flow diagrams pretty much speak for themselves. I have always found it quite difficult to trace through who does what and when in the four different situations—the two export and the two import—and this was simply an attempt to put that down in diagrammatical form. As you can see from the first diagram, essentially the CPS will be involved once there is a hearing at the Westminster Magistrates' Court, which is at the right-hand box on the second line, for a Part 1 case. It comes in at the same stage essentially for Part 2 but in a Part 1 case the Secretary of State will not have been involved at that stage.

Q167 Dr Huppert: Thank you. Can I ask a specific question about the role of the CPS as an agent for other countries? You said in December that the CPS would be acting as the agent of Sweden in the proceedings with Julian Assange. I have here a letter from the CPS, which states: "my response is as a CPS lawyer working for the US in extradition proceedings". First, is it right that the CPS should work as an agent of other countries given that it does not act as an agent of the Government here, in that sense?

Mr Keir Starmer QC: There is an essential difference between our role as public prosecutor here for domestic criminal cases and our role in extradition cases. There is no reason why the role should be the same. It is different. So far as extradition is concerned, the CPS and I require a statutory provision to give us power to conduct extradition proceedings. That does not arise from the power to act as DPP or CPS in this country. Those powers are dependent on the international agreements that have been made either of a bilateral or multilateral nature. The judicial authority in a Part 1 case or the state in a Part 2 case has, under the international arrangements, the right to seek extradition in this country. It needs somebody to conduct those proceedings on its behalf. The CPS acts in that capacity. There is a statutory power to do it. It has been described by the courts as akin to a solicitor/client relationship. The only footnote that I would add to that is that, under domestic legislation, the CPS is a public authority bound by the Human Rights Act and therefore cannot act incompatibly. Secondly, as lawyers, we have duties to the court about evidence that is presented. Beyond that, it is broadly speaking a solicitor/client arrangement.

Q168 Dr Huppert: When you are acting as an agent of another Government, do you have any sort of internal review on that? How do you exercise your responsibilities under the Human Rights Act and your responsibilities to the court? Can you refuse to act as its agent?

Mr Keir Starmer QC: The understanding is that an arrangement is set up on the basis that we are the agent so we therefore act on its instructions. I say "instructions" because the international agreement sets out the procedures, the process, the

evidence that has to be presented and so forth and we comply with that. There is no provision under the statute that says that the CPS can refuse to act in the following circumstances. That having been said, we are bound by the Human Rights Act. We are bound by our duties to the court. We can of course give advice in these cases and we do give advice in these cases as they develop.

Q169 Dr Huppert: So if there was a conflict and you were supposed to act as the agent for Sweden, the US or any other country, and you felt that to do so would breach the Human Rights Act, could you refuse to act?

Mr Keir Starmer QC: You have to take this quite carefully because if you take a Part 1 case—if I can use the flow diagram for these purposes—we would have got involved at the hearing at the magistrates' court. The district judge will be seized of the matter. The district judge will then ask the questions that are set out in the following series of boxes. Then, at the bottom left-hand corner of my diagram, the district judge considers whether it is an extradition offence. Are there bars to extradition? That starts to introduce the length of time and so forth.

Q170 Dr Huppert: But that is the district judge considering it, not you?

Mr Keir Starmer QC: Yes. Then there is the Section 21 question: would these proceedings—would extradition or surrender—be incompatible with human rights? That is a question for the court to determine. The only possible circumstances in which we as the CPS could conclude that we would be acting incompatibly with the Human Rights Act in continuing proceedings would presumably be if we had reason to doubt that the court would properly exercise its function. In other words, assuming

that the court conducts the Section 21 exercise in accordance with the statute, it will come to a finding of whether there is a breach of the Human Rights Act. If it decides that there is not, it logically follows that we are not breaching the Human Rights Act to bring the proceedings. If it finds that there is a breach or there is an incompatibility, it will discharge the proceedings in any event. There may be some extreme case falling outside of all of that, but we have not yet encountered it. It would be a rarity that that mechanism does not provide the place for that discussion to take place.

Q171 Dr Huppert: But you have no choice and no ability to adjust until the bottom left-hand corner on the flow diagram, when the district judge decides Section 21? Is that right?

Mr Keir Starmer QC: The only caveat that I would put on that is this, and I am saying this as a theoretical situation: if, for example, we had reason to doubt the truth of the evidence or something like that, as an officer of the court we would be duty bound not to act on it. I would give that wriggle-room. As an officer of the court you have an obligation to the court to conduct the thing properly without abusing the processes of the court. Under those extreme circumstances, my view would be that we were entitled to say that we were not proceeding.

Lord Dubs: I should first declare an interest in addition to my written interest: my daughter works for the CPS.

Mr Keir Starmer QC: I am glad to hear it.

Q172 Lord Dubs: My first question is this: if the initial request for extradition is vague, can the CPS request further information from the issuing authority, either before the warrant is certified by SOCA or after the defendant is arrested?

Mr Keir Starmer QC: Yes, and we quite often advise on such matters. We take the view that the request should be put before the court in a proper form and therefore we can advise that there may be a defect in the evidence or that further evidence is needed, and we do that in certain cases.

Q173 Lord Dubs: Then you are satisfied that the country requesting the individual has everything organised for the proceedings to follow. Is that part of it as well?

Mr Keir Starmer QC: That is not part of our function, but we have a power to advise. Therefore, this is done in the spirit of advice. If we are asked for advice, we will give it. We are not required to certify because under a Part 1 case, as you can see, the certification is early certification by SOCA, not by the CPS. The process will be: the request is received by SOCA, SOCA certifies under Section 2, the warrant is executed and the person is then arrested and brought before the court. There is no stage at which we formally have to approve or certify anything. However, if a country comes to us and says, "This is what we are proposing to do. Is this in the sort of order that is needed to be put before the court?" we will give advice. It is a power not a duty.

Q174 Lord Dubs: Is there an opportunity for the defence to obtain more information about the facts of the case from the issuing authority?

Mr Keir Starmer QC: The information that the defence must have is set out in Section 2 of the Act. We have summarised it in the first diagram in the second box on

the right-hand side. It is set out in Section 2 of the Act. Essentially, the information must be the person's identity and the particulars of any other warrant issued. Then it states that the "particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence". So that is a mandatory requirement of the warrant itself. That is something that the court will look at and we will look at as well.

Q175 Mr Sharma: Several witnesses to the committee have argued that the human rights threshold is too high. Several have also suggested that the defence lawyers find it difficult to locate evidence showing a risk of a breach of human rights in extradition cases. Can you comment on that?

Mr Keir Starmer QC: The statute requires the court to consider whether extradition would be compatible with convention rights. The essential question, therefore, is: what approach will the court take and what test will it set? Since those witnesses gave evidence—I have seen the evidence of some of the witnesses—the law has slightly moved on. The bar was set quite high in certain circumstances, but two recent authorities have suggested that it should perhaps be a little lower. There was the case of Klimas, which suggested the approach that you take. First, you assume, if it is a European convention country, that the country requesting will comply with the European Convention on Human Rights and will have domestic remedies available to the individual should there be any breach, so you have a presumption. Then the

approach has been that the individual can rebut that presumption by clear and cogent evidence that there will be a breach of his or her human rights. In the case of Klimas, it was suggested that the threshold is quite high. You would have to show that there was some constitutional defect in the country requesting whereby the human rights would not be upheld—possibly revolution or constitutional turmoil. The two recent cases, Targosinski and Agius—the first in February of this year and the second in March of this year—said that that was the wrong approach. The court is duty bound to inquire and it must ask itself whether there is clear and cogent evidence of a breach. In Targosinski, our court said that if, for example, there was evidence that the Strasbourg court had found a systematic violation of human rights in the country in question, which was Poland in this case, that might be sufficient for clear and cogent evidence. Essentially, our courts have tried to align themselves with the Strasbourg jurisprudence and say that, if you can show consistent breaches that have been found by the Strasbourg court, you are getting close to clear and cogent evidence of a breach of human rights. That is a lower threshold than the threshold as was understood to be the case before the last six weeks. I can understand why people would have been anxious about the higher threshold that had been articulated beforehand.

Q176 Mr Raab: Notwithstanding the case that you cited, if you compare the regime with the human rights regime for deportation, particularly around Article 8 and the growing case law around that, would you agree with the assessment that the ability

or scope to block a deportation on human rights grounds is greater than in extradition cases, at least in the European context?

Mr Keir Starmer QC: I am not sure that I necessarily would, because most of the deportation cases are Article 2 and Article 3 cases. In those cases, there is obviously very extensive scrutiny, because you are talking about a situation where somebody might lose their life or be subjected to torture. The courts carefully scrutinise those and have a rather exacting test. In extradition cases, sometimes of course you are dealing with Article 2 and Article 3, but more often you would be dealing with Article 5 on the right to liberty, Article 6 on fair trials and Article 8. They are by their nature different rights. In other words, the scrutiny that you would attach to a case where somebody might lose their life is inevitably greater than the scrutiny that you might attach if somebody is likely to have their Article 8 rights infringed. The test is pretty clear from Strasbourg. It may appear to be differently articulated, but that is probably because the two types of cases are normally focusing on different convention rights. There are slightly different tests with different convention rights.

Q177 Dr Huppert: To return to the issue of the discretion of the CPS, you have already outlined the very limited discretion that you have in extradition cases. As I understand it, in the Netherlands the public prosecutor can refuse to execute a European arrest warrant as well as the court. The Netherlands has clearly found some way to empower its prosecutors. Is that a role that you think you should have?

Mr Keir Starmer QC: Perhaps I can caveat my answer. We have been trying to track down exactly what is the power of prosecutors in the Netherlands. It is not entirely

clear. I know that there is a suggestion that they have some discretion before taking on a case. I think that that argument has been advanced in particular when it comes to proportionality. As everyone appreciates, a lot of requests come from Poland. On the face of it, they are often relatively minor cases and therefore there is a question of whether the prosecutor or somebody else should have the power to say, "I'm sorry, this is disproportionate". There is some hint that there may be such a power in the Netherlands. Our investigations of the Eurojust desk have not borne that out, but we have not done extensive research. I am not entirely sure.

On the face of it, if the regime works as it should, on the one hand the extreme exposure to a breach of human rights ought to be dealt with by the court under Section 21. Equally, proportionality ought to come in under Section 21. An individual accused of stealing a loaf of bread in another country would be able to argue that to remove him or her would be such a disproportionate interference with their Article 8 right that it should not happen. There is a Latvian case where an individual was charged with stealing two mobile phones. There was quite a considerable suicide risk and our court said that that would be a breach of Article 8 and disproportionate. Therefore, in answer to your question, if the regime works properly, there is arguably no need for the prosecutor to have the additional role. That depends on the view one forms of whether the regime is operating as it should.

Q178 Dr Huppert: Given that the regime is operating as we actually see it operating, would you like to have that power?

Mr Keir Starmer QC: I am hesitating because there is a problem with the number of cases from Poland. A lot of work is going on on proportionality and whether there is some way in which the number of cases can be reduced by applying some proportionality principle. I am well aware of that work, which is being advanced. There are a number of ways of skinning this particular cat. At the end of the day, if someone suggests that the prosecutor should be given a role to be able to say early on that this is clearly a case that is disproportionate and should never come into the system, I would not argue against that. At EU level, a lot of work is going on to try to reach agreement. If that agreement can be reached, all well and good.

The Chairman: I think, Mr Sharma, that your question has already been answered.

Q179 Lord Bowness: Can surrender of a person under the European arrest warrant be postponed so that the requested person can be prosecuted in the United Kingdom?

Mr Keir Starmer QC: It depends where the case has got to. If a decision is taken to prosecute the individual in this jurisdiction before the extradition hearing, the extradition proceedings must be adjourned until the domestic proceedings are completed. In those circumstances, that would nearly always be the case; they would be prosecuted here before the extradition proceedings continued. Yes, it can happen and, yes, it has to happen in those circumstances.

Q180 Lord Bowness: But only in those circumstances, where there is a domestic prosecution.

Mr Keir Starmer QC: Yes. I hope that I am answering the question completely.

Q181 Lord Bowness: The reason why I asked the question was that we understand that the framework decision allows a member state not to extradite on that basis, but that has not actually been put into domestic legislation. Is that correct?

Mr Keir Starmer QC: No, it has.

Q182 Lord Bowness: That particular exclusion?

Mr Keir Starmer QC: Yes, it has. If you would like the details of how it operates, I am more than happy to provide them.

Q183 Lord Bowness: Our understanding was that it was not in the original Extradition Act. It was then put into domestic legislation in a later Act, but that required a resolution of both Houses, which has never been put to each House. It is therefore not in force.

Mr Keir Starmer QC: I am sorry. This is in force. The provision that you may be thinking of is the forum bar, where Parliament has passed provisions which have not been brought into effect but which would deal with the appropriate forum for conduct that is an offence in both jurisdictions. I am sorry; perhaps I am not being clear. If during extradition proceedings a decision is taken to prosecute in this jurisdiction for an offence, that will take priority. If you have a different situation, with proceedings at an early stage, where there is conduct that could be tried in this country or another country and a decision has to be taken about which country will try the individual, provisions on that were passed by Parliament but have not yet been brought into force.

Q184 Baroness Stowell of Beeston: Before we get into the detail of the European arrest warrant, can you tell us what you see as the practical advantages of this system?

Mr Keir Starmer QC: The advantages are a lesser role for the Secretary of State. It is judicial authority to judicial authority. Under the old regime and the non-EAW regime, the Secretary of State has a role at the very beginning and at the end. This is quicker and clearer. In a case where someone consents to be extradited under a European arrest warrant, they are usually surrendered in about 16 days. If it is contested, it is about 93 days. That is much quicker than it used to be. It was common to have a rule before the European arrest warrant that a country would not surrender its own nationals. This regime deals with that issue and there are more limited provisions on dual criminality. There are a number of advantages in those respects.

Q185 Rehman Chishti: Witnesses to the committee have commented that old and outdated European arrest warrants remain in place for some time, posing difficulties for the subjects of those requests. Is that right?

Mr Keir Starmer QC: The arrest warrant is Europe-wide. An individual can be arrested in this country under a warrant and discharged by our courts. If they then travel to another country, that warrant can still be a valid basis for arresting them there. I am aware that that has happened on occasions. The mere fact that the warrant has been executed in one country and proceedings have been brought does not extinguish the warrant, which remains outstanding and can be acted on in other countries.

Q186 Rehman Chishti: Is there a way of improving the system that we have in place at the moment?

Mr Keir Starmer QC: Yes, but it would have to be a Europe-wide solution, because this is a framework decision; it is not a UK decision. If all the countries in the EU were to agree to amend that, it could be amended.

Q187 Rehman Chishti: Is there a system by which outstanding extradition requests are reviewed?

Mr Keir Starmer QC: I am not sure. I will happily try to find out. Whether there is a central clearing process across Europe, I am not sure. There are obviously Eurojust and Europol, but I am not sure whether there is formally a clearing mechanism. I will check and, with permission, I will write to the committee and let you know.

Q188 Rehman Chishti: The reason why I say that is that it would make sense if the right arm knew what the left arm was doing, rather than having a situation where there is no connectivity between states and you have a problem with people being repeatedly arrested.

Mr Keir Starmer QC: I completely take your point. The problem arises because, when the European arrest warrant is issued, it is not always known where in Europe the individual will be. Therefore, it is a Europe-wide warrant. As I say, the fact that the person has been arrested and discharged in country A does not stop country B picking them up. I take your point about a general review and I will come back to you on that.

Q189 Rehman Chishti: Do the time limits for processing European arrest warrants cause concern and problems for the CPS?

Mr Keir Starmer QC: Generally speaking, no. The framework requires the process to be completed in 90 days, but our domestic law does not, so there is no domestic consequence of failure to extradite within 90 days. The domestic time limit that bites is one under the European arrest warrant of removal 10 days after the final order. That is fixed. We can apply to extend it and we have done so, but it is quite tight. Normally, it should not cause too many difficulties, but it can do—for example, if you have a final order coming into play on 22 or 23 December, which is a very busy time for flights, bookings and so on. Ten days to make all the arrangements is quite tight. There is provision for us to extend that time, which we do on occasion. It is not an insuperable problem, but it is tight.

Q190 Rehman Chishti: Justice has said, "The UK does already far exceed the timeframe in many cases that we are supposed to adhere to on European Arrest Warrant cases".

Mr Keir Starmer QC: Let me give you the figures that we have on that. Our figures suggest that we have not met the 90-day time limit in 112 cases, which is quite high across Europe. The average time is about 93 days, which is obviously beyond the 90 days. In our view, the reason is that we have quite an elaborate appeal system. I am not complaining about that; it is perfectly right and proper, but it takes time for cases to progress through our courts. They go reasonably quickly, but to get a case through the district judge, the High Court and, if necessary, the Supreme Court within 90 days

within our legal system is quite a big ask. I am not for a minute suggesting that in order to speed things up you would want to limit any of those rights of appeal.

Q191 Rehman Chishti: One point that I would like to link with that is that Fair Trials International told the committee that "the deadlines are too tight in many cases for an individual to obtain evidence—often expert", which leads to injustice for the accused. Is that a fair comment?

Mr Keir Starmer QC: I do not think that it is right for me to comment one way or the other. The district judge has the power to adjourn if it is necessary in the interests of justice. Therefore, there is the ability to apply for an adjournment if necessary. In the individual case, the court will simply have to make up its mind, but I am not in a position to comment.

Q192 Rehman Chishti: What practical effects would increasing time limits have on EAW cases?

Mr Keir Starmer QC: If the law provided a longer timeframe or it simply started to take longer?

Rehman Chishti: No, if the law allowed for the timeframe to be increased.

Mr Keir Starmer QC: At the moment, the 90 days is a requirement under the European framework but not a requirement of domestic law, so it does not present a problem. There is no domestic law consequence of going beyond the 90 days. The domestic law consequence is at the end of the process—the time limit of 10 days from the final order. That can be a bit tight, but as long as everyone is doing their job we ought to be able to apply for extensions as and when we need them.

Q193 Lord Morris of Handsworth: Mr Starmer, witnesses to the committee commented that not enough information about the extradition process is provided to defendants. Do you think that the CPS could play a role in providing this information?

Mr Keir Starmer QC: Could the CPS play a role? Yes of course it could but, if you trace through the process, it is probably right that this is the function of the police. The arrest warrant is executed by the police. It has to have certain information within it and the police will do the physical picking up of the individual, which is when the individual needs to know what is happening and so forth. The individual will then be brought to the court very swiftly. The court then has to ensure that it has all the information that it requires. The process is essentially: execution of warrant, brought to court, police to provide certain information, court to provide information. I am not against any suggestion that the CPS should provide any further information as necessary, but in fact in that process the individual will already have been brought before the court by that stage. I know that there are moves to standardise the information available to individuals across the EU for both extradition and non-extradition. That is a good thing. The spirit is right and I would support that. Actually, it is a function of the police and the court, but I would not quarrel with any suggestion that anybody who is able to play a part, including the CPS, should do so.

Q194 Lord Morris of Handsworth: I want to pick up the point that you just made about the provision of information. Is there any difference in the information given to persons awaiting surrender under the European arrest warrant and to those awaiting extradition to a non-EU state?

Mr Keir Starmer QC: Not significantly. The information needed is set out in statute. To that extent, the information required is broadly similar. There is of course the major difference between a Part 1 and Part 2 case when it comes to the broader questions of the information that the court must consider. In a Part 1 case, there is no requirement to show a prima facie case whereas in a Part 2 case there may be. Therefore, in a Part 2 case, there is likely to be much more by way of information/evidence that the individual gets. The test that the court has to apply is different.

Q195 Lord Dubs: Witnesses have argued that those who are subject to extradition request do not have sufficient access to lawyers in the UK or in the requesting country to enable them to prepare an effective defence on human rights grounds. What do you think about that?

Mr Keir Starmer QC: There are some outstanding lawyers acting on behalf of those being extradited in this country. I did cases myself for individuals and I know many of the practitioners involved. As far as the lawyers in this country are concerned, I think that it is well recognised that there is a body of highly regarded extradition experts who invariably are involved in these cases and are extremely good human rights lawyers. As for whether there should be parallel lawyers in the requesting state, I do not have a view on that. In a sense, the proceedings are here and it is a matter for the domestic team to decide if and when it wants to involve lawyers from elsewhere. There are well known individuals acting in these cases in this country who are extremely respected and good lawyers.

Q196 Lord Dubs: But the witnesses have said to us that those subject to extradition requests do not have sufficient access to the lawyers. The issue is about being able to have the lawyers there to help them.

Mr Keir Starmer QC: I am not sure that I am in a position to comment. I was in practice for a number of years and dealt with these cases. It did not appear to me in that capacity to be a major problem. I have not been doing it for a couple of years. If others have perceived it to be a problem, they can give their evidence.

Q197 Lord Dubs: Are there enough CPS lawyers at any one time to answer defence queries?

Mr Keir Starmer QC: I hope so. We have a dedicated team in our headquarters in London who are themselves experts broadly speaking doing only extradition cases and they manage the casework very well. I would not hand on heart say that there was never an occasion when a telephone call went unanswered, but broadly speaking it is a specialist unit with specialists in it who know what they are doing and are experts in their field. They do not have any great difficulty.

Q198 Lord Morris of Handsworth: Are they all London-based?

Mr Keir Starmer QC: Yes, they are all London-based for requests into this country. That is for two reasons. Our specialist divisions on counterterrorism and organised crime tend to be London-based so that we can get a group of specialists together. Secondly, the City of Westminster Magistrates' Court is the court that deals with these cases. Therefore, it makes sense to have our team located in London.

Q199 Mr Raab: In 2009, we had about twice as many European arrest warrant requests as any other member state. Why do you think that we in Britain received so many?

Mr Keir Starmer QC: I am not sure that I am in a position to answer that other than to say that the number of requests and surrenders by us compared with the number of requests that we make is quite marked. I am not sure that I am in a position to explain why that is other than to say that a lot of them come from Poland: 425 surrenders in 2009-10 were surrenders to Poland, which is 61% of all EAWs. I suspect that it may be that particular population that we have here.

Q200 Mr Raab: We obviously get a lot of EAW requests now. What resource implications does that have for the CPS?

Mr Keir Starmer QC: The numbers have gone up. The number of surrenders by the UK under the EAW scheme has gone up. For example, in 2004 there were 23. The figure then went up year on year to 75 in 2005, 151 in 2006, 320 in 2007, 470 in 2008 and then 699 in 2009-10, so it has gone up quite steeply in a short period of time. So far as the CPS is concerned, we manage that well within our resources. Obviously, it is more demanding because there are more cases, but we have our specialist unit and we are able to process them reasonably efficiently.

Q201 Mr Raab: Just to give us a broad-brush view, what proportion in percentage terms of CPS resources or manpower is now absorbed on extradition requests?

Mr Keir Starmer QC: In pounds and pence, it is about £2 million out of a total of about £650 million. I can give you the precise figures if you would like them as a percentage.

Q202 Mr Raab: It is a very small proportion.

Mr Keir Starmer QC: It is a small proportion. We prosecute about 1 million defendants a year within this jurisdiction, so when you put it in that context you can perhaps see why it seems such a small percentage.

Q203 Mr Raab: Do you see any value in and do you think that it would be feasible to have some kind of filter—whether a public interest test, a seriousness test or a proportionality test—that the CPS could adopt?

Mr Keir Starmer QC: If there was agreement that there ought to be a different regime involving the CPS having some sort of filter exercise, that would not present us with a difficulty. We do it in all our domestic cases. I am not making a case for it, but I am perfectly happy to accept it if that is a change in the regime that others think is more sensible.

Q204 Mr Raab: Is there a type of filter that you think might be more manageable than others, whether it is proportionality, seriousness or public interest, so that you do not end up with huge legal proceedings around the definition of the threshold? Public interest strikes me as quite broad.

Mr Keir Starmer QC: You could have a proportionality exercise. There is a way out on proportionality grounds under Article 8 when the case gets to the court. However, you could say, if there is an obvious case, why put it into the process just for the

courts to deal with at a later stage? The CPS could deal with it earlier. If people think that that is a good change, that would not present us with a difficulty. The problem with the public interest is that you would have to be quite careful. Gauging when it is in the public interest to prosecute in this country is a task that we have to perform, but it is not always easy. Trying to gauge whether it is in the public interest for an offence to be prosecuted in another country, with different traditions from our own, would on the face of it be quite a headache. I do not suggest that some means could not be devised, but it would not be quite the same exercise.

Q205 Mr Raab: Finally on this area, you talked a bit about the obligation in Poland to prosecute, which resulted in a peak or increase in cases from that jurisdiction. Can you elaborate on the nature of that duty?

Mr Keir Starmer QC: I am not professing to be an expert, but perhaps I can try to sketch out what I think are the three fundamental differences. In Poland, they operate on the principle of legality, which means that they do not have the public interest test that we have before they prosecute. If there is enough evidence, the case goes to court. The prosecutor cannot say, "This is not in the public interest. It is such a small amount that the penalties would be nominal". We have that power and therefore we operate it. In Poland, everything goes before the court, so you are locked into a system where the legality principle applies. It applies in a number of countries in Europe, not just Poland. Secondly, in Poland, as I understand it, the law requires the individual to be before the court for the pre-trial stages in person. Therefore, the court cannot proceed without the individual being there. I think that it is that

combination that leads to a real difficulty. The contrast is with the guidance that we have given to our own staff when they are considering applying for a European arrest warrant. I put in place guidance that says, "Think about the likely sentence. Think about proportionality and think about the gravity of the offence before deciding if it is appropriate to issue a warrant". We have built-in flexibility in our own guidance. That does not exist in Poland and therefore, if there is enough evidence, broadly speaking the person will be required to be returned to go before the courts. That is part of the problem.

Q206 Baroness Stowell of Beeston: It has been suggested to the committee that there have been some inconsistencies in the way in which the UK implements export and import requests, with the CPS requiring a trial-ready case before requesting a person for extradition to the UK while no such discretion is exercised by other countries issuing an EAW request. What are your views on that?

Mr Keir Starmer QC: There is a difference. The question under the statute is whether the request is "for the purpose of being prosecuted" for the offence. There is a difference, because in this country no one is put before the court unless they are charged. In nearly all cases, we will make the assessment about whether there is sufficient evidence. You have to have reached point X with the threshold of a reasonable prospect of conviction before you are charged. Only at that stage are you required to appear before the court. In civil law jurisdictions, which obviously apply in some countries in Europe, there is a different approach. The court is seized of the matter much earlier on and there is an examining judge. The prosecutor has a

different role. Therefore, the pre-trial stage starts much earlier. That means that some of those countries may make requests for the purpose of prosecution at an earlier stage than we would recognise as being the start point of criminal proceedings. There is a difference broadly speaking to do with the two different approaches in Europe as to the function of the court in criminal cases.

Q207 Baroness Stowell of Beeston: That might lead those who are the victim of a crime and who are waiting for the person who has committed the crime to be imported back to the UK from another country to lose some confidence in the system. Once the CPS has advised the victim of a crime that an application will be made for a European arrest warrant, in normal circumstances how long after that would you expect an application for the warrant to be made to the court?

Mr Keir Starmer QC: I would expect the application for the warrant to be made as soon as it was reasonably practicable. If there is a crime in this country, there will then be an investigation. If, looking at the evidence that has been collated by the police, we form a view that there is enough to charge the individual but the individual has left the jurisdiction, we apply for a warrant. Once we have reached that decision—that there is a case to be charged and progressed—I would expect the warrant to be applied for reasonably swiftly. The reverse procedure then requires that the warrants will go to the country in question and the case will progress through their domestic proceedings. If it is within the EAW scheme, broadly speaking, it ought to be about the same. Most countries in Europe would say that they are a bit quicker than we are

at dealing with requests and getting people through their courts. We take slightly longer than other European countries.

Q208 The Chairman: Thank you very much for your evidence today. There are a number of other questions that we would have liked to ask but time was against us. We would like to write to you with questions that relate to the counterterrorism review.

Mr Keir Starmer QC: By all means. I should just add that I have various notes clarifying answers that I have given. It may be helpful to the committee if I put those in writing. Mr Raab asked me about extradition and immigration and I have a more detailed answer to that, which I can give the committee.

The Chairman: Thank you very much.

Examination of Witnesses

Baroness Neville-Jones [Minister of State for Security and Counter-Terrorism], and **Ms Fenella Tayler** [Head of Judicial Co-operation Unit, Home Office].

Q209 The Chairman: Good afternoon and welcome back to the committee. I believe that you wish to make a brief statement but, before that, will you please introduce yourself and your colleague?

Baroness Neville-Jones: I am Pauline Neville-Jones, the Minister of State for Security and Counter-Terrorism at the Home Office. This is Fenella Tayler, who heads the extradition section of the Home Office.

Q210 The Chairman: I understand that you want to make a brief statement of about two minutes.

Baroness Neville-Jones: Thank you, Chairman. I will be brief, because I know that the committee would much prefer to spend the time on questions. I just thought that it might be helpful if I were briefly to review what the Government have been doing in two areas that I know are of interest to the committee: the review of the Extradition Act and the European investigation order.

When the Government came into office, they had decided that they wanted to see the operation of the Extradition Act reviewed. As the committee will be aware, Sir Scott Baker has taken on this task. We have put to him a number of issues that in particular we would like his panel to focus on. The committee may be aware of those. They include the question of whether there is an imbalance in the arrangements

between the UK and the USA in the matter of extradition. On the European side, there is the operation of the European arrest warrant, as concern has been expressed about the perceived ease with which people can be surrendered by the UK to other member states. There is also the question of whether the UK might implement more of the safeguards, which are optional under the European arrest warrant framework decision. There are other questions that we would be grateful if the panel would look at, including the Secretary of State's discretion and its extent. I might say that, on all these matters, having asked the panel to do all this, I am reluctant to pre-empt the findings that it will come to, but obviously I am willing to talk to the committee about these issues.

The final thing is the European investigation order, which is an EU legislative proposal aimed at streamlining the process of MLA, or mutual legal assistance. Progress has been quite slow on that. The officials have reached only Article 19 out of 34, so I think that it will take some time. We do not reckon that the EIO, if finally agreed, will enter into force until either 2014 or 2015, so it is some way off.

Q211 The Chairman: Thank you. I begin by asking about the Government's commission of a review of the UK's extradition policy. Did the Government have a concern about the human rights protection afforded to those involved in extradition proceedings?

Baroness Neville-Jones: The Government felt that the amount of comment to which the operation of the system had given rise indicated that it was not quite right. I would not say that the Government thought that the human rights elements were a

particular problem of note, but certainly human rights elements would be included. There was the whole question of fairness to both suspect and victim.

Q212 The Chairman: Do these concerns differ for proceedings under Part 1 and Part 2 of the Extradition Act?

Baroness Neville-Jones: Part 1, in theory, ought to give rise to less concern, as it relates to extradition between countries that ought to have equally valid judicial systems, if I can put it that way. Clearly, as I said, the operation of the system has given rise to comment, so we feel that it would be right to look at both parts.

Q213 Lord Dubs: I think that you have partly answered my question. You have indicated that the European arrest warrant should be in the scope of the review because of certain problems. Is there anything that you want to add to what you said in your introduction or is that enough?

Baroness Neville-Jones: I think that, for starters, it is enough. Practical problems arise about proportionality and there are issues relating to the length of time, which is not so much a matter of law as a matter of habit and practice in states about how people are treated, the date at which the trial begins and all those things. We think that the so-called road map, which is meant to come into operation to strengthen some of the safeguards of MLA, will be helpful, as it ought to even up the standards that are observed in practice between member states.

Q214 Lord Dubs: Witnesses have commented to us that mutual recognition and mutual trust of legal systems on which the European arrest warrant is based do not exist in practice, as the differences are so great. Fair Trials International told us:

"Standards of justice vary greatly from one EU country to another and human rights do not receive the same respect in every Member State". Would you like to comment on this?

Baroness Neville-Jones: I think that it is probably a matter of observation that human rights are not interpreted in all member states in the same way. We are committed to this system. The UK would regard it as important, therefore, to try to work within the system to raise standards elsewhere, so that this can be a valid way of treating people.

Q215 Baroness Stowell of Beeston: How is the review going to look at the interests of the victims of crime, in terms not just of those who are the subject of extradition but of those who are affected by the crimes that are reported to have been committed?

Baroness Neville-Jones: I hesitate to speak for those who are conducting the review. I know that they have taken oral evidence and that they have had submissions put to them. I think that they are also going to pay a series of visits. All those things are useful means of relating the theory of the operation of the system to real life. The anxieties that have been expressed relate to the perceived gap. It is not always just the suspect who has cause for anxiety; it is also the victim. Both parts of that need to be looked at. I do not know whether Fenella wants to comment further on that question, which is an interesting one.

Ms Fenella Tayler: I just wondered whether you were referring particularly to people who have been victims of crime in this country and where the alleged assailant had fled overseas.

Q216 Baroness Stowell of Beeston: Primarily, yes. I am looking more from the point of view of the British citizen who is a victim of crime and is waiting for the person to be extradited back to the UK.

Baroness Neville-Jones: In the case of Part 1 countries, the chances of getting someone back are greatly increased by the existence of the system, for all its imperfections—we know that there are some in practice. The chances of getting people extradited in the absence of a system of this kind would be much lower. To that extent, the interests of justice are certainly served by both extraditing and facilitating the process under the rules. When you have got someone back here, of course, British justice is in operation.

Q217 Mr Raab: One of the issues that we have heard evidence on is that judges in extradition cases are reluctant to refuse to surrender on human rights grounds, basically because of, in EAW cases, the mutual trust implicit in the system. I wondered whether you had any reflections or comments on that.

Baroness Neville-Jones: It goes to the core of the criticism that is being made, which is that, although in theory you get equal justice, in fact you do not. I come back to what I was saying. We have to endeavour over time, if we are committed to this system, to try to get standards elsewhere raised. Clearly, one thing that the panel will wish to look at is whether some of the uncommenced safeguards could be brought

into play, which might help. If that recommendation were made, the Government would look at it very seriously.

Q218 Mr Raab: Another interesting thing that has come up in the evidence is the comparison between deportation proceedings and extradition proceedings and the application of Article 8 human rights standards. Obviously, this becomes rather technical, but it is apparent that there is an exceptionality rule for pleading disruption to family life under Article 8 in extradition proceedings which is not as high in deportation proceedings. That leads to quite a stark anomaly. Your innocent British citizen is protected by weaker safeguards than your foreign national criminal when you try to deport him. Is that something that you think ought to be addressed?

Baroness Neville-Jones: The question of the right level of human rights protections is itself controverted and to some extent that level is moving. Individual cases give rise to changes in law. I think that it would be preferable to have confidence in same standards, but the difficulty is that justice is a moving thing and standards change over time. I would not say necessarily that one has heard the last word about human rights standards in either of those two contexts.

Q219 Lord Morris of Handsworth: Minister, we note your opening comments about the reviews that are taking place, but can we have some indication of the extent to which the Government believe that implementation of the European arrest warrant has been successful?

Baroness Neville-Jones: The numbers certainly show that the system is operating. One reason why we asked the panel to look at it is that we are not entirely content

with some aspects of the operation. The one that is most obvious and most often commented on is proportionality. It is no secret that there is one country in particular that sends us many more warrants than any other—over 60 per cent of the warrants that we receive come from Poland. Fenella Tayler has talked to the Polish authorities and I have talked to their Minister. There is a plan to ask the Polish judicial authorities to come over here to see our system in operation. At the end of the day, of course, this is a judicial rather than a governmental matter. One thing that we would like to do is to inculcate various habits that are more like ours. Secondly, I think that it is true to say that, in the negotiation of the European investigation order, the experience of EAW has alerted people to the need for proportionality in the operation of the EIO. I think that there will be greater safeguards there. Fenella, you might like to say something about that.

Ms Fenella Tayler: That is certainly something that is being considered in the negotiations on the European investigation order. Those negotiations are ongoing, so we do not yet have a concluded instrument, but we are working hard to try to ensure that proportionality is included in the instrument.

Q220 Lord Morris of Handsworth: Can I just pick up that point? Both of you have made strong reference to the principle of proportionality. Will that be codified somehow or will it apply purely on a subjective basis? Will there be criteria on the application of proportionality?

Baroness Neville-Jones: You have put your finger on a very acute issue. I asked the same question: could one codify this and define proportionality? The answer that I

get from the experts is that that is very difficult and that, if you try to fix a definition of what constitutes proportionality in any given area, that would give rise to its own anomalies. It comes back to more common sense and restraint. There are some guidelines in EAW that are meant to bear on the question of proportionality—for instance, on the kind of offences for which you can extradite. The system is not wholly without its own limits, but I think that its operation is still open to the criticism of spending too much time on relatively trivial offences when perhaps it would do well to focus its attention on ensuring justice for the more serious offences.

Q221 Lord Morris of Handsworth: Do you think that agreed guidelines would be more objective?

Baroness Neville-Jones: I think that guidelines are probably the way to go, rather than legislation. Is there not a code book now and some guidelines that judiciaries are meant to use?

Ms Fenella Tayler: In relation to the European arrest warrant, there is a threshold below which a warrant cannot be issued, which is that the offence must attract a maximum sentence of at least 12 months.

Q222 Lord Morris of Handsworth: Within domestic law?

Ms Fenella Tayler: That is within the law. But although that is a threshold, it none the less allows, as Baroness Neville-Jones indicated, quite a lot of warrants to be issued. It depends on the law of the issuing state as to whether a warrant would be issued for such offences.

Q223 Baroness Stowell of Beeston: A lot of the exchange that has just taken place has been about a topic that I was going to come on to later, so in the interests of speed I should like to pick out an issue from the later questions that has not been covered. We understand that the European Commission has suggested incorporating a proportionality principle in the context of the European arrest warrant.

Baroness Neville-Jones: I am not aware of that.

Ms Fenella Tayler: It is at the moment enshrined in the handbook, so it is in guidance rather than legislation. If it were to be enshrined in the instrument, that would require an amendment to it, which brings a lot of further complex issues in its train.

Baroness Neville-Jones: It brings with it a whole definitional train. I think that for someone in government it would be very helpful to have the guidance of the experts on this. If the extradition panel has views on this, it would be very helpful to have them. I am not sure how much further forward enshrining a proportionality principle in law and then interpreting it would get us than we already are. That is my worry.

Q224 Mr Raab: You mentioned earlier some of the progress on the EIO. That was very useful, so I shall skip some of the questions that relate to that. There are two concerns. One is operational strain on the police service. The Met gave us evidence in the form of a letter, which I understand went to the Home Office. One point that it made was that "the EIO is likely to become an ineffective instrument should it go ahead without a proportionality clause". You said that that is quite difficult to define,

so I wondered how in the EIO negotiations parties are going about trying to get to grips with it. Is there anything more that you can say on that?

Baroness Neville-Jones: I am aware that there has been evidence to the effect that the EIO would give rise to a much bigger demand for investigation. I confess that that was not something that the police said to us at the time when we were discussing whether to opt in. We do not on the face of it see why that would be the case. This is another area where guidance would be very useful as a material way of controlling the kind of requests that we received. That is a material consideration. Am I not right in thinking that another piece of European legislation is coming up?

Ms Fenella Tayler: There is the European evidence warrant—

Baroness Neville-Jones: That is already in existence. We are not pursuing that, I seem to remember.

Ms Fenella Tayler: The EIO will supersede it.

Q225 Mr Raab: Can I just ask a follow-up? Fair Trials International made a number of points on safeguards as opposed to a filter with the accused in mind. It talked about fundamental rights grounds, the absence of dual criminality provisions in the original draft, the lack of provision for the defence to request evidence and the lack of data protection controls—for example, the fact that the EIO request can go to someone who is not themselves subject to a criminal investigation but is just a witness. I appreciate that there has been only limited or partial progress, but are all these things currently under negotiation or is there any progress on any of them that you might be able to report?

Baroness Neville-Jones: I will ask Fenella to answer that in detail, as she is part of the negotiation, but my understanding is that almost every one of the issues that you have described has been raised in the negotiation. The question is how far those will be considered to be absolutely material to the system's operation. One can get to the point at which one makes the operation so complex, particularly if one starts to insert the need to go to a judge every time, that it jams up and ceases to be useful. However, there are other areas where some guidance and safeguards would be a good idea.

Ms Fenella Tayler: One particular area that we are investigating and pushing on at the moment is to seek to ensure that an EIO cannot be sent or executed in this country for something that would not be possible under our own domestic law if it was a domestic case. That is perhaps the most basic form of proportionality. It would be a way of refusing or screening out such requests for evidence. That is a key safeguard that we are seeking to enshrine.

Q226 Mr Raab: ACPO took a rather different line on the EIO. Certainly the Home Secretary's Statement to the House at the time of the original decision to opt in took a rather different line from that taken by the Metropolitan Police. Had both given evidence prior to the Oral Statement? Had the department received evidence from both?

Baroness Neville-Jones: I am afraid that I do not know. It was before we were in office. The briefing that I had was that we had consulted the police. My

understanding at that stage was that the police were rather in favour, as indeed were the prosecuting authorities.

Mr Raab: I think that ACPO was but that the Met seemed rather less enthusiastic, so I was curious about the synergy between the two.

Baroness Neville-Jones: You are enlightening me. I think that we will have to write to you on that.

Q227 Lord Dubs: Witnesses have suggested that the Extradition Act 2003 could be amended to include a forum safeguard. Would the Government consider amending the Extradition Act 2003 to implement some of the optional grounds for non-execution of the warrant?

Baroness Neville-Jones: That is one of the things that we have asked Sir Scott Baker and his panel to look at. We will now await his recommendations, but if there is a recommendation to implement that, we would want to look at it positively.

Q228 Lord Dubs: What possibility is there for renegotiating the framework decision itself?

Baroness Neville-Jones: That is difficult, as you may know. It requires, I think, 25% even to get the matter considered for renegotiation. Having said that, I would not want to underestimate the difficulty, but equally, if the level of dissatisfaction with this piece of legislation is very great indeed, it would be right to try to do something about it. I do not take the view that in no circumstances would we be willing to reopen. It would be difficult and one also has to bear in mind the fact that you might

get outcomes that were unwanted as well as ones that were wanted. We would have to balance the risk.

Q229 Lord Dubs: Witnesses have also told the committee that many requests for extradition under the EAW are issued for the purpose of evidence gathering, leading to those persons awaiting trial for many months in a foreign country, sometimes without bail. What do you think about that?

Baroness Neville-Jones: One of the things that we are trying to do is to get the system operating so that people can come back under supervision. Secondly, this relates to the comments that were made earlier about the efficiency with which the EAW is operated at both ends. I am quite clear that we need to speed this up.

Q230 Lord Dubs: Does the EAW actually allow extradition for the purpose of investigation?

Baroness Neville-Jones: No, it does not. There has to be an offence.

Q231 Lord Dubs: Yes, but to investigate the offence—

Baroness Neville-Jones: Yes, but you cannot just have a fishing expedition. It has to be issued by a member state with a view to arrest and surrender by another member state.

Q232 Lord Dubs: We have had witnesses who gave us instances of where a country questioned somebody but was clearly not trial-ready at all. The individual was held while there was an investigation on how to take the matter further. That seemed to us to be a bit premature.

Baroness Neville-Jones: In relation to the UK?

Lord Dubs: It was somebody from the UK, yes.

Baroness Stowell of Beeston: This goes to the heart of the question that we were discussing with Mr Starmer.

Q233 Lord Dubs: We certainly had a witness who spoke to that effect. Is there any way in which the Government can take steps to ensure that EAW requests are used only for the purpose of prosecution?

Baroness Neville-Jones: The way we can do that is to ensure that any request that we get conforms to the provisions of the legislation under which we are operating—that is to say, the directive and our transposition of it into UK law. We shall do that.

Q234 Lord Dubs: But does that not mean that there ought to be a power in the courts in Britain to ensure that that is the way the system is operating?

Baroness Neville-Jones: We can and do reject requests.

Q235 Lord Dubs: So the courts could ascertain whether the country requesting the individual is ready to put that person on trial. Does it go as far as that?

Baroness Neville-Jones: That goes to judicial proceedings in other countries. The purpose of the directive and of the Act that transposes it is to facilitate a trial. It is not just a means of keeping people warehoused.

Q236 Lord Dubs: So you are unhappy—

Baroness Neville-Jones: I would be unhappy to have the sense that this was what was going on. I would want to be aware of such cases.

Q237 Lord Morris of Handsworth: The committee has heard from witnesses that those subject to extradition requests are not at all times provided with sufficient

information on their rights when arrested. Can you offer any comments on that, Minister?

Baroness Neville-Jones: That is very important. There is a provision, which I think is under negotiation, to make it mandatory on a member state that arrests a foreign national who does not speak and understand the language in which the proceedings are going to be conducted to provide both translation of documents and interpretation of proceedings. This will not just be in the context of EAW; it will be more general. That will certainly help and will be a major improvement on the current situation. That is part of what is called the road map. These are important practical safeguards, which should improve the real-life experience of people who get caught up in the legal systems of other countries.

Q238 Mr Raab: We have covered a lot of ground, but I wondered whether in relation to both Part 1 and Part 2—EU and non-EU—you thought that there was scope for greater ministerial discretion. I know that the trend has been the other way, but perhaps it needs to be slightly rejigged. One can think of cases such as the McKinnon case where Ministers have said, "We just don't have the discretion", whatever their disposition might have been. Do you think that the automaticity of the EAW or the UK-US and other extradition relations should be addressed?

Baroness Neville-Jones: You are right to say that on the whole the trend has been the other way. This is not just a trend in the UK. Governments have been increasingly reluctant to get themselves involved in the exercise of discretion. That is related to the greater saliency of law in international relations. On the whole, it becomes

increasingly uncomfortable to exercise executive discretion in a judicial or quasi-legal context. We have asked the panel to look at this issue and I do not want to go much further at the moment. The reason why on the whole people in the Executive have wanted to reduce their discretion is precisely because of the difficulties to which its exercise can give rise and the unevenness of the justice that can result. I do not get the impression that the Home Secretary is seeking a great expansion of her discretionary authority.

Q239 Mr Raab: In relation to the UK-US treaty, there has been a lot of discussion and debate about the differing standards between the evidential thresholds for the US and the UK. In the UK, you have to demonstrate prima facie that a case exists, whereas there is a different formula for the US. Is it the view of the department that there is a meaningful and significant practical difference between the two evidential thresholds?

Baroness Neville-Jones: We have so far had too few cases to test the whole thesis of whether there is a difference of form or a difference of reality. Much of this happened before we were in office, but it is fair to say that we do not believe that injustice was delivered. Again, this is an area that we have asked the panel to look at in terms, so it would be wrong of me to express a view beyond that. I appreciate why the question is being asked, as it is central.

Q240 Mr Raab: Finally, with the EAW and the UK-US treaty, there is the question of what you can do without changing the international instrument. In broad-brush

terms, how much room for manoeuvre do you feel there is in terms of adjusting the administrative arrangements under the US-UK treaty without amending the treaty?

Baroness Neville-Jones: Clearly, that is a hypothetical question. Without specific detail, all that one can say is that these are two friendly Governments. If an adjustment can be made which is in the spirit and intention of the treaty and which improves its operation, I would expect us to be able to do that.

The Chairman: Thank you very much for your evidence today, which has been most productive. We hope that we will produce our report by the early summer so that the review can take account of it.