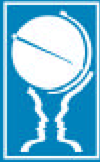

THE US/UK EXTRADITION AGREEMENT

A summary of discussion at the International Law Programme Discussion Group at Chatham House on 19th May 2005; participants included lawyers, academics and representatives of NGOs, and of Parliament and Government Departments.

This summary is issued on the understanding that if any extract is used, Chatham House should be credited, preferably with the date of the meeting.

Background

There was some discussion of the history and background of the 2003 US/UK Extradition Agreement and of the current UK legislation. Both had come about as a result of a review of extradition law or, more precisely, two reviews. The first had been no more than a tidying up exercise but had been overtaken by events. The government team responsible for the review were temporarily reassigned to deal with the Pinochet case. In the interim, the European Council, held in Finland in October 1999, reached agreement on the policy of Mutual Recognition of Judicial Decisions within the framework of EU judicial cooperation. This gave rise to a new review which was published in March 2001. This was the basis for the new Extradition Act 2003. One speaker said it was a myth that the 9/11 attacks on the World Trade Centre were the motive for the new US/UK Extradition Treaty although it is probably true to say that the negotiations for the treaty and for the Agreement on a European Arrest Warrant were speeded up as a result of those events.

The new treaty was signed in Washington on 31 March 2003.When it comes into force, it will replace the existing US/UK Extradition Agreement which was signed in 1972 and came into force in 1976. The old Agreement which adopted a "list approach" for extradition offences had become slow and unwieldy in its operation. It had also proved time consuming and cumbersome to update. By contrast, the new treaty contains a simple sentence threshold test by which offences are extraditable if punishable in both countries by sentences of one year or more.

One speaker commented that it was now possible that the US Senate would not ratify the new treaty. Both the US Civil Liberties Union and the Ancient Order of Hibernians were hostile to the treaty and had been actively lobbying against it. Whilst the Senate was probably unworried by the opposition of the Civil Liberties Union, it might be more swayed by its awareness of the Irish vote.

The New Treaty

Reciprocity – One speaker pointed out that the treaty lacked reciprocity. Article 8.3(c) imposed a requirement on the UK to supply information providing a "reasonable basis to believe that the person sought committed the offence for which extradition is requested." There was no corresponding requirement for the USA. The

question was raised as to whether reciprocity was an important objective in itself. Did it really matter to the accused whether his counterpart in the USA was in a better or worse position? Treaties were not always reciprocal . A good example of this is the varying approach to “own nationals” provisions in many extradition agreements. The critics of Article 8 accepted that reciprocity was not an end in itself but argued that, on such a fundamental matter, the removal of all protection based on *prima facie* evidence was disturbing. One speaker questioned whether there was any other example of a UK extradition treaty lacking reciprocity on the requirement for evidence.

The Requirement for Evidence - Under the 1972 treaty, the US had had to produce evidence sufficient to make a case to answer under UK law, whilst the UK had had to satisfy a “probable cause” test. One speaker said that it was probably a fair statement that the UK test requiring prima facie evidence was a little more rigorous but the two tests were broadly similar. Another speaker said that the requirement for evidence was an important protection and its removal must be justified. It was difficult to see any benefit to the UK in the one-sided removal of this requirement other than a possible saving to the legal aid budget by the curtailment of proceedings prior to extradition to the USA. Another speaker argued that, in practice, the tests for inward and outward extradition from the USA remained broadly similar in that the US authorities operated a “probable cause” test on both. The key thing was to have fair, effective and workable extradition arrangements. There were fundamental safeguards in the 2003 Act and it was important to remember that, as far as evidence was concerned, the USA was being treated no differently than many other countries. It was also noted that US authorities would have had to satisfy a Grand Jury in order to issue an indictment . Another speaker pointed out that Grand Juries could be persuaded to indict almost anyone for anything.

Some speakers were concerned by the removal of the evidence requirement in view of the US courts’ questionable exercise of extra-territorial jurisdiction in financial and corporate crime cases. This was a particular problem where the CPS or Serious Fraud Office decided there was insufficient evidence to prosecute in this country. In such cases, the double jeopardy rule would not protect those whose extradition from the UK was being sought. Another speaker referred to the Lofti Raissi case. If there had been no requirement to supply *prima facie* evidence in that case the suspect could have been extradited to the USA, but it was impossible to speculate on how the case would have proceeded if the absence of *prima facie* evidence had not curtailed it at an early stage. Extradition to the USA could cause serious hardship. Sentences are often far more severe than in the UK and the heavy discounts given for guilty pleas inevitably places huge pressure on a defendant to plead guilty regardless of the strength of the case against him.

Onward Extradition – There was a brief discussion of Article 18(2) of the treaty. Could this provision, taken together with the published side-letter precluding onward surrender to the International Criminal Court (ICC) conflict with the UK’s international obligations under the Rome Statute? It was asserted that it would not, and that the provision fell squarely within Article 98(2) of the Statute. Strictly speaking, there appears to have been no need for the side-letter since the position would have been the same without it and its publication has only served to draw further attention to the US position on the ICC.

Extradition Act 2003

Designation - The Extradition Act which received Royal Assent in November 2003 is not linked to the existence of bilateral treaties. It divides states into two main categories. The first category consists of EU states where no evidence is required to support a request for extradition. Category 2, which includes the United States, consists of states designated as such by the Secretary of State. For such states, evidence sufficient to make a case to answer is required unless the Secretary of State under section 84(7) dispenses with this requirement in respect of states designated for the purposes of that section. An order designating the USA has been made under this section . This order was criticised by some speakers. It had deprived those whose extradition to the USA was sought of the right to have the case against them tested in court.

It was pointed out that this is a right currently conferred under the 1972 UK/US treaty which is still in force. The decision to override the 1972 Treaty before the new Treaty had entered into force was surely wrong. The order designating the USA should be revoked at least until ratification of the new Treaty. One speaker argued that the decision to designate could be the subject of judicial review. In such a case, it was suggested that a judge might take the view that the Home Secretary had acted unlawfully in making the Order. Such designation might have been prompted by the assumption that the USA would quickly ratify the new bilateral treaty but now any incentive for them to do so may have disappeared.

Some speakers stressed the fact that the USA was not the only state which was no longer required to produce prima facie evidence. It shares that distinction with 47 other countries, including Albania and Russia. The decision to designate a particular state was a policy decision. The requirement to produce prima facie evidence had proved to be both resource intensive and time consuming. The system put in place by the Act was developed within the EU and was part of a new way of regulating extradition between functioning democracies . Important safeguards remained but they were now to be found in the new legislation rather than in the treaty.

Safeguards – There was some discussion of the safeguards contained within the 2003 Act. One speaker pointed in particular to the broad human rights protection conferred in section 87 and the Bars to Extradition in sections 79 –84, including the rule against double jeopardy. In addition, the rule on double criminality remains for the USA, although it has been relaxed to some extent for EU countries. It was still easier to refuse a request than to grant it and the US authorities continued to comment that they faced more difficulties in making extradition requests to the UK than to some other countries.

Other speakers expressed doubts on this score and challenged the relevance of the human rights provisions to US requests. They could see their potential importance with some other countries but with the USA it was surely the existence and quality of the evidence supporting the charges against the accused which was crucial. Again some speakers referred to the US courts' aggressive exercise of their corporate crime jurisdiction. One speaker added that it was no comfort to know that the USA was not the only country which was no longer required to produce evidence in support of an

extradition request. Further the double jeopardy rule could not help where the UK prosecuting authorities had decided there was insufficient evidence to prosecute. Unlike an acquittal, a decision not to prosecute carried no weight.

Natural Forum - There was a brief discussion as to whether there should have been a place of commission/natural forum provision in the UK legislation. In practice, the 2003 Act ensures that a domestic prosecution will always take precedence over an extradition request. This applies even where the prosecution relates to a different offence or offences. In such a case, any request would be placed on hold until the conclusion of the proceedings. One speaker expressed the view that any consideration of natural forum was a separate issue unrelated to extradition.

Parliamentary Scrutiny of Treaties – The Ponsonby Rule

One speaker said that the new Treaty demonstrated the need to reform the whole process of parliamentary scrutiny of treaties. The Ponsonby rule was outdated and inadequate. It was important that Parliament should have an opportunity to scrutinise more closely treaties which raised important issues of this kind. Such an opportunity presented itself in the period between signature and ratification. One speaker asked what had happened in regard to the proposals of the Wakeham Committee which had recommended the establishment of a House of Lords sifting committeee for this purpose. In reply, another speaker said that no action had been taken and it was difficult to see the Government agreeing to such a proposal.

Concluding Remarks

There was some discussion of progress on the EU/US Extradition Agreement which has been signed by the EU and USA but requires individual ratification by EU Member States. One speaker asked whether the new UK/US treaty was part of a pattern. Were we likely to see other similar non- reciprocal agreements in the future? It was pointed out that the new legislation means that, in practice, there is no longer a need for treaties although it is probable the UK would continue to have them. No programme of negotiations is envisaged and there are no plans to amend established arrangements.

Joanne Foakes