

EXTRADITION
DAVID BENTLEY

Fingering White Collars

An extradition treaty between Britain and the United States signed in 2003 is getting a battering in parliament and the media. The procedures had operated pretty uncontroversially for a hundred and fifty years, difficulties over extraditing Irish Republican activists from the US aside. America's death row unsurprisingly fell foul of the European Court of Human Rights in the Soering case in 1989. But now the arrangements are attacked as biased in favour of America and unfair to defendants pursued by its authorities. What has gone wrong?

THE EXTRADITION ACT and the treaty that followed are the result of a twenty-year effort to modernise Britain's creaking extradition arrangements, especially within the European Union but

also with other regular extradition partners. But the apparent disregard for international norms the United States administration sometimes displays in its 'war' on terror has had a knock-on effect that translates in some quarters into a general distrust of America and its laws.

There is sometimes too a naive expectation that extradition crimes will fit the traditional pattern – the murderer fleeing abroad to escape justice at home. The reality of international business and electronic communications means extradition law must now catch up with virtual crimes and virtual fugitives.

Poodling and Rough Parity

It would be unfair to single out anti-Americanism as responsible for these attacks on the US/British treaty, though many doubtless agree with the member of parliament who accused the

'But what this means is that you can't hunker down in your manor house in rural England ... and say, you know, "come and get me – I know you can't."'

**Institute on White Collar Crime,
Las Vegas, March 2005**

government in London of 'poodling' to the American authorities. Indeed, it is among the business community, whose transatlantic links are strong, that criticism is loudest.

There is a plain lack of reciprocity in the new arrangements with the US. Although the US Senate only consented to ratification of the 2003 treaty in September 2006, Britain immediately applied it. And the Treaty is unequal in an important respect, the case the requesting state must

make when applying for extradition.

A British minister disingenuously claimed that 'the practical consequences of what we are doing now are very reciprocal. We make applications to them. They adhere to those and make applications to us'. In fact Britain must provide a US extradition court with 'such information as would provide a reasonable basis for the court to believe that the person sought committed the offense for which extradition is requested' or, in short, 'show probable cause'.

But the US prosecutor need only provide a British court with enough material to justify issuing a warrant of arrest, a distinctly lighter test. British lawyers do not view the requirement that he or she must first persuade an American grand jury to issue an indictment before seeking extradition as particularly onerous.

Until 2003, the US bore the heavier burden, having to satisfy an English magistrate that there was enough evidence to commit the case for trial had the conduct occurred in Britain – the prima facie case requirement. Ministers have retreated to describing the present position more honestly as 'a rough parity of tests'; but the abandonment of the prima facie requirement raises other concerns.

Hunkering Down and Bad Guys

The second source of unhappiness reflects the typical characteristics of the defendants in recent high-profile cases, like the NatWest Three and Ian Norris. As in these examples, a number of US requests have concerned businessmen accused of white-collar crime, even though British ministers emphasised the importance of the new arrangements for combating terrorism – ‘bad guys’.

Some commentators also worry about the zeal with which terrorism cases may be pursued. Addressing the House of Commons Home Affairs Committee about an American extradition application in 2002, Bow Street Judge Timothy Workman said it would have been ‘difficult to have done anything other than extradite’ Lotfi Raissi, an Algerian pilot suspected of training the September 11 2001 attackers, had the 2003 Act procedures been in force. As it was, the US failed to make out a prima facie case against Raissi and he has returned to Algeria, presumably safe from any further request for his extradition.

NatWest Three

In February, the High Court upheld the extradition of three London bankers accused of defrauding a subsidiary of the British bank NatWest of some \$7.3 million, through a conspiracy with executives of the failed Enron corporation in Texas. Because US prosecutors no longer have to make a prima facie case, though it appears they could have, the defendants challenged extradition on other grounds.

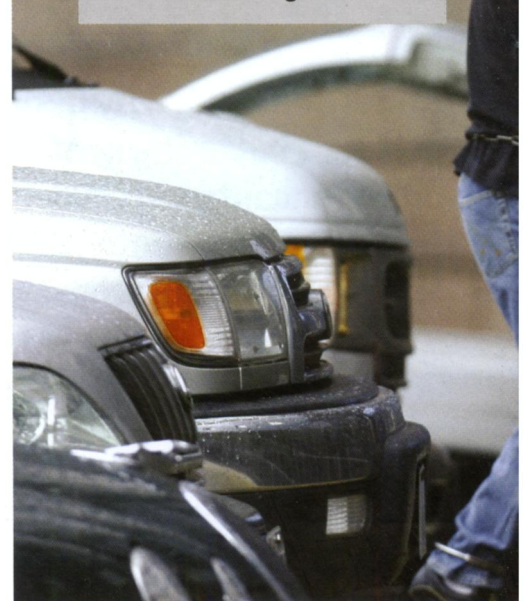
While ‘hotly disputing the accusation brought against them, notably its core element of fraud upon their employers’, the defendants contended, as their counsel has since written, ‘[T]hat where crimes are allegedly committed in the UK against a UK victim, defendants should be tried, if at all, here’. Unlike several European countries, he wrote, ‘we have at present no rules whatever for deciding the appropriate national forum for the trial of an alleged transnational crime’.

A well-meaning attempt in the House of Lords to provide for an ‘interests of justice’ test to decide on this in the Police and Justice Bill was overturned in the House of

Commons in November. It is unclear how the courts could have operated such a test, and it would have required renegotiation of the extradition treaty, a wholly unrealistic prospect. However Ministers have promised consultation between prosecutors in transnational cases to decide where they should be tried. A House of Lords amendment restoring the prima facie requirement – surely also in breach of Britain’s obligations under the 2003 Treaty – similarly failed.

Critics of the NatWest Three ruling appear to take little account of the court’s view that the facts disclosed ‘a significant United States dimension to the whole case; there is a Cayman Islands dimension as well, in addition to the English dimension. In relation to such transactions it is unnecessary, and probably unwise, to canvass the question which is the

British bankers Giles Darby, Gary Mulgrew and David Bermingham, from the left, former employees of NatWest, enter a Houston court in July.



dominant country in terms of the acts allegedly done or the defendants’ alleged ‘target’. The US dimension does not arise from the contingency that a telephone call or an email happened to be received in that jurisdiction’ – a frequent criticism of the potential effect of the Treaty. It is claimed that Enron lost \$20 million as a consequence of the scheme in which the defendants were allegedly involved.

Accusations that the American prosecutors acted in bad faith in bringing charges and that the British Serious Fraud Office acted unreasonably in refusing to take the case, were rejected by the court, as were arguments based on the European Convention on Human Rights, including the painful family circumstances of one defendant, and the shortcomings of the American system as regards bail and defence facilities for foreign defendants.

Nor did the court accept that the Home Secretary had failed to deal with the case properly. The 2003 Act deliberately leaves little discretion over ordering extradition, the absurdly prolonged challenges to such decisions are to be a thing of the past. The Act has brought clarity to extradition law,

Chatham House Events January 2007

JANUARY 12 Japan’s Global Strategy
Koji Omi, Minister of Finance, Japan

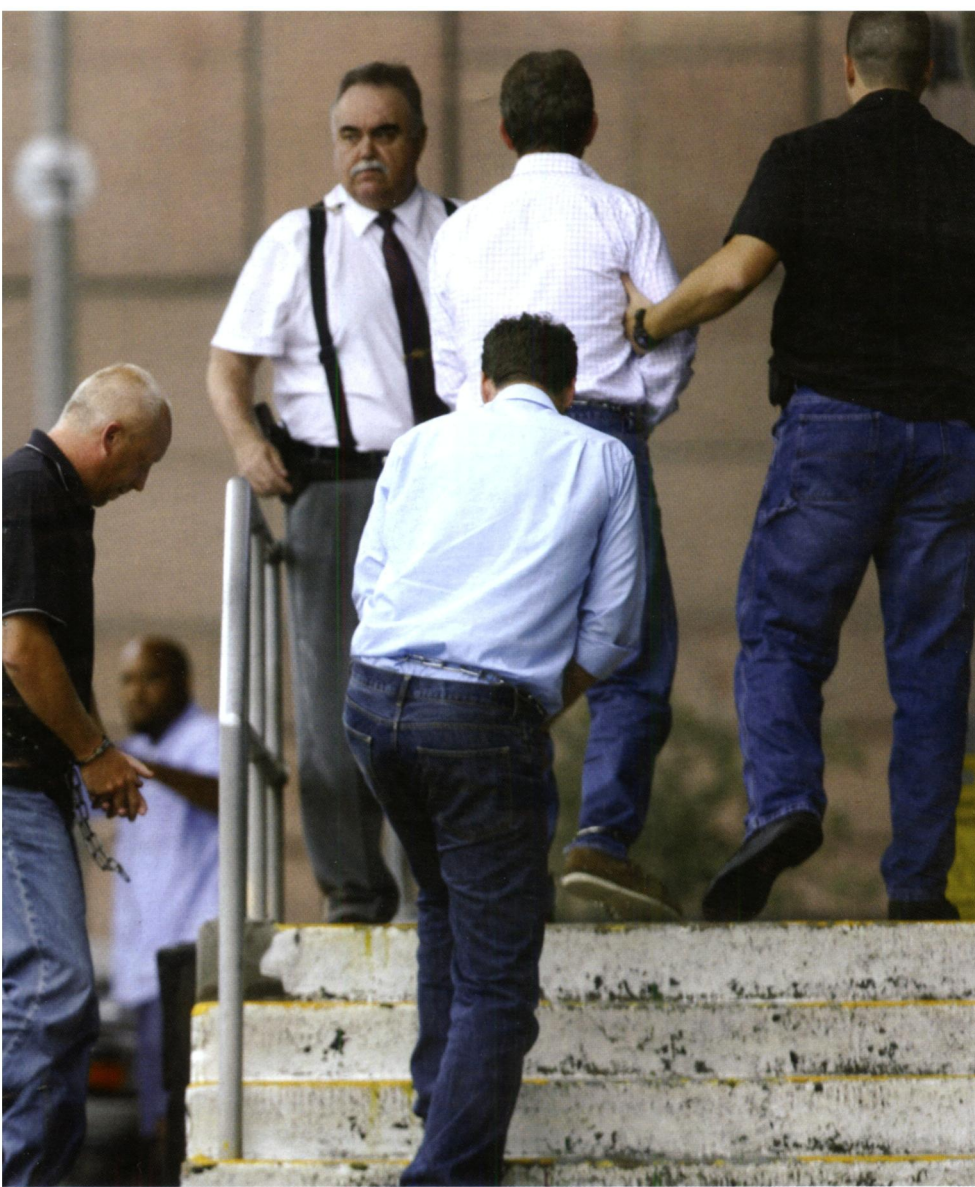
JANUARY 15 How Russia Really Works
Alena Ledeneva, School of Slavonic and East European Studies, London

JANUARY 18 From the Human Rights Commission to the Human Rights Council
Ambassador Luis Alfonso de Alba, President, UN Human Rights Council

JANUARY 31 Thinking Ahead
William Hague MP, Shadow Foreign Secretary

Chatham House has a worldwide reputation for furthering the understanding of international issues. An impartial research and membership organisation, independent of government and vested interests, it brings together people of all nationalities and from all walks of life.

Membership: +44 (0) 20 7957 5721
Meetings: +44 (0) 20 7957 5732
Conferences: +44 (0) 20 7957 5754
e-mail: contact@chathamhouse.org.uk



admittedly at some length, though quite possibly at the risk of injustice and undue hardship in some cases; and the court's adherence to its terms is welcome. In June, the House of Lords refused to hear the defendants' appeal, nor would the European Court of Human Rights take the case.

Ian Norris Case

In October, the High Court heard the appeal of Ian Norris, formerly chief executive of Morgan Crucible, an international manufacturing company, against his extradition to America on charges of price fixing, an offence the US Department of Justice takes very seriously.

The key issue goes to the heart of the extradition process, which traditionally requires dual criminality: the defendant's alleged conduct must at the time also have been a criminal offence in the law of the requested state, had it occurred there. But there was no specific offence of price fixing in English law while Norris headed Morgan Crucible, and ministers appear to have given the business world the impression that the new extradition

procedures would not apply to price fixing occurring before the Enterprise Act 2002 created such an offence.

However, American prosecutors claim that what Norris is charged with would, if done at that time in England, have amounted to the common law offence of conspiracy to defraud, so satisfying dual criminality.

While the precise construction of the relevant provisions of the 2003 Act remains for the court to decide, two comments are in order. First, while the scope of conspiracy to defraud is notoriously imprecise, it has very rarely been thought to catch price-fixing. The analogy with retrospective criminal law, prohibited by the European Convention on Human Rights, is worrying. American lawyers may recall Chief Justice Marshall's censure of 'flexible' definitions of crime.

Secondly, 'defrauding', whatever that may mean in this context, is not an element of the American offence; nor, with the disappearance of the prima facie requirement, need its existence be tested in the extradition

DAVID BENTLEY is an Associate Fellow in International Law at Chatham House.

proceedings. Removal of the prima facie requirement may also make it harder to resist applications by foreign prosecutors to add charges following a defendant's extradition.

It is contended too that obstructing American justice, with which Norris is also charged, is obviously not an offence in English law, hence dual criminality is again absent. This argument perhaps transforms a principle that a state should not extradite for the kind of conduct it does not regard as truly criminal, however reprehensible it may be, into a rather technical objection to extradition. EU states have recognised this in relaxing the same principle for the European Arrest Warrant. Whatever the High Court decides, the case will surely go to the House of Lords and then probably to the Human Rights Court at Strasbourg.

Win Some, Lose Some

Cases turn on their facts as well as the law. Though the NatWest Three were extradited, a Canadian judge has quashed for abuse of process a US request for the extradition of Gavin Tollman, an American citizen resident in London accused of tax fraud, arrested when he stopped in Toronto for a meeting on his way to Bermuda.

A city solicitor commented, 'It is refreshing that this Canadian court has drawn a line in terms of the prosecutor's tactics and behaviour'; a former director-general of the confederation of British Industry was less restrained.

Predictably, that ruling has now surfaced in the protracted proceedings for the extradition from Britain of Tollman's uncle, charged with massive bank fraud and tax evasion, and his aunt. As in other white-collar extradition cases, there have already been successful prosecutions in the US arising from the activities in which they are alleged to have been involved.

In Graham Greene's *The Captain and the Enemy*, the captain quotes Rudyard Kipling's fugitive from justice:

'God bless the thoughtful islands
Where never warrants come;
God bless the just republics
That give a man a home'.

There will always be sympathy for those facing removal to a foreign jurisdiction, not always undeserved, and it is arguable that recent reforms have tipped the scales of justice a touch too far against Kipling's fugitive, but the old rules were undoubtedly proving too kind to him.

