A

Queen's Bench Division

Regina (St John) *v* Governor of Brixton Prison and others

[2001] EWHC Admin 543

2001 July 2; 12 Brooke LJ and Harrison J

B

Extradition — Restrictions on return — Arrangement to protect — United States Government seeking extradition of fugitive on charge of murder — Possibility of death penalty on conviction of murder in first degree — No assurance obtained that death penalty would not be imposed — Committal in custody — District judge's finding not specific as to intent neccessary to found charge of first degree murder — Whether committal order violating Convention right not to suffer death penalty — Whether adequacy of protection of right of specialty relevant at committal stage — Whether committal order lawful — Extradition Act 1989 (c 33) (as amended by Hong Kong (Extradition) Order 1997 (SI 1997/1178), art 2, Sch, para 4), ss 1(3), 6(4), Sch 1, para 1(3)[1] — Human Rights Act 1998 (c 42), Sch 1, Pt III, art 1[2]

C

The Government of the United States of America requested the applicant's extradition in respect of a number of alleged extradition offences committed in the State of Pennsylvania which included murder, manslaughter and causing grievous bodily harm. Under Pennsylvanian law murder in the first degree, which required proof of intent to kill, attracted the death penalty or life imprisonment, at the jury's discretion. The applicant was arrested in the United Kingdom and the Secretary of State for the Home Department issued an authority to proceed in respect of all the offences. At the time of the committal proceedings before the district judge the Secretary of State had neither sought not obtained any assurance from the United States Government that if the applicant were extradited and found guilty of murder in the first degree he would not face the death penalty. The district judge committed the applicant in custody under paragraph 7(1) of Schedule 1 to the Extradition Act 1989 to await the Secretary of State's decision as to his extradition on all the offences alleged, but it was not apparent from his decision whether he had found a prima facie case of murder on the basis of an intent to kill or of an intent to cause grievous bodily harm. The applicant sought the issue of a writ of habeas corpus ad subjiciendum on the grounds, inter alia, that the alleged offence of murder was not an extradition crime since, in the absence of any assurance that he would not be exposed to the death penalty, extradition would contravene the applicant's rights under article 1 of the Sixth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the committal order was contrary to section 6(4) of the 1989 Act because there was no adequate specialty provision and there was therefore a risk that the applicant might be dealt with in Pennsylvania for an offence other than the ones for which his return was ordered.

D

E

F

G

On the application—

Held, refusing the application, (1) that the issue whether extradition would violate the applicant's rights under article 1 of the Sixth Protocol would not arise until the Secretary of State decided whether to make an order for his surrender under

H

[1] Extradition Act 1989, s 1(3): "Where an Order in Council under section 2 of the Extradition Act 1870 is in force in relation to a foreign state, Schedule 1 to this Act (the provisions of which derive from that Act and certain associated enactments) shall have effect in relation to that state, but subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order."

S 6(4), as amended: see post, para 51.

Sch 1, para 1(3): see post, para 52.

[2] Human Rights Act 1998, Sch 1, Pt III, art 1: see post, para 38.

paragraph 8(2) of Schedule 1 to the Extradition Act 1989; that, since any such decision would be susceptible to judicial review, the making of the order of committal exposed the applicant only to the Secretary of State's consideration of his extradition and not to the violation of his Convention rights; and that, accordingly, it would be premature and wrong to reach conclusions about potential violations which might never occur (post, paras 49, 64).

(2) That on its true construction section 6 of the 1989 Act applied only to the return or committal of persons under Part III of the Act and did not apply where extradition was sought in accordance with Schedule 1 to the Act; that the applicant's right to specialty was therefore governed by paragraph 1(3) of Schedule 1 and not by section 6(4); that since, unlike section 6(4), paragraph 1(3) precluded return but not committal where there was no adequate provision for specialty the question of the adequacy of such provision fell to be considered by the Secretary of State when deciding whether to surrender the applicant and was not relevant to whether an order of committal should be made; and that, accordingly, the order of committal was lawful (post, paras 58–60, 66).

Per Brooke LJ. The position is not satisfactory because it means that a defendant may lawfully be detained in custody here for a long time before he has the opportunity of challenging the quality of any assurances given as to the non-availability of the death penalty for the crime for which his extradition is sought (post, para 64).

The following cases are referred to in the judgment of Harrison J:

Arton, In re (No 2) [1896] 1 QB 509, DC
Espinosa, In re [1986] Crim LR 684, DC
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
Soering, In re [1988] Crim LR 307, DC
Soering v United Kingdom (1989) 11 EHRR 439

The following additional cases were cited in argument:

R v Governor of Brixton Prison, Ex p Gross [1999] QB 538; [1998] 3 WLR 1420; [1998] 3 All ER 624, CA
R v Governor of Pentonville Prison, Ex p Lee [1993] 1 WLR 1294; [1993] 3 All ER 504, DC

APPLICATION for writ of habeas corpus ad subjiciendum

On 19 January 2001 District Judge Pratt, sitting at Bow Street Magistrates' Court, in extradition proceedings requested by the Government of the United States of America, committed the applicant, Christopher St John to custody pursuant to paragraph 7(1) of Schedule 1 to the Extradition Act 1989 as amended by section 158(8) of the Criminal Justice and Public Order Act 1994.

By a notice of motion dated 9 February the applicant applied for the issue of a writ of habeas corpus ad subjiciendum directed to the Governor of Brixton Prison to have the body of the applicant before the court at such time as it might direct.

The facts are stated in the judgment of Harrison J.

Paul Garlick QC for the applicant. The contents of the United States Government's evidence bundles were not properly authenticated and

A therefore not receivable in evidence. [Reference was made to *R v Governor of Brixton Prison, Ex p Gross* [1999] QB 538.]

The court should interpret domestic legislation so that it is compatible with the Convention: see *In re Arton (No 2)* [1896] 1QB 509; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and *R v A (No 2)* [2002] 1 AC 45. Since the entry into force of the Human Rights Act 1998 the court has to interpret an extradition offence so
B that it conforms with the Act. Accordingly, the availability of capital punishment to the Pennsylvania court means that no extradition offence subsists in the present case. The risk of exposure to the death penalty is a violation of article 3 of the European Convention on Human Rights: see *Soering v United Kingdom* [1989] 11 EHRR 439.

In Pennsylvania intention to kill is necessary to convict a person of murder
C in the first degree, whereas the English offence of murder can be proved by intention to kill or by mere intention to cause grievous bodily harm. It is not possible to determine whether the district judge committed the applicant on an intention to kill or on an intention to inflict grievous bodily harm basis. Thus, under the committal charge of murder there is no adequate speciality provision and, contrary to section 6(4) of the 1989 Act, the applicant is not properly protected from being dealt with for an offence other than the
D offence for which his return was ordered. The preclusion of action by the foreign state under section 6(4) is a condition precedent to not only an order for return, but also to an order of committal.

John Hardy for the governor, the Government of the United States of America and the Secretary of State for the Home Department. The failure to specify which certificates associated with the bundles were original and
E which were copy documents is of no consequence to their authentication: see *In re Espinosa* [1986] Crim LR 684. The court should avoid a restrictive approach to extradition treaties: see *In re Arton (No 2)* [1896] 1 QB 509 and *R v Governor of Pentonville Prison, Ex p Lee* [1993] 1WLR 1294.

As to the issue of extradition offences the question is not whether the charges against the applicant constitute extradition crimes: they do. The question is whether the availability of capital punishment is a bar to this
F stage of the extradition process. It is not a bar at this stage because the matter falls to be considered by the Secretary of State at the conclusion of the extradition process pursuant to para 8(2) of Schedule I to the 1989 Act: see *In re Soering* [1988] Crim LR 307.

The preclusion of committal or return in section 6(4) applies only to extradition under Part III of the Act. The present extradition proceedings
G were brought under Schedule I to the Act. Preclusion of returning a fugitive for crimes which are not the apposite ones for the case in question is dealt with in Schedule I cases by para 1(3) of Schedule I. Unlike its counterpart in section 6(4), this Schedule I, para 1(3) form of speciality provision precludes surrender but does not preclude the earlier stage of committal.

Cur adv vult

H

12 July. The following judgments were handed down.

HARRISON J

1 The applicant applies for a writ of habeas corpus arising from his detention pursuant to a committal order made under paragraph 7(1) of

Schedule 1 to the Extradition Act 1989, as amended by section 158(8) of the Criminal Justice and Public Order Act 1994, on 26 January 2001 at Bow Street Magistrates' Court to await a decision by the Secretary of State as to his extradition to the United States of America.

2 The Government of the United States of America, has requested the applicant's extradition in respect of a number of alleged extradition offences comprising murder, manslaughter, causing grievous bodily harm and assault occasioning bodily harm.

3 All those offences relate to an alleged course of violence by the applicant towards his wife's uncle, John Bowman, between 22 and 24 March 2000 resulting in his death on 24 May 2000. The violence was witnessed by the applicant's wife and three of their children as well as two other witnesses, all of whom have sworn affidavits.

4 The alleged offences were committed in the State of Pennsylvania. The FBI became involved and a federal warrant for the applicant's arrest was issued on June 2000. He was eventually arrested in the United Kingdom on 1 August 2000 pursuant to a provisional warrant of arrest. Orders to proceed were issued dated 4 October 2000 and 6 January 2001. Committal proceedings took place on 19 January 2001 at Bow Street Magistrates' Court before District Judge Pratt, judgment being given on 26 January 2001.

5 Mr Garlick, who appeared on behalf of the applicant, made three main submissions. The first related to the authentication of documents relied upon by the Government of the United States of America. The second related to the death sentence that may be imposed on the applicant if he were extradited. The third related to an alleged lack of adequate specialty provisions.

Authentication of documents

(a) Introduction

6 Dealing firstly with the authentication of documents relied upon by the United States, Mr Garlick submitted that a number of affidavits were not properly authenticated and therefore not receivable in evidence, as a result of which there is, he said, no evidence of the punishment that the alleged extradition crimes would attract in the United States, no evidence as to the cause of Mr Bowman's death and no authentication of the warrant for the applicant's arrest. Mr Hardy, who appeared on behalf of the Government of the United States of America and the Secretary of State, accepted that, if the applicant's point on authentication were good, there would not be a prima facie case. He, however, submitted that the documents were properly authenticated.

(b) The law

In order to understand Mr Garlick's submission it is necessary first to refer to the provisions of the Extradition Act 1989 relating to the authentication of documents.

7 There is an extradition treaty between the United Kingdom and the United States of America which is incorporated into an Order in Council, the United States of America (Extradition) Order 1976 (SI 1976/2144), which was made under section 2 of the Extradition Act 1870 (33 & 34 Vict c 52). Section 1(3) of the Extradition Act 1989 provides that, where an Order in Council made under section 2 of the Extradition Act 1870 is in

force in relation to a foreign state, Schedule 1 to the 1989 Act shall have effect subject to any limitations, restrictions, conditions, exceptions and qualifications contained in the Order. It follows that Schedule 1 to the 1989 Act applies to extradition cases involving the United Kingdom and the United States of America.

8 Paragraph 12 of Schedule 1 provides:

> "Depositions and statements on oath taken in a foreign state, and copies of such original depositions or statements and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Schedule."

9 Section 26 of the 1989 Act provides:

> "(1) In extradition proceedings in relation to a person whose return has been requested by a foreign state foreign documents may be authenticated by the oath of a witness, but shall in any case be deemed duly authenticated—(a) if they purport to be signed by a judge, magistrate or officer of the foreign state where they were issued; and (b) if they purport to be certified by being sealed with the official seal of the minister of justice, or some other minister of state, of the foreign state."

10 The other statutory provision relating to authentication of documents is contained in article VII(5) of the Treaty, which provides:

> "The warrant of arrest, or the judicial document establishing the existence of the conviction, and any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition: (a) if it is authenticated in the case of a warrant by being signed, or in the case of any other original document by being certified, by a judge, magistrate or other competent authority of the requesting party, or in the case of a copy by being so certified to be a true copy of the original; and . . . or (c) if it is authenticated in such other manner as may be permitted by the law of the requested party."

(c) The facts

11 There are two sealed bundles of documents relied upon by the United States in support of its extradition requisition. It is accepted that both bundles were properly sealed in accordance with section 26(1)(b).

12 The first bundle was certified by a certificate dated 22 September 2000 signed by Mr Thomas Snow. The certificate stated:

> "I, Thomas Snow, Deputy Director, Office of International Affairs, Criminal Division, United States Department of Justice, United States of America, hereby certify that the attached affidavit of John C Pettit, District Attorney for Washington County, Pennsylvania, along with the attached documents, are true and authentic. They have been prepared in support of the United States' request to the United Kingdom for the extradition of Christopher St John."

13 The affidavit of Mr Pettit, the District Attorney for Washington County, Pennsylvania, contained a summary of the facts of the case as well as a summary of the relevant law. In paragraph 31 of his affidavit he listed the

attachments to his affidavit which consisted of eight affidavits including the affidavits of the applicant's wife and their three children, as well as a number of other documents which were either exhibited to those affidavits or which constituted other attachments to Mr Pettit's affidavit. Paragraph 32 of Mr Pettit's affidavit stated:

> "All of the above affidavits were sworn in the presence of the Honorable Thomas D Gladden, President Judge of the Court of Common Pleas of Washington County, Pennsylvania and in the presence of Michael J Lucas, an Assistant District Attorney for Washington County Pennsylvania. Mr Lucas took part in the preparation of this affidavit and its attachments."

14 At the end of Mr Pettit's sworn affidavit were the words: "signed and sworn to before me this twentieth day of September 2000 at the Washington County Courthouse located in Washington, Pennsylvania" followed by the signature of Thomas D Gladden, described underneath as "Thomas D Gladden PJ".

15 The affidavits of the applicant's three children Katie, Christina and Steve aged respectively 14, 12 and 11, contained a paragraph at the end which, although varying slightly between them, stated:

> "I, Thomas D Gladden, President Judge of the Court of Common Pleas of Washington County, the Twenty Seventh (27th) Judicial District in the Commonwealth of Pennsylvania, did examine Christina St John and I am satisfied that she is a competent witness who understood the oath to tell the truth she took prior to signing this affidavit in my presence. Christina St John swore to the truth of this affidavit in my presence on 20 September 2000."

16 That statement was followed by the signature of Thomas D Gladden, described underneath as "Thomas D Gladden PJ", except that in the case of Katie's affidavit the letters "PJ" were omitted.

17 An affidavit of Susan Falvo-Warco, Chief Deputy Coroner for Washington County, Pennsylvania, which was attached to Mr Pettit's affidavit, also contained a statement at the end of it certifying that it had been sworn before Thomas D Gladden, President Judge of the Court of Common Pleas, Washington County, Pennsylvania, but in that case he did not sign the certificate.

18 There were four other affidavits attached to Mr Pettit's affidavit. They were the affidavits of the applicant's wife, two other witnesses to the violence and Nancy Lupetin, the custodian of criminal records for District Court 27-1-03 in Washington County, Pennsylvania, who exhibited a number of formal documents to her affidavit. None of those affidavits contained the certification describing Thomas D Gladden as a president judge. They were simply signed by Thomas D Gladden, underneath which were the words "Thomas D Gladden PJ" in the same way as at the end of Mr Pettit's affidavit.

19 During the hearing, the original sealed bundles were shown to the court. Comparison of the documents in the first sealed bundle with those in the first bundle which was before the court, and which was before the district judge, revealed some inconsistencies. The certificate at the end of the affidavit of Susan Falco-Warco, which was unsigned in the bundle before

A the court, was signed in the sealed bundle, and the signature of Steve St John at the end of his affidavit in the bundle before the court had, in the sealed bundle, been crossed out and replaced by a different signature of Steve St John. No explanation was given for those inconsistencies, but the district judge was told about them and no reliance was placed on those documents by the Government of the United States of America during the committal proceedings. It was also noted, when comparing the first sealed bundle with
B the first copy bundle before the court, that there were slight differences between the signatures of Christina St John at the end of her affidavit and between the signatures of President Judge Gladden at the end of the affidavit of Katie St John. As mentioned previously, however, both of those affidavits contained the full certification by President Judge Gladden referring to his status as a president judge.

C 20 The foreign warrant of arrest, which formed an attachment to Mr Pettit's affidavit, was signed by Ms Sensenich who was stated on the document to be a "US magistrate judge".

21 The second bundle relied upon by the Government of the United States of America was certified by a certificate dated 31 October 2000 signed by Mr Russell Bikoff, Deputy Director, Office of International Affairs, United States Department of Justice. The certificate was identical in form to
D the certificate of Mr Snow relating to the first bundle save that it referred to another affidavit of Mr Pettit along with the documents attached to it. That was a supplemental affidavit of Mr Pettit which did not contain the equivalent of paragraph 32 of Mr Pettit's first affidavit but which was signed at the end by Thomas D Gladden, underneath which were the words "Thomas D Gladden PJ", in the same way as with Mr Pettit's first affidavit.

E 22 One of the exhibits to Mr Pettit's supplementary affidavit was an affidavit of Dr Rozin, a forensic pathologist, to which was attached his autopsy report giving the cause of Mr Bowman's death. Dr Rozin's affidavit was similarly signed by Thomas D Gladden, underneath which were the words "Thomas D Gladden PJ".

(d) Submissions

F

23 Mr Garlick submitted that each affidavit had to be examined separately to see if it has been properly authenticated pursuant to the requirement of section 26(1)(a). He contended that it was not permissible to look at other material within the sealed bundle or at material outside the sealed bundle. It followed that all the affidavits which had simply referred to "Thomas D Gladden PJ", without any statement saying that he was a
G president judge, were not properly authenticated because there was nothing within the document itself to say what "PJ" meant. According to that argument, all of the affidavits in both bundles, save for the affidavits of the applicant's three children in the first bundle, would not be receivable in evidence. Mr Garlick accepted that his argument was a technical one but he stressed the importance of authentication because it provides the gateway to
H the admission of evidence as an exception to the hearsay rule. He pointed to the inconsistencies between documents in the sealed bundle and those in the bundle before the court as demonstrating the need to be strict about authentication.

24 He contended that paragraph 32 of Mr Pettit's first affidavit did not operate to authenticate the other affidavits exhibited to it because it was not

permissible to look at the contents of the affidavit until it had been authenticated. Even then, paragraph 32 would, he said, be inadmissible because it was hearsay evidence. He accepted that his argument was stronger in relation to the second bundle because there was nothing in that bundle which purported to state that Mr Gladden was a judge.

25 Finally, Mr Garlick accepted that article VII(5) of the Treaty provided an alternative route to authentication but he submitted that the certificates given by Mr Snow and Mr Bikoff were inadequate because they did not identify which documents were being certified as originals and which documents were being certified as true copies.

26 Mr Hardy submitted that the certificates given by Mr Snow and Mr Bikoff provided sufficient authentication for all documents in the bundles pursuant to article VII(5) of the Treaty. It was, he said, patently obvious that Mr Pettit's affidavits and the other affidavits were originals and it would be meaningless to certify what was obvious. He referred to the transcript of the judgment of Watkins LJ in *In re Espinosa* [1986] Crim LR 684, where the Divisional Court had to consider the authentication of affidavits which were certified in a somewhat similar way to the certificates given by Mr Snow and Mr Bikoff in this case. The court upheld the authentication of the affidavits in that case even though the person signing the certificate had not seen the original affidavits. Watkins LJ said that courts should beware of taking an over strict view of the relevant provisions. Mr Hardy reminded us that extradition treaties are to be interpreted liberally according to their language, object and intent: see *In re Arton (No 2)* [1896] 1 QB 509, 517.

27 Alternatively, Mr Hardy submitted that Mr Pettit was a competent authority under article VII(5) of the Treaty to certify the documents attached to his affidavit. He was in a position to speak to the status of President Judge Gladden in the way that he did in paragraph 32 of his first affidavit.

28 Finally, Mr Hardy submitted that the foreign warrant of arrest purported to be signed by a magistrate judge, Ms Sensenich, and that it was therefore deemed to be duly authenticated under section 26 of the 1989 Act.

(e) Conclusions

29 In my view, the certificates provided by Mr Snow and Mr Bikoff are sufficient to authenticate the affidavits of Mr Pettit to which they respectively refer, pursuant to article VII(5) of the Treaty. It is right to say that Mr Snow and Mr Bikoff do not specify whether those affidavits are originals or true copies but, having seen the original affidavits in the sealed bundles, it is perfectly obvious that they are the original afidavits.

30 Mr Pettit's first affidavit having been thus authenticated, it is permissible to have regard to its contents. Paragraph 32 of his affidavit makes it clear that Thomas D Gladden is a president judge. That would be something of which, as district attorney, he would have personal knowledge. It follows that the letters "PJ" in the description "Thomas D Gladden PJ" at the end of his affidavit must be an abbreviation for president judge.

31 The other affidavits in the first bundle are attachments, or exhibits, to Mr Pettit's affidavit. They can therefore be considered together with Mr Pettit's affidavit, thus making it clear that the letters "PJ", where they occur in the description "Thomas D Gladden PJ" at the end of the affidavits which do not already refer to Mr Gladden being a president judge, are also

A an abbreviation for president judge. By that route I consider that all the other affidavits in the first bundle are deemed to be duly authenticated pursuant to section 26(1)(a) of the 1989 Act because they purport to be signed by a judge of the foreign state where they were issued.

32 Furthermore, I also accept the submission of Mr Hardy that the foreign warrant of arrest is deemed to be duly authenticated under section 26(1)(a) because it purports to be signed by a judge or magistrate of
B the foreign state where it was issued.

33 I come then finally to the documents in the second bundle. As I have already indicated, Mr Bikoff's certificate authenticates Mr Pettit's affidavit in that bundle pursuant to article VII(5) of the Treaty. Mr Pettit's affidavit in that bundle does not refer to the status of Mr Gladden as a president judge, it simply used the letters "PJ" in the description under Mr Gladden's signature.
C However, Mr Pettit's affidavit is expressed to be a supplemental affidavit—that is to say, supplemental to his affidavit in the first bundle. That being so, it must, in my view, be permissible to read that affidavit together with his first affidavit. In those circumstances, it is clear that the initials "PJ" at the end of the supplementary affidavit, and at the end of Dr Rozin's affidavit which forms an attachment or exhibit to Mr Pettit's supplementary affidavit, are an abbreviation for president judge. For those reasons, I conclude that
D the affidavits in the second bundle are also deemed to be duly authenticated under section 26(1)(a).

34 Having considered the authentication of the affidavits with the care that Mr Garlick says is necessary, I conclude that they are properly authenticated for the reasons that I have given.

E *Death penalty*

(a) Introduction

35 Mr Garlick's second submission related to the death penalty that could be imposed if the applicant were extradited to the State of Pennsylvania and found guilty of murder of the first degree. This is, apparently, the first occasion that the court has considered an extradition case involving the possibility of the death sentence since the Human Rights
F Act 1998 came into force.

(b) The facts

36 On 6 January 2001 the Secretary of State issued an authority to proceed in respect of alleged extradition offences including the offence of murder. Under the law of the State of Pennsylvania, a person who is
G convicted of murder of the first degree, which involves an intent to kill, shall be sentenced to death or to a term of life imprisonment. The jury decides whether the sentence shall be death or life imprisonment. By the time of the committal proceedings before the district judge, the Secretary of State had not sought or obtained any assurance from the Government of the United States of America that, if the applicant were extradited and found guilty of murder of the first degree, he would not face the death penalty.

H

(c) The law

37 Under paragraph 8(2) of Schedule 1 to the 1989 Act, the Secretary of State may by warrant order the fugitive criminal to be surrendered to the requesting state. Article IV of the Treaty provides:

"If the offence for which extradition is requested is punishable by death under the relevant law of the requesting party, but the relevant law of the requested party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting party gives assurances satisfactory to the requested party that the death penalty will not be carried out."

38 Article 1 of the Sixth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is incorporated into the law of the United Kingdom by the Human Rights Act 1998, states: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

39 Under section 6 of the Human Rights Act 1998 it is unlawful for a public authority, which includes a court, to act in a way which is incompatible with a Convention right.

40 Under section 3 of the 1998 Act, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights so far as it is possible to do so. In *R v A (No 2)* [2002] 1 AC 45, 67 para 44, Lord Steyn stated that section 3 placed a duty on the court to strive to find a possible interpretation compatible with Convention rights; see also the observations of Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 72, para 75.

41 The meaning of an "extradition crime" is derived from paragraph 20(1) of Schedule 1 to the 1989 Act and article III(1) of the Treaty.

42 Paragraph 20 of Schedule 1 states:

" 'extradition crime', in relation to any foreign state, is to be construed by reference to the Order in Council under section 2 of the Extradition Act 1870 applying to that state as it had effect immediately before the coming into force of this Act and to any amendments thereafter made to that Order."

43 Article III(1) of the Treaty provides:

"Extradition shall be granted for an act or omission the facts of which disclose an offence within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offence, if: (a) the offence is punishable under the laws of both parties by imprisonment or other form of detention for more than one year or by the death penalty; (b) the offence is extraditable under the relevant law, being the law of the United Kingdom . . . (c) the offence constitutes a felony under the law of the United States of America."

44 Finally, under paragraph 6(2) of Schedule 1 to the 1989 Act the district judge has to receive any evidence which might show that the crime of which the prisoner is accused is "not an extradition crime".

(d) Submissions

45 Mr Garlick submitted that the committal order made by the district judge was unlawful because the alleged offence of murder was not an extradition crime when interpreted in the light of the applicant's Convention rights because, in the absence of any assurances to the contrary, extradition would expose him to the risk of the death penalty in contravention of those

A rights. Mr Garlick stressed the importance of interpreting the meaning of an extradition crime compatibly with Convention rights under section 3 of the Human Rights Act 1998. He contended that an extradition crime must be interpreted as being one where the rendition of the fugitive would not contravene his Convention rights. Absent any assurance that the applicant would not be exposed to the risk of the death penalty if extradited and found guilty of murder of the first degree, Mr Garlick submitted that the offence B could not be an extradition crime because it violated the applicant's Convention rights and it was therefore unlawful to make an order committing him into custody. He stressed that it was a question of jurisdiction for the district judge to decide whether the offence was an extradition crime within the meaning of the Act and the Treaty as interpreted compatibly with Convention rights.

C 46 Mr Hardy, on the other hand, submitted that the time for a challenge of this nature is when the Secretary of State makes a decision whether or nor to make an order for the fugitive's surrender under paragraph 8(2) of Schedule 1 to the Act, and that this application relating to the district judge's committal order is premature, in the same way as it would have been premature if an application for judicial review had been made when the Secretary of State issued the order to proceed. He contended that the D committal proceedings are part of the preliminary processes, following which the Secretary of State makes the final decision whether or not to extradite and, in doing so, he would have regard to article IV of the Treaty under which he can refuse extradition unless there are satisfactory assurances that the death penalty will not be carried out. Mr Hardy, submitted that a committal order by a district judge does not expose the E fugitive to violation of his Convention rights; it exposes him to the Secretary of State's consideration of his extradition.

47 Reference was made to a Divisional Court case, *In re Soering* [1988] Crim LR 307, where an application for a writ of habeas corpus arising out of a committal order was refused where the applicant's extradition was sought to face a charge of capital murder in the State of Virginia in the United States of America. It was held that article IV of the Treaty conferred a discretion on F the Secretary of State and, although the assurance given by the Government of the United States of America did not seem to be of the type envisaged by the Treaty, the court would not review an administrative decision by the Secretary of State prematurely and so an application for leave to apply for judicial review was refused.

48 In fact, Mr Soering subsequently took his case to the European Court G of Human Rights which in *Soering v United Kingdom* (1989) 11 EHRR 439, 478, para 111 held that, in the event of the Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of article 3 because he would be exposed to the "death row phenomenon". However, Mr Hardy made the point that the decision of the Divisional Court remained good law and that the Secretary of State would consider the question of assurances before deciding whether to H return the applicant.

(e) Conclusions

49 Even if Mr Garlick were right in his submission about the interpretation of the meaning of an extradition crime in the light of the

human rights legislation, it still would not justify the issue of a writ of habeas corpus because, in my view, the committal order does not, on its own, violate the applicant's Convention rights. I accept Mr Hardy's submission that the potential issue of violation of the applicant's Convention rights arises at the time when the Secretary of State decides whether to extradite the applicant. He may decide not to extradite, or he may obtain satisfactory assurances that the death penalty will not be carried out. In either of those situations, the issue of the violation of the applicant's Convention rights would not arise. In my judgment, it would be premature and wrong to reach conclusions now about potential violations of the applicant's Convention rights when they may never occur. If the Secretary of State were to decide to order the applicant's return without obtaining satisfactory assurances from the Government of the United States of America that the death penalty will not be carried out, it would be open to the applicant to seek permission to apply for judicial review of that decision. The availability of such a remedy, in my view, is sufficient to safeguard the applicant's position.

50 The district judge, when dealing with this aspect of the matter, felt unable to entertain the human rights submission because he could find no evidence before him that first degree murder is a capital offence in the State of Pennsylvania, so he left it in the hands of the Secretary of State in the knowledge that he has power not to order the return of a person accused of an offence in respect of which he could be sentenced to death in the requesting country. There was obviously a misunderstanding because both counsel were in fact, agreed upon the relevant provisions of the law of Pennsylvania. In any event, it is clear from the documentation put before this court that the sentence for first degree murder in the State of Pennsylvania is the death penalty or life imprisonment. The district judge, nevertheless, reached the correct end result by leaving it to the Secretary of State, albeit that the conclusion should, in my view, have been reached for the reasons that I have given.

Lack of adequate specialty provisions

(a) Submissions

51 Mr Garlick's third submission related to the alleged lack of speciality provisions. His point was that, in English law, a person can be convicted of murder where he does an act which causes the death of another either with an intention to kill or with an intention to inflict grievous bodily harm, whereas in the State of Pennsylvania a person can only be convicted of murder of the first degree if it is proved that he intended to kill. It is not possible to say whether the district judge found a prima facie case of murder against the applicant on the basis of an intent to kill or on the basis of an intent to inflict grievous bodily harm. It is therefore submitted that, under the committal charge of murder, there is no adequate specialty provision for protecting the applicant from being dealt with in respect of an offence other than in respect of which his return is ordered. The committal order is therefore said to be contrary to section 6(4) of the 1989 Act, as amended by the Hong Kong (Extradition) Order 1997 (SI 1997/1178), article 2, Schedule, paragraph 4, which provides:

"A person shall not be returned, or committed or kept in custody for the purposes of such return, unless provision is made by the relevant law,

A or by an arrangement made with the relevant foreign state, Commonwealth country or colony or with the Hong Kong Special Administrative Region, for securing that he will not, unless he has first had an opportunity to leave it, be dealt with there for or in respect of any offence committed before his return to it other than—(a) the offence in respect of which his return is ordered . . ."

B 52 Mr Hardy, on the other hand, submitted that section 6(4) does not apply to Schedule 1 cases. He maintained that the whole of section 6 applies to Part III cases. His case was that the speciality provision relevant to extradition between the United Kingdom and the United States of America was contained in paragraph 1(3) of Schedule 1, which provides:

"A fugitive criminal shall not be surrendered to a foreign state unless
C provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded."

D Under paragraph 1(3) of Schedule 1 the specialty provision relates to the time of surrender, whereas under section 6(4) it can relate to the time of committal. Mr Hardy submitted that, if section 6(4) did apply, paragraph 1(3) of Schedule 1 would be otiose.

53 It was also contended that, if section 6(4) did apply, there was "an arrangement made with the relevant foreign state", namely the arrangement under article XII(1) of the Treaty, which provides:

E "A person extradited shall not be detained or proceeded against in the territory of the requesting party for any offence other than an extraditable offence established by the facts in respect of which his extradition has been granted . . ."

That article relates to the position after the extradition has been granted.

F 54 Mr Hardy submitted that this was a matter about which representations should be made to the Secretary of State when he is considering whether to order the surrender of the applicant.

(b) Conclusions

55 In order to determine whether section 6(4) applies to a Schedule 1 case it is necessary to consider the structure of the 1989 Act. As
G mentioned earlier in this judgment, Schedule 1 applies to the applicant's case by virtue of section 1(3) of the Act because there is in force an Order in Council (the 1976 Order) in relation to the United States of America which was made under section 2 of the Extradition Act 1870. There are, apparently, only one or two other countries to which Schedule 1 applies.

56 Part III of the Act applies to a foreign state, a Commonwealth
H country or a colony and the Hong Kong Special Administrative Region. However, by virtue of the European Convention on Extradition Order 1990, as subsequently amended, made under section 4 of the Act, and by virtue of amendments made to the 1989 Act, special provision is made for foreign states who are party to the European Convention on Extradition in so far as they only have to supply information, rather than evidence, to provide

the basis on which the magistrate can make an order to commit. Schedule 1 cases are therefore distinct from those two different kinds of Part III cases.

57 Section 6(4) comes within Part II of the Act which is headed "Restrictions on Return". Section 6(1) expressly prohibits the return of a person under Part III of the Act in four stated circumstances. The remaining subsections of section 6 do not expressly refer to Part III of the Act, but subsection (4) refers to a foreign state, a Commonwealth country or a colony and the Hong Kong Special Administrative Region which are the countries to which Part III of the Act applies. Subsection (2) refers to a foreign state and to the Hong Kong Special Administrative Region, and subsections (6) and (7) refer to a Commonwealth country or a colony. In fact, subsection (7) expressly relates back to subsection (1) which is the subsection which expressly refers to Part III of the Act.

58 Having considered those statutory provisions, in my judgment section 6 is dealing with Part III cases; it is not dealing with Schedule 1 cases. I am fortified in that opinion by the fact that paragraph 1(3) of Schedule 1 makes specialty provision. It is unlikely that Parliament would have intended, firstly, that there should be duplication of provision and, secondly, that the duplicated provision should be capable of application at different times, one at committal and the other at surrender. Mr Garlick pointed out that both section 26 of the Act and article VII(5) of the Treaty deal with authentication and that it was accepted in this case that both apply to Schedule 1 cases. However, section 26 is in Part VI of the Act which is headed "Miscellaneous and Supplementary", and section 26 supplements rather than duplicates article VII(5) of the Treaty.

59 In my view, paragraph 1(3) of Schedule 1 governs the position in this case. In so far as the point that is now made on behalf of the applicant may have any merit, it should be made to the Secretary of State when he is considering whether to surrender the applicant. The Secretary of State would no doubt take into account the past record of the United States of America in performing its obligation under article XII of the Treaty. It seems to me, however, that extradition would be based on the conduct revealed in the evidence submitted with the extradition request and that it would be a matter for the court in Pennsylvania to decide whether the evidential hurdle of showing an intent to kill necessary for murder of the first degree has been proved.

60 I do not therefore accept that the order of committal was unlawful on the ground of lack of adequate specialty provision under section 6(4) of the Act which, in my view, does not apply to Schedule 1 cases in any event.

Overall conclusion

61 For the reasons that I have given, I consider that the order of committal was lawful and that this application for a writ of habeas corpus should therefore be dismissed.

BROOKE LJ

62 There were features of the evidence filed in support of this extradition request which made me uneasy. As appears from paragraph 19 of the judgment of Harrison J, no fewer than four of the affidavits to which

A Mr Pettit made reference in his first affidavit appear to have been subsequently returned for reswearing, or for a further signature to be appended to them, after the documents in the first sealed bundle were first copied and sent to England.

63 Despite these oddities (only two of which were identified before the district judge) it appears to me that each of the affidavits now in the two bundles were appropriately sworn and authenticated in the manner required
B by the Act and the Treaty. On the other hand, it was a near-run thing, and it is to be hoped that the appropriate authorities in the United States may be prevailed upon to ensure that oddities like this do not recur, because it cannot be taken for granted that the English courts will always be able to find their way to admit evidence which contains unexplained features, as occurred in the present case.

C 64 On the second issue in the appeal, I agree with Harrison J that the procedure prescribed by Schedule 1 has the effect that he describes in paragraph 49 of his judgment. The position is not satisfactory because it means that a defendant may lawfully be detained in custody in this country for a long time before he has the opportunity of challenging the quality of any assurances the Secretary of State may be given by the authorities in the United States as to the non-availability of the death penalty for the crime for
D which his extradition is sought. This is, however, a necessary consequence of the wording of the present extradition arrangements with the United States which do not permit a challenge of this kind at the committal stage in habeas corpus proceedings.

65 I can see nothing in the Human Rights Act 1998 which enables us to mitigate this rather harsh result. If the death penalty were the only penalty available for the equivalent of the English offence of murder in the State of
E Virginia the result might have been different: indeed a viable challenge might in those circumstances have been made to the initial order to proceed.

66 On the third issue I have nothing to add to the judgment of Harrison J, with which I agree.

67 This application is therefore dismissed.

F *Application dismissed.*
Permission to appeal refused.

19 November. The Appeal Committee of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Rodger of Earlsferry) refused a petition by the applicant for leave to appeal.

G *Solicitors: Leo Abse & Cohen, Cardiff; Treasury Solicitor.*

Reported by DURAND MALET ESQ, Barrister

H