Extradition to foreign courts: are our laws fair?

The government insists that the controversy over this country's extradition arrangements is unwarranted. In the House of Commons on 12 July, the Prime Minister said that the standards of proof required for US-UK extraditions were "roughly analogous". Critics who based their opposition on the case of the Nat West Three were misguided, as "these people would have been extradited even under the old treaty provisions."[1]

The Prime Minister's argument centred on the principle of reciprocity and the assertion that basic rights had not been eroded under the new provisions. This essay submits that he, and the government, are wrong on both counts. In pursuing a bilateral agreement with its 'special relation', the UK has unilaterally jettisoned fundamental protections against unwarranted extradition. This, and the increasing extra-jurisdictional reach of the US Department of Justice, the wide differences between the penalties imposed in both countries for extraditable crimes, and the broad discretionary powers afforded to ministers to amend extradition arrangements, have all meant that changes to the law on extradition have led to the erosion of basic rights.

We must remember that extradition to another country puts a heavy burden on the accused. The Nat West Three, for example, have been ordered to put up millions of dollars in bail, are restricted in their ability to work in order to pay for their legal fees, and will spend many months away from their families with no definite hope of return.

[1] See *House of Commons Hansard*, Vol. 448, Part 182, Columns 1385-6.

It is essential, therefore, that extraditions are only granted where there is a real case to answer.

The US-UK extradition treaty and the Extradition Act 2003 abandon this principle.[2] Section 71 (4) of the Extradition Act sets out that, for certain "designated" countries, only "information" need be presented in front of a court for an extradition request to proceed. At Ian Norris' extradition proceedings, an indictment and affidavit from a US Department of Justice attorney sufficed.

This contrasts with the American position, cemented by Article 8 (3) (c) of the treaty and ultimately by the US constitution, which demands that authorities demonstrate "probable cause" that the accused committed the offence in question. "Probable cause" may not amount to a full examination of the evidence, as in a criminal trial, but counsel for the accused are allowed to cross-examine those making the accusations, and the use of hearsay is restricted.[3]

The government contends that unjustified removal is not a reality under the Extradition Act. But we only need look back to a case in 2002, before the present provisions came into force, to see the value of a *prima facie* burden of proof. Loffi Raissi was a pilot from Algeria, arrested in the UK on a provisional warrant following an extradition request from the U.S. The authorities there alleged that he had helped

---

[2] *Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America* (2003), Article 8 (2-3). The requirements under the treaty include a description of the person sought, a statement of the facts of the offences, the text of the relevant laws describing the offence and punishment for it, a copy of the warrant for arrest issued by the judge, and a copy of the charging document, if any.

[3] For example, see The North Carolina Court System, Office of Indigent Defence Services, *NC Defender Manual*, Chapter Three: Probable Cause Hearings, p. 9. Can be found at www.ncids.org/Def%20Manual%20Info/Defender_Manual/DefManChpt03.pdf.

train the 9/11 hijackers, saying that video and telephone evidence made the connection. At his committal hearing at Bow Street Magistrates in February 2002, however, this "evidence", turned out to be a webcam of Raissi with his cousin.[4]

Under the present system, such evidence would have been accepted without question, and Raissi would have been extradited. But this is not the only part of the present arrangements that immunises law enforcement agencies against the scrutiny of the courts. By statutory instrument, ministers are able to decide at any time to vary the evidential requirements for extraditions to different countries.[5] The entrenchment of a minimum standard of proof, as in the US constitution, is no barrier to the British government – ministers have designated Russia, Azerbaijan and Serbia and Montenegro as countries that require only "information" for extradition requests to be fulfilled.[6]

Such developments are not surprising to the legal historian. The last few years have seen increasing moves to streamline the extradition process,[7] with terrorism and globalisation (which enhances the possibilities for fraud) providing the impetus. The problems of doing this are easily summarised: the need to cater in legislation for numerous, ever-changing bilateral arrangements, and the worrisome principle of ensuring that extra-territorial jurisdiction does not allow countries to extradite individuals who have committed acts that are only defined as crimes in the requesting country. The British response to the first problem is to carry on making extradition

[4] Paul Garlick, 'The mysterious case of the new US extradition scheme', *New Law Journal* (14 May 2004).
[5] Extradition Act 2003, s.71 (4).
[6] Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/2334.
[7] The 2003 act has cut the time to extradite someone from the UK to the US from an average of 33 months to 11.5. Information taken from a freedom of information request, response received 24 November 2006.

arrangements without parliamentary scrutiny: the US-UK treaty was negotiated in secret, and only announced to the House of Lords after the Extradition Act had been passed.[8] The response to the second problem, in the case of the US-UK arrangements, is to limit extraditable offences to those punishable by detention for more than one year in both countries,[9] but then allow the requesting country to get around that provision by other means.

These other means are the US wire fraud provisions[10] that were used as the basis of the case against the Nat West Three. Their potential to extend jurisdiction well beyond US borders is perhaps best encapsulated by *Pasquantino v US USLW 4287* [2005]. The Supreme Court upheld the convictions of three US citizens for wire fraud, after they had smuggled alcohol across the border, avoiding Canadian excise duty. The apparent victim was the Canadian government. But the three men were liable in the US, based only on the fact that they had placed orders for the alcohol over the telephone with a US supplier.

Ingenuity of this sort has been a hallmark of the 69 extraditions to the US since 2003.[11] The case against Ian Norris relied on the US offence of price-fixing amounting to the English common law crime of conspiracy to defraud. In making their request, the Department of Justice was not deterred by the historical lack of any conviction for price fixing in the English courts under this provision.[12]

---

[8] Katherine Reece-Thomas, 'The New Extradition Regime – How unjust is it?', *Journal of International Banking and Financial Law*, (2006) 8 JIBFL 331.
[9] As set out in Article 2 (1) of the US-UK treaty, but this is also a common provision in British bilateral extradition treaties.
[10] Contained in Title 18, Part 1, Chapter 63, Section 1343 of the US Code. See http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+18USC1343.
[11] Figures released from Home Office in Freedom of Information Request, 24 November 2006.
[12] Alistair Graham and Rebecca Stevenson, 'UK/US Extraditions: The New Picture', *Journal of International Banking and Finance Law*, (2005) 8 JIBFL 295.

We might also question the equivalence of the penalties for such offences in the requesting country. In the US courts, penalties for white-collar crime could, in theory, run to 164 years in prison. In the UK, the highest sentence ever imposed has been 14 years.[13]

Reciprocity and rights are, therefore, not valid justifications for the legal framework on extradition; under that framework, they simply become redundant concepts.

[13] Julia Kollewe, 'Fast-Track Extradition Treaty in the Dock Over "Imbalances"', *The Independent*, 23 June 2006.