HOME OFFICE CONSULTATION ON EXTRADITION

SUBMISSION BY DAVID BERMINGHAM

I INTRODUCTION

This paper sets out the case for substantive amendments to the Extradition Act 2003 ("the Act"), and to the US/UK Extradition Treaty. The author was one of the NatWest Three, one of the most high profile and contentious cases to be brought under the Act. I am one of a very small number of people who have personal experience not only of the practical workings of the Act, but also the US criminal justice and penal systems. I have been a passionate advocate of legislative change since the Act first came into force, and was instrumental in the drafting of the original 'forum' clauses proposed by the Conservatives and Liberal Democrats when in opposition in 2006. I have been involved in a number of the most high profile US extradition cases, both past and ongoing, and correspond regularly with several individuals in prison in both the US and the UK who have been victims of the legislation.

Although the Home Office consultation identifies five very specific areas in which views are sought, I believe it is important to understand the UK's extradition relations in the context of both their legislative history and also the approach adopted by other countries around the world. I believe we should also start by asking the wider question as to what we believe our extradition laws *should* achieve, in order then to measure whether the current arrangements are fit for purpose.

My observations on the UK's current extradition arrangements could be summarised as follows:

- They were badly designed, in haste, with the sole aim of expediting the process rather than ensuring that justice was done.
- They were shovelled through Parliament without proper debate, supposedly as a necessary weapon in the War Against Terror.
- They lack any substantive protections for defendants.
- They have all but eradicated the presumption of innocence.
- They assume that all Requesting States are models of probity whose word on any matter should be taken without question.
- They lack any mechanism for deciding whether a domestic prosecution would be more appropriate.
- They have encouraged a flood of applications from countries which would never otherwise have made such applications.
- They are totally inconsistent with the practical approach adopted by all of our extradition partners.

II SUMMARY OF RECOMMENDATIONS

With respect to the specific questions posed on the Home Office website, my responses, in brief, are as follows:

- The powers of the Home Secretary to stop extraditions should be extremely limited;
- The European Arrest Warrant ("EAW") system should be overhauled with a view to restoring fundamental protections to defendants, and to aligning our practices in extradition with those of our European partners. In particular, there should be a proportionality test;
- Not only should crimes alleged to have been committed mainly in the UK be tried in the UK; there should be a fundamental presumption that if a case *could* be heard in the UK, then it should be for the *Requesting State* to demonstrate why it would be in the interests of justice for the case *not* to be heard in the UK;
- The US-UK Extradition Treaty should be renegotiated to restore the requirement for the US to provide evidence sufficient to demonstrate to the extradition court that a prima facie case could be made out; and
- Either all Requesting States should be required to provide evidence in support of their requests for extradition, or in the alternative they should undertake to support an application for immediate return to the UK on bail (or on remand if the individual had been held on remand during the currency of the extradition proceedings) of any person extradited who is ordinarily resident in the UK.

In addition to the above, it should be mandatory that undertakings are received from Requesting States that UK citizens who are ordinarily resident in the UK and who are extradited and convicted abroad, should be allowed to serve the *entirety* of any sentence imposed in the UK prison system, subject to UK rules.

III THE CONTEXT IN WHICH OUR EXTRADITION LAWS SHOULD BE SEEN

The Purpose of Extradition

Historically, extradition developed by way of bilateral agreements between friendly States to render unto one another fugitives who were alleged to have committed a crime in one state and fled to the other. Whilst such simple fact patterns still exist in the modern day, the huge changes in the ways in which we conduct our lives, and in particular the development of electronic means of communication and commerce, and ease of international travel, have meant that crimes are much more likely to have an international element to them. This could be by way of a single person committing a series of crimes in different countries, or committing a single crime (for example fraud) in which there are multiple victims in different countries. Alternatively, a crime may involve numerous perpetrators acting in concert from a series of different locations.

Ultimately, the purpose of extradition must be to ensure that allegations of crime are dealt with in such a way that justice can be seen to have been done. It stands to reason, perhaps, that if countries trust each other sufficiently to have formal extradition arrangements in the first place, then presumably each should trust the other equally to be able to deal with an allegation within their own jurisdiction if necessary.

The March 2001 Review of the UK's extradition laws (which was the precursor to the 2003 Extradition Act), foresaw a radical restructuring of what was admittedly a sclerotic and inefficient regime, mired in satellite proceedings. The then Home Secretary Jack Straw commented as follows:

> Serious crime is becoming increasingly complex and international in character. This is particularly true of organised crime, which can cause great damage to individuals, local communities and even entire economies, across the world. As improved global communications make it easier for criminals to plan and commit crime across borders, so does international travel make it easier for them to evade justice.
>
> In response we need to step up our efforts to tackle these growing problems. One key element of the fight against cross-border crime lies in improving judicial co-operation between countries. Extradition, the process by which an individual is handed over from one jurisdiction to another to face trial or serve a term of imprisonment, plays a key part. No one should be able to escape justice simply by crossing a national border.

Whilst there will be a number of different groups whose interests should be considered, the starting premise should be the fundamental precepts which underpin our democracy; the presumption of innocence, and habeas corpus. The act of extradition has profound implications for both of these, and so should be seen in that context.

It is submitted that the underlying purpose of the UK's extradition arrangements should be to ensure that allegations of crime can be investigated and prosecuted expeditiously in a manner which best serves the interests of justice, taking into account <u>all</u> relevant factors in any given case, including notably the circumstances of the defendant, and issues pertaining to both witnesses and evidence.

The current extradition arrangements fail singularly to meet this test, being totally skewed towards expeditious process, with little focus on the interests of justice and fairness.

<u>Practical Consequences of Extradition</u>

In determining the nature of our extradition arrangements, it is important to consider the practical consequences to an individual of extradition. In most (although admittedly not all) cases, these will include;

- Incarceration in a foreign prison, for periods of months if not years prior to any trial;
- Physical separation from home, work, family and friends;
- Problems with language, culture and a different legal system;
- Difficulty in preparation for trial, including access to documents, witnesses, legal counsel;

- Difficulty in accessing adequate legal representation, particularly in cases where there is no proper state-funded legal aid system;
- The possibility of extreme psychological stress, including by exposure to a combination of the above factors, resulting in a defendant feeling under an obligation to enter a guilty plea to something that he or she did not do, simply in order to get home; and
- The possibility of physical harm whilst incarcerated abroad.

It may be that some, all or none of the above apply to a particular case, but it is critical that a system which contemplates the extradition of an individual is aware of the likely consequences of extradition to that person, and able to weigh up the relative benefits of extradition versus, say, the alternative of dealing with the matter locally.

It ought to go without saying that in a pre-trial scenario, the defendant is presumed in law to be innocent. An objective observer might conclude that extradition, therefore, ought perhaps to be the 'last resort' of a civilised country, rather than the first, in the ongoing fight against international crime. The act of extradition is akin to a summary sentence in itself. It should not be undertaken lightly, therefore.

A Snapshot of International Extradition Regimes

In analysing the UK's approach to extradition, I believe we should be mindful of how some of our major extradition partners deal with the issues.

The UK approach

Historically, the UK has adopted a territorial approach to its criminal justice system, taking the view that a crime should be prosecuted in the territory where either most of the conduct took place, or where the effects were primarily felt. With some limited exceptions, this philosophy guides the UK's approach also to extradition requests to other countries.

However, this approach has been unilaterally abolished in respect of *incoming* extradition requests, where the Extradition Act 2003 supersedes the provisions of all bilateral Treaties and any multilateral conventions to which the UK is a signatory. The UK's approach to an incoming request is now governed simply by the identity of the Requesting State:

Part 1 countries, being those 26 EU nations that have adopted the European Arrest Warrant procedures (plus Gibraltar), and where the UK approach is that:

- No evidence is required in support of the request
- Dual criminality may not be required
- The Home Secretary has no discretionary role to play in the legal process

Since the UK's Crown Prosecution Service acts as agent for all incoming requests for extradition under the Extradition Act, at no cost to the Requesting State, it is perhaps unsurprising that requests under this Part of the Act have risen exponentially since 2004.

There were a total of 66 extradition requests to the UK from around the world in 2000, and 93 in 2003. Requests under the EAW in its first year of operation totalled 24. By the end of 2009, that figure had reached 4,100, with more than half coming from Poland alone, many for extremely trivial matters. During the same period, Britain made a total of only 220 requests of other countries.

Britain is by some distance the greatest recipient of EAW requests, with Spain in second place in 2009 with only 1,629 inbound requests, and then France with 967 and Holland with 683. The UK is currently sending over 100 defendants to Poland alone *every month*, for offences such as theft of a jacket and exceeding an overdraft limit.

Part 2 countries (bilateral Treaty partners) that have been designated by the Home Secretary as having no requirement to produce evidence. These 94 countries include Azerbaijan, Liberia, Russia, Sierra Leone, The United Arab Emirates, and Zimbabwe. Originally in 2004, the list was around 40 countries, confined to the signatories to the European Convention on Extradition, our three most important Commonwealth partners (Canada, Australia and New Zealand), and the United States. The UK's approach to these countries is that:

- No evidence is required in support of the request
- Dual criminality is required
- The Home Secretary has a limited discretionary role to play in the legal process

Part 2 countries that have not been designated by the Home Secretary. The UK approach is as above, except that the Requesting State must support its application with evidence.

Part 3 countries (parties to International Conventions, designated by the Home Secretary as being able to request extradition as if they were part 2 countries). The UK approach is as above, including the requirement for evidence.

In practical terms, defendants under the Extradition Act have very few defences to extradition. In particular, the UK has never refused to extradite its own nationals. The removal from most countries of the burden to produce evidence has significantly lowered the bar for foreign prosecutors. The courts have rendered the supposed Human Rights defences to extradition (ss21 and 87 of the Extradition Act) almost entirely worthless, ruling in the NatWest Three case that only in the most exceptional of circumstances would the rights of the individual take preference over the desirability of honouring our international treaty obligations.

The Home Office's own statistics (in particular the percentage of requests that are turned down by the courts) will show that the UK's arrangements for requests from overseas now effectively constitute 'extradition on demand' to nearly 120 countries, without even the necessity to produce a scrap of evidence other than as to identification.

Measured against the yardstick aspirations of being both expeditious and serving the interests of justice, the UK's regime undoubtedly meets the former, but fails lamentably in the latter, with the rights of the defendant being all but non-existent, and no consideration whatsoever given to any of the merits of the case, the optimal jurisdiction, or the practical consequences of extradition either for the defendant or for his family.

The European Model

Many European countries have traditionally adopted a 'personality' approach to criminal jurisdiction, as distinct from the UK 'territorial' model, reserving unto themselves the right to try their own citizens, and therefore not to extradite them. Article 6 of the European Convention on Extradition (to which the UK is a signatory) specifically allows countries to refuse extradition of their own nationals, and most continental European countries adopt this provision in their bilateral extradition treaties with the rest of the world. This principle conflicts with the underlying tenets of the EAW system, but in practice most EU states continue to assert their sovereign independence in this manner, and amongst themselves there is a tacit understanding that this is the way it will continue.

A recent example would be the 2009 case of the locum Daniel Ubani, a German national who administered a fatal dose of drugs to an elderly British patient on his first stint working in the UK. He promptly returned to Germany. UK prosecutors spent many months painstakingly putting together a case against Dr Ubani for manslaughter, only to find that the German authorities had dealt with him administratively in their own system, and that consequently he could not face any proceedings in the UK.

Article 7 of the European Convention on Extradition permits counties to refuse to extradite where a crime could be deemed to have been committed partially or wholly on their own soil. This so called 'forum' provision is widely used in practice by most European countries, but despite the UK being a signatory to the ECE, the forum provisions in the Extradition Act 2003 have not been activated, meaning that decisions on forum will be made at the whim of UK prosecutors, without judicial oversight. If proceedings in the UK are commenced, then an extradition will be automatically stayed pending their outcome, and the double jeopardy provisions in the Act may then come into play. Since there is little or no judicial oversight of the prosecutors in their decision making process, there is no transparency or consistency in application. The NatWest Three highlighted this inadequacy in their judicial review of the refusal of the Director of the Serious Fraud Office to investigate their case, the High Court ruling that he had no duty in law to do so.

The Russian Federation

Russia was one of the Part 2 countries designated by the Home Secretary on the coming into force of the Act in January 2004.

In July 2007 Russia refused to extradite Andrei Lugovoi for the murder of Alexander Litvinenko in London the previous October. The Russians argued that they reserved the right to try Mr Lugovoi in Russia if he were found to have done anything amiss.

Prime Minister Gordon Brown said at the time:

> "Russia's refusal to extradite Mr Lugovoi is extremely disappointing and we deeply regret that Russia has failed to show the necessary level of cooperation in this matter."
>
> "This was a crime that was committed in London, the evidence and the witnesses are in the United Kingdom and we do not have confidence that a trial in Moscow would meet the standards of impartiality and fairness that we would deem necessary."

This does rather beg the question as to why Russia was designated in the first place. Since 2007, a number of Russian extradition requests have been turned down by the UK courts either under the 'political offences' defence or for abuse of process. The act of designation by the Home Secretary in 2004 was tantamount to a political statement that Russia is a trusted partner. The UK courts have taken a different view.

Mr Lugovoi was cleared by Russian investigators of any wrongdoing and subsequently won a seat in the Russian Duma. The Crown Prosecution Service maintain that the evidence against him in the Litvinenko murder is utterly compelling.

The United States

After the coming into force of the Act, and in particular beginning with the case of the NatWest Three, the Labour Government came under significant fire from many different directions for allowing British citizens to be extradited to America without evidence. The arguments were complicated by the interaction between the UK-US Extradition Treaty and the Act. The former was negotiated in secret and is demonstrably non-reciprocal, in that requests from the US can be made without any evidence and will not be subject to a UK evidential hearing, whilst requests from the UK will be subject to an evidential hearing in a US court to establish whether there is 'probable cause.'

From its signature in March 2003, to its ratification in early 2007, the Treaty was a bit of a red herring, in that inbound requests from the US would be dealt with under the Act, not the Treaty. It became a totemic issue, however, firstly because of the explicit lack of reciprocity (at first acknowledged by the Government, and then subsequently denied), secondly because despite its obvious bias in favour of the US Government, it remained unratified by the US Senate for nearly 4 years after signature, and thirdly because despite this lack of ratification, the Home Secretary nonetheless committed its most important provision (the removal of the requirement on the US to provide evidence in support of requests) to our domestic legislation by designating the US under the Act.

In one of life's great ironies, given that Prime Minister Blair and successive Home Secretaries steadfastly defended the provisions by reference to the 'War Against Terror', the agreement of the US Senate to ratify the Treaty came only after Baroness Scotland and the Northern Ireland Secretary, Peter Hain, gave a written undertaking that the new Treaty would not be used to seek the extradition of 'on the run' IRA terrorists who had been living safely in the Irish American communities for up to thirty years.

The United States' practical attitude to extradition sets it apart from every other country in the world. It shares with many countries the belief that the rights of its own citizens are paramount, wherever in the world they may be, but has the additional belief that US law has a universal sovereignty. In this regard, it refuses to recognise the legitimacy of the International Criminal Court, because it cannot contemplate the possibility that American soldiers could be tried overseas for war crimes.

The US adopts an extremely aggressive extraterritorial approach to crime, and over the last twenty year has been expanding the reach of US domestic statutes to criminalise the conduct of non-US citizens overseas who may never have set foot in the US. Prosecutions of foreign nationals under the Foreign Corrupt Practices Act are becoming more and more commonplace, and the antitrust laws have also vastly expanded the scope of US prosecutorial reach.

It is notable that after Tony Blair intervened to stop the SFO investigation into the BAe Al Yamamah contract, the US prosecutors launched their own investigation, eventually forcing BAe to pay a fine of hundreds of millions of dollars to avoid prosecution. Likewise, British Airways agreed to pay several hundred millions of dollars to make the investigation into price-fixing on transatlantic cargo go away.

The British businessman Ian Norris was indicted in 2003 on charges of price-fixing. After a very lengthy extradition battle, the House of Lords decided that he could not be sent to face the price fixing charges because they had not been a crime in the UK at the time he was alleged to have committed them, but the US prosecutors then pursued the subsidiary allegations of obstruction of justice, and he was eventually sent to Philadelphia in March 2010, stood trial in July, was found guilty on one of the three counts, and is currently serving a sentence of 18 months in prison.

The US, like the UK, is not unwilling in principle to extradite its own nationals, but in practice all such requests must satisfy a US court that the evidence is sufficient to establish 'probable cause' that a crime has been committed. Individual judges in the US hold the UK legal system in varying degrees of disdain, with many representing largely Irish American communities, whose votes keep them in their jobs. Not one IRA terrorist has ever been extradited from the US to the UK. Indeed, Home Office statistics reveal that between January 2004, when the Extradition Act came into force, and June 2010, of the 33 people extradited from the US to the UK, only three were either US nationals or had dual citizenship.

The US has bilateral extradition treaties with over 120 countries. Unlike in the UK, Treaties in the US count as primary legislation, and so are subject to debate and amendment by the Congress and Senate in the same way that UK Bills are.

Of the 120 Treaties with the US, only three do not require that the US should provide evidence to support its requests. Those three are France, Ireland, and the UK. Of those, France will not extradite its own nationals under any circumstances (article 3); Ireland will not extradite where the crime could have been deemed to have been committed wholly or partially on Irish soil (article 3(2)), or where the Irish authorities have investigated and found no wrongdoing (article 5(b)). The UK will extradite anyone, at any time, without evidence.

Separation of Powers

As with many aspects of British law, the relationship between Parliament and the judiciary might be said to be part of the problem in our current extradition arrangements. The UK courts have historically taken the view that if Parliament is happy to have formal extradition arrangements with another country, then there should be a working assumption that all aspects of that country's legal system are acceptable, and that there should be a presumption in favour of extradition.

Parliament has a history of hiding behind the decisions of the courts, and nowhere has this habit been more manifest than in the Extradition Act, where numerous parliamentarians have indicated that 'it's a matter for the courts', when of course all the courts are doing is implementing the law that the parliamentarians have adopted. Bad law makes for injustice.

With respect to the EAW provisions, Parliament took every aspect of the Eurowarrant procedures and committed them to domestic law, eviscerating any possible protections for defendants. Parliamentarians could claim that their hands were tied by Brussels, but this would ignore the practical steps taken by other European countries to provide protections for their own citizens. As with so much European law, the UK has gold-plated the European template, to the detriment of its own citizens, while every other European country adopts a smorgasbord approach, picking the features that it likes, and ignoring those that it does not.

In this aspect, the European courts also will generally take a far more hard-headed and sceptical approach to requests from foreign states, questioning everything from evidence to motivation, and even undertakings as to treatment after arrival. In the UK, courts will invariably take an interpretation that favours the Requesting State, and accept as fact, without question, the statements of foreign prosecutors. This fundamental philosophical issue can only be addressed through proper amendments to the legislation, widening the remit of the courts, and removing some of the 'hardwired' presumptions concerning the trustworthiness of the materials received from abroad.

IV LEGISLATIVE HISTORY

It is important to be able to see the development of the UK's current extradition arrangements within the wider context of the world at the time. A chronology of some of the more important events is as follows:

Date	Event
9 March 2001	Home Secretary Jack Straw launches Review of UK's extradition laws. Many interested parties including Liberty and Justice submit their views.
9 November 2001	Attack on the Twin Towers
27 November 2001	European Commission publishes a discussion paper on Mutual Recognition of Decisions in Criminal Matters amongst EU Member States
18 January 2002	UK Home Office responds to the EC paper, stressing that territoriality is the key principle underlying the UK's views
8 February 2002	Letter from Department of Justice enclosing first draft of US/UK Treaty.
28 Feb 2002	EC Decision to establish Eurojust
22 May 2002	Officials meeting in Washington (UK-Home Office/ US State Department) to discuss the new Treaty
12 July 2002	Meeting in London (UK-Home Office, CPS/US State Department and Department of Justice) to discuss the new US/UK Treaty
12-14 September 2002	Home Office Ministers' informal bilateral discussions with US Attorney General (Ashcroft) at JHA Council
December 2002	Second Reading of Extradition Bill
31 March 2003	Home Secretary David Blunkett and US Attorney General Ashcroft sign UK/US Extradition Treaty
16 December 2003	Home Secretary Designates US under Extradition Act
1 Jan 2004	Extradition Act 2003 comes into force
12 Feb 2004	US requests extradition of NatWest Three (indicted in 2002)
March 2004	Eurojust issues Guidelines as to which Jurisdiction should Prosecute where more than one could do so.
31 October 2004	Commons European Scrutiny Committee writes to HO Minister Caroline Flint for her views on the Eurojust guidelines. No response ever received.
1 July 2005	Commons European Scrutiny Committee writes to HO Minister Andy Burnham for his views on the Eurojust guidelines. No response received until Feb 2006.
17 August 2005	Counsel for HO tells High Court in case of NatWest Three that 'forum non conveniens' has no place in criminal cases or extradition
23 Dec 2005	EC publishes Green Paper on Conflicts of Jurisdiction in criminal matters, seeking submissions from all Member States
Feb 2006	HO Minister Andy Burnham responds to European Scrutiny Committee request of July 2005 (by letter dated 31 July 2005, never received by the Committee at the time), saying that the HO is fully supportive of the Eurojust Guidelines, and the role of Eurojust in resolving cases of conflict where more than one jurisdiction should prosecute.

March 2006	Responses submitted to EC re Green Paper. The vast majority are for formal guidelines, formal exchange of information, judicial oversight and the recognition of defendants' rights. A-G Goldsmith on behalf of the UK proposes no formal requirements, and does not even mention the rights of defendants. However, states that if Eurojust's decisions are to be formalised, then would need judicial oversight.
March 2006	Amendments proposed to Extradition Act through Police & Justice Bill by Conservatives and Lib Dems. Would involve a forum clause, and the requirement that the US should have to provide evidence
July 2006	NatWest Three extradited
7 November 2006	Govt defeats Extradition Act amendments but puts forward its own version of 'forum' clause with a sunrise provision, vowing never to implement it.
27 Jan 2007	A-G Goldsmith publishes guidelines for prosecutors in cases involving the US
April 2007	US and UK ratify 2003 Extradition Treaty
30 Nov 2009	EU Framework Decision 2009/948/JHA formalises an obligation on Member States to exchange information in cases where more than one State could prosecute, but specifically states that it does not affect the rights of individuals to argue that they should be prosecuted in their own or another jurisdiction if such rights exist under national law.

The significance of the above is to demonstrate that the UK's extradition arrangements came into being amidst a climate in which the 'War on Terror' was being cited by every Government Minister as a reason for dismantling fundamental civil liberties. Thereafter, the case of the NatWest Three developed into an extremely vicious battle fought in the media, where the Government's position became entrenched, not by reference to common sense, logic or objective analysis, but by the total hatred of three men who had had the timerity to take on the Government's spin machine, and were winning.

By way of example of the standard of intellectual debate on the issue, the following is an extract from the Commons Hansard of 1st March 2006:

> **Sir Menzies Campbell:** Along with the outrage of Guantanamo Bay, there remains the continuing problem of the unequal extradition arrangements between the United Kingdom and the United States. How can the Prime Minister be comfortable with an extradition treaty that results in British citizens having inferior rights to American citizens, and which the US Senate shows no signs of ratifying?
>
> **The Prime Minister:** I do not accept that the rights of British citizens are subject to unfairness. I am very sorry to have to say this to the right hon. and learned Gentleman and the Liberal Democrats, but I sometimes wish that they would spend a little of the effort that they put into attacking the United States on understanding why these international

terrorism issues are so important, and why it is important that we stand with our allies in defeating global terrorism. *[Interruption.]* People can say what they like about it, but I am also entitled to say what I like about it. I find the uneven way that the Liberal Democrats always express themselves on this issue—*[Interruption.]* I am sorry, but I find it an affront, given what people are facing right round the world: a global terrorism that I would have thought we could unite against and defeat.

On 12th July 2006, there was an emergency debate in the House of Commons, which was nominally on the subject of the Extradition Act and the Treaty, but in practice was a last ditch effort to stop the extradition of the NatWest Three. An analysis of the Commons Hansard from that session would reveal that the shortcomings in the Act and the Treaty that are now the subject of the current consultation were well and truly aired.

The Commons Hansard from 24th October and 6th November 2006, and the Lords Hansard from 1st November and 7th November 2006, when the amendments to the Extradition Act were finally voted down by the Government's three line whip, show very clearly the paucity of intellectual rigour in the Government's arguments. Instead, their position was based on nothing other than bigotry, notwithstanding that the NatWest three were already in Texas by that time, and could never have benefitted from any subsequent law change.

V DETAILED ISSUES FOR THE CONSULTATION

THE POWER OF THE HOME SECRETARY TO STOP EXTRADITIONS

One of the central planks of the new Extradition Act was to limit the power of the Home Secretary in the extradition process, and thereby limit the scope for judicial review proceedings of what were effectively quasi-judicial decisions. The extradition courts should be the place for all arguments to be heard.

In my view this approach is wholly correct, and the framework of the Extradition Act has all but succeeded in this aspiration. With the notable exception of Gary McKinnon, there have been few if any judicial review proceedings against the Home Secretary's decisions, specifically because his decision-making powers are so limited.

If there were a way to remove even the limited powers that the Home Secretary has, and devolve them to the extradition courts, this would be better still.

THE EUROPEAN ARREST WARRANT

There is no doubt that the EAW system has its merits, and there have been some high profile cases which have benefitted UK prosecuting authorities.

However, the system is overwhelmed by trivial cases, costing vast amounts of taxpayers' money, and clogging up the courts. The Part 1 measures were the subject of intense criticism at every single stage of the legislative process from the original responses to the Home Office Review in 2001 through the passage of the Extradition Bill and ever since.

Harrowing cases such as those of George Symeou, Gary Mann and most recently Edmond Arapi demonstrate the appalling dangers of fast track extradition without evidence. Many of the Part 1 countries have both suspect legal systems, and prisons (in which extraditees will be incarcerated on arrival) which would shame a third world country.

Britain should follow the example of its European neighbours in its practical implementation of the Eurowarrant procedures. There should be common sense and practical safeguards built into the procedures, including the ability of the UK courts to request information or evidence, and to take representations on the practical situation that a defendant will face if extradited.

There should also be a de minimis threshold built into the system, allowing a defendant to make an application for a summary dismissal of the case if it would be regarded as trivial under UK law. This might prevent a sizeable number of cases ever being brought by prosecutors in countries like Poland.

Consideration should also be given to charging Requesting States for the costs of extradition, in return for a reciprocal undertaking. In strained economic times, the bringing of spurious and trivial cases is far less likely if the Requesting State will be presented with the bill for not only the legal costs of the case but any costs of incarceration if an individual has to be remanded in custody in the UK.

SHOULD CRIMES COMMITTED MAINLY IN THE UK BE TRIED IN THE UK?

With respect, this is the wrong question. As stated above, the fundamental principle should be that the interests of justice be served, and that an individual accused of a crime should not be able to escape justice. But given that the act of extradition is in many cases equivalent to a summary sentence without evidence, it should arguably be a last resort rather than the first.

The idea that the concept of honouring our international treaty obligations should always override the rights of individuals is simply preposterous. It takes no account of the fact that there may be absolutely no need whatsoever for an individual to suffer extradition, for him to be tried for his alleged crimes.

In an almost Kafkaesque irony, the current legal situation is that a person who was born in the UK and has never set foot abroad may nonetheless be extradited to face a life sentence in a foreign prison, on allegations unsupported by any evidence, and has no article 8 ECHR protections, notwithstanding that he is presumed innocent. By contrast, a foreign immigrant who has lived in the UK for only a few years before committing a serious crime might not be able to be deported thereafter, even though a convicted criminal and perhaps a dangerous person, because article 8 ECHR deems that he has a right to a settled family life here.

The better approach by far to the extradition issue would be to start with the question as to where a trial would be most appropriate in light of all the circumstances. Such an approach would have the following benefits:

- It would allow the extradition court to make a determination on the appropriate forum;
- It would prevent satellite proceedings with respect to some 'behind closed doors' decision by prosecutors as to the optimal venue for trial;
- It would be consistent with the approach adopted by most of our European partners;
- It would be consistent with the approach adopted by Eurojust.

In January 2007, in the aftermath of the extradition of the NatWest Three, the Attorney General Lord Goldsmith published a protocol for prosecutors in deciding which jurisdiction should prosecute in cases involving the US. This protocol allows for no review of the prosecutors' decision, no transparency of process, and was a cynical attempt to make a problem go away without actually changing anything.

The Eurojust Guidelines on which jurisdiction should prosecute, by contrast, provide a very good framework for decision-making, recognizing that defendants too have rights, and that a decision as to forum should not just seek the easiest venue for prosecutors. These guidelines, according to the CPS website, are now the formal basis for decision-making where cases involve European countries. See http://www.cps.gov.uk/legal/h_to_k/jurisdiction

The Eurojust guidelines are set out in full on this site, but the link to the protocol for US cases does not work!

The situation therefore is that the Eurojust Guidelines now cover our European cases. The US protocol covers the US cases. No other protocol exists for other countries, although the CPS website indicates that prosecutors should be able to use the Eurojust principles.

But there is currently no formal mechanism for judicial oversight of **any** decisions taken by prosecutors under any of the protocols or guidelines, unless a referral is made directly by a State to Eurojust. Defendants have no rights in the matter.

The 'forum' provisions in the Extradition Act have never been implemented, because they were given a sunrise clause and were put there by John Reid and Baroness Scotland in a shameless political manoeuvre in November 2006, in the full knowledge that the required affirmative resolution of both houses would never be forthcoming.

The implementation of these provisions, therefore, could be instant, and should be done forthwith, to give some relief in current cases. However, this would be a 'quick fix', and the causes themselves are flawed and need to be replaced. When the Conservatives and Liberal Democrats first put forward the amendments to the Act, in early 2006, the proposed forum provisions contained a presumption *against* extradition where a case could be heard in the UK:

> "If the conduct disclosed by the request was committed partly in the United Kingdom, the judge shall not order the extradition of the person unless it appears in the light of all the circumstances that it would be in the interests of justice that the person should be tried in the category [1 or 2] territory…."

By contrast, the clauses adopted by Reid and Scotland contain a presumption *in favour of* extradition even where there is UK conduct, unless the defendant can demonstrate firstly that there is sufficient UK conduct, and secondly that extradition would not be in the interests of justice.

> "A person's extradition to a category [1 or 2] territory ("the requesting territory") is barred by reason of forum if (and only if) it appears that –
>
> (a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and
>
> (b) in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory"

In my opinion, the original proposals by the Conservatives and Liberal Democrats are far the better proposition, for the following reasons:

- They are consistent with the view that territoriality has primacy, which is the cornerstone of the Eurojust Guidelines:

  > "There should be a preliminary presumption that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained. When reaching a decision, prosecutors should

balance carefully and fairly all the factors both for and against commencing a prosecution in each jurisdiction where it is possible to do so."

- They are consistent with the practical approach taken by most of our extradition partners;
- They put the onus of demonstrating that a trial should best be held abroad onto the people seeking that trial; and
- They are not open to abuse by foreign prosecutors in the way that the Reid/Scotland amendments are.

This latter point is directed in particular at requests from the United States, where the only conduct to which the courts currently have reference in making their decision is the conduct alleged in the indictment. Consequently, if the existing forum provisions in the Act were to become operable, US prosecutors would instantly be able to sidestep them by minimizing the amount of UK conduct that is referred to in the indictment, which is after all merely a construct of the prosecutors themselves.

Baroness Scotland, when Attorney General, wrote to all Peers in October 2009, expressing the reasons why she thought that activating the forum provisions was a bad idea. In summary, her arguments were as follows:

- There are already effective mechanisms for cross border co-operation between prosecutors;
- The judiciary are the wrong people to be making decisions on forum;
- Individuals already have a right to judicially review a prosecutor's decision on forum, so no mechanism is needed in the Extradition Act;
- A defendant might flee before the UK could prosecute him;
- It might be more difficult to hold a case here because witnesses for the prosecution might refuse to travel here; and
- Enacting the forum provision would put the UK in breach of its international Treaty obligations.

On the assumption that Home Office civil servants drafted the above series of arguments, and will presumably therefore be advancing them again as part of this consultation process, it would be worth addressing each of these points in turn.

Effective mechanisms already exist

The 'effective' mechanisms for cross-border co-operation are of course the Goldsmith protocol for US cases and the Eurojust Guidelines. Each in practice give prosecutors unfettered discretion, in a process that is manifestly untransparent, and in which the defendant or his attorneys are unlikely to have any input or role. There is no process of judicial oversight to such arrangements. A referral to Eurojust for arbitration, for example, is made by a State, not a defendant. Whilst the Guidelines are wholly good on paper, therefore, there is currently no means by which a defendant can have their use enforced.

The judiciary are the wrong people to make decisions

The judiciary in the UK routinely make decisions on forum in all sorts of cases. Indeed, in most countries the decision on forum in extradition may be taken de facto by the judge. The European Convention on Extradition specifically caters for such decisions, as does the European Union Council Framework Decision 2009/948/JHA:

> "This Framework Decision is limited to establishing provisions on the exchange of information and direct consultations between the competent authorities of the Member States and therefore does not affect any right of individuals to argue that they should be prosecuted in their own or in another jurisdiction, if such right exists under national law".

Judicial review is already an option

This line of argument is almost beyond belief. First, because it suggests that satellite proceedings to decide forum in front of a different court would be preferable to having the decision taken by the extradition court. The fundamental purpose of the Extradition Act was to remove the scope for costly and burdensome satellite proceedings.

Stranger still, however, is that this argument suggests that indeed the courts ***are*** well equipped to decide forum (in stark contrast to Baroness Scotland's earlier argument), but only via judicial review, rather than in extradition proceedings. Since the two might well be heard by the same court (as happened in the case of the NatWest Three, who brought a case against the Head of the Serious Fraud Office for refusing to investigate their case), the argument seems to be that a judge is incompetent to decide an argument on forum during the extradition proceedings, but competent to decide it in a separate judicial review.

A Defendant might flee

The argument appears to be that a defendant would not flee if the decision were made to extradite him, but would flee if the decision were made that a trial should take place in the UK. This seems vaguely implausible, frankly. If a defendant is deemed a flight risk, the extradition judge can order that he be remanded in prison. Since extradition proceedings take many months anyway, there is plenty of time for UK prosecutors to assemble sufficient evidence to bring domestic charges if the extradition fails. And in any event, if the protocols are working as well as Baroness Scotland suggests, then the prosecutors will already have exchanged all of the necessary information to enable a decision to be made on whether charges could be brought in the UK, and if they could not, then this fact would be relevant in the judge's decision on forum.

It might be harder to hold the trial in the UK

Such arguments would naturally form part of the process for deciding which jurisdiction should prosecute. The implicit assumption in Baroness Scotland's argument (that the attendance or otherwise of defendants' witnesses is irrelevant) is quite illuminating. The NatWest Three argued that if sent to Texas, they would be unable to access witnesses or documents vital to their defence, since all were in the UK. There being no platform for such arguments in the Extradition Act, they lost. Once in Texas, they did indeed find themselves utterly unable to access witnesses or documents, a fact which bore heavily on their ultimate decision to enter into a plea bargain. If an analysis had been done of their case using the Eurojust Guidelines, as part of a decision on forum, it is totally unthinkable that a UK court would have agreed to extradite them.

The forum provision would put the UK in breach of Treaty obligations

This is a ridiculous proposition. Not a single one of the UK's bilateral extradition treaties contains a provision allowing for a bar to extradition on human rights grounds, and yet such a bar exists (although perhaps in spirit rather than in fact) in the Extradition Act (ss21 and 87), along with others such as passage of time which also have no place in our bilateral treaties.

In summary, therefore, the Eurojust Guidelines provide an admirable framework for a decision on forum. All that is missing is judicial scrutiny of that process, and the ability for the defendant to partake. The Government could activate the existing forum provisions in the Extradition Act immediately to provide some relief for existing cases, but should revert to the original wording of the proposed amendments from 2006 in order to provide the correct mechanism and burden of proof. Since prosecutors are already supposedly following the guidelines as to which jurisdiction should be best to prosecute, they should have no difficulty in making their reasoned case before the extradition courts, where the defendant would be able to make his own representations.

IS THE US-UK EXTRADITION TREATY UNBALANCED?

There is not a lawyer in the UK outside of the Home Office, the Labour benches and the American embassy who believes that the US-UK Extradition Treaty is fair and balanced.

In December 2003, when arguing that the US should be designated by the Home Secretary under the Extradition Act, Home Office Minister Baroness Scotland stated as follows:

> If this order is approved, the United States will no longer be required to supply prima facie evidence to accompany extradition requests that it makes to the United Kingdom. This is in line with the new bilateral extradition treaty signed by my right honourable friend the Home Secretary earlier this year.
>
> By contrast, when we make extradition requests to the United States we shall need to submit sufficient evidence to establish "probable cause". That is a lower test than prima facie but a higher threshold than we ask of the United States, and I make no secret of that. The fact is that under the terms of its constitution the United States of America cannot set its evidential standard any lower than "probable cause".

Since that time, the Labour Government's arguments on the subject have morphed into the position that in fact there is no lack of reciprocity, and that the arrangements for each country are 'roughly analagous'. This position was most recently advanced by Baroness Scotland in her letter to Peers in October 2009:

16. The information that must now be provided in order for a US extradition request to proceed in the UK is in practice the same as for a UK request to proceed in the US. It is important to stress that in both cases the standard of information which must now be provided for an extradition request to be accepted is the same as must be provided to a criminal court in that country in order for a domestic arrest warrant to be issued. When the UK makes an extradition request, the US courts must be satisfied there is information demonstrating a probable cause to issue an arrest warrant. Probable cause has been defined as, for example: "facts and circumstances ... sufficient to warrant a prudent person to believe a suspect has committed. is committing, or is about to commit a crime" (United States v Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989)). When the US makes a request, UK courts must be satisfied that there are reasonable grounds for suspicion to issue an arrest warrant. Reasonable suspicion has been defined (by Lord Devlin) in the following terms: "circumstances of the case ... such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence". While development of the criminal law in the two countries means that there are semantic differences between these two tests the crucial point is that in both cases the standard of information to be provided is exactly the same as must be provided in order to justify arrest in an ordinary criminal case in that country.

17. As can be seen then, the standards to be met by the two countries in extradition cases are as close as is possible given our different legal systems. It is also important to stress that prior to issuing an extradition request to the UK a US case must in any event satisfy a US court that there is probable cause justifying the issue of an arrest warrant. On this basis, even if there were any fears as to an imbalance between the requirements imposed by the treaty (which for the reasons set out above is an argument that doesn't withstand any scrutiny) the manner in which extradition requests are made by the US must surely allay those fears completely.

Stepping away from the legal analysis, the redundancy of this argument is obvious. In practical terms, a US prosecutor can obtain the extradition of a UK citizen without ever testing a single piece of evidence in either a US or a UK court, contrary to the assertion of Baroness Scotland in paragraph 17 of her letter. By contrast, a request from the UK to extradite a US citizen must be accompanied by evidence which can be tested and argued by the defendant in the US extradition proceedings.

What has frequently been lost in the fog of this technical argument is an understanding of how indictments are brought in the US. A prosecutor convenes a Grand Jury, consisting of 16 or more individuals, who are likely to have little or no legal training or experience. They are ordinary members of the public. He presents as much or as little as he wishes of his case, and asks for the Grand Jury to return an indictment. There is no judicial oversight. The defendant has no right of audience or argument in the proceedings, and indeed may even be oblivious to them. If the prosecutor chooses to hide or ignore exculpatory material, there are few practical sanctions. As Sol Wachtler, the former chief justice of the New York Court of Appeals once observed, a determined prosecutor could 'indict a ham sandwich'.

Armed with this indictment, the prosecutor has all that he needs to submit a request under the Extradition Act, safe in the knowledge that no UK court can request to see any evidence. It has often been argued by the Labour Government that attempts to restore an evidential requirement to the Treaty smack of anti-Americanism. They do not. They merely recognise what every other country on the planet already does, which is that since charges can be brought by a US prosecutor without ever presenting evidence to a court, the extradition process should therefore provide a system of checks and balances to what would otherwise be too great a temptation to prosecutors to cut corners, knowing full well that the act of extradition provides an almost guaranteed successful result through plea bargain.

Senior Judge Timothy Workman testified to the Commons Home Affairs Select Committee in November 2005 that if the Extradition Act 2003 had been in force in early 2002, he would probably have been powerless to prevent the extradition of Lotfi Raissi, sought by the US on entirely false allegations that he had trained the 9/11 pilots; allegations which they were unable to substantiate with evidence at the extradition hearing because no such evidence existed.

There are many very troubling cases involving US prosecutorial abuse, at the very highest level. That is not to say that all US prosecutors are bad people who will cheat given the chance. But to ignore the issue completely, and assume, as our courts do, that anything that a US prosecutor says must be true is an extremely dangerous course of action. The indictment against the NatWest Three turned out to be largely fabrication, but under the terms of the Extradition Act its contents were taken as fact by the courts, and quoted as such in the numerous judgments. Of cardinal importance in establishing a nexus with the US was a meeting in Houston, Texas, that was said by the prosecutors to be pivotal in the alleged conspiracy to defraud. After their extradition, the prosecutors conceded that this meeting was in no way connected to any scheme to defraud. But the damage had been done by then.

There is another important feature of the US criminal justice system that makes it stand out from almost every other nation in matters of extradition. The US adopts a very aggressive extraterritorial view of its jurisdiction, and can criminalise conduct by people who have never

set foot in the country. In that sense, it is almost unique, and most countries realise this and have crafted their extradition arrangements with appropriate safeguards.

The US has developed into an extremely hostile environment for criminal defendants. The costs of litigation are vast, and non-recoverable. Both prosecutors and judges routinely seek political office. Prosecutors often leave public service to move into lucrative white collar defence work on the back of their record. The rules of evidence are skewed horribly in favour of the Government. The plea bargaining system effectively renders the prosecutor judge, jury and executioner, as the disproportionality in sentencing between going to trial and losing, and entering a guilty plea, can be truly vast.

In one such case in 2004, a defendant named Jamie Olis, who refused to enter into a plea bargain, and lost at trial, was sentenced to 24 years in prison, whilst his two co-defendants who agreed to enter a plea were given sentences of 15 months and 30 days respectively. Faced with such overwhelming odds, nearly 98% of people indicted in the Federal system enter into a plea bargain rather than opt for trial. Add to this hostile environment the psychological pressure of being a foreign defendant who has been extradited, and who will almost certainly be incarcerated thousands of miles from home and family, it is close to a statistical certainty that anyone extradited to the US will be convicted, irrespective of their innocence.

Labour politicians and doubtless Home Office civil servants will argue that to renegotiate the Treaty would cause a major diplomatic incident. I suspect this is improbable. There is no evidence that the US demanded the right to seek extradition without evidence. It is more likely that it was an act of unilateral folly by a UK Government led by a Prime Minister falling over himself to ingratiate himself with President George W Bush. That the US Constitution would prohibit a US citizen being sent abroad without a case being made in a US court should be reason enough for them to accede instantly to a request for the same courtesy in return.

Indeed, some three years after the US-UK Treaty was negotiated, the US signed new extradition treaties with Macedonia, Latvia, and Estonia, in each of which it was happy to support its requests for extradition with evidence.

Home Office Minister Andy Burnham testified to the Commons Home Affairs Select Committee in November 2005 that it was the new arrangements with the US that had dramatically reduced the time taken in extradition proceedings, implying that to reinstate the evidential provision would slow up the process once more. This was and remains utter nonsense. The UK process would be entirely unaffected by whether a Part 2 country had to provide evidence, since the Part 2 legislation assumes already that they do, and it is only by designation that this obligation is removed. The timetable of proceedings is unaffected by designation.

Two extremely long running UK cases (and probably many more) might well never have been brought if the US had had to produce evidence in support of its requests.

Gary McKinnon is of course a very high profile case commanding huge public sympathy, and where a requirement to prove the damage asserted in the indictment might have proved difficult, but a less well-known case is perhaps the more shocking. Babar Ahmad, a young Muslim man from Tooting, has been a Category A prisoner on remand in the UK since

August 2004, pending the decision of the ECtHR on his extradition case. To put that in perspective, this man has already served the equivalent of a sentence of nearly ***thirteen*** years, under the harshest possible terms of confinement, for an alleged offence which had been thoroughly investigated by the UK authorities in 2003, and on which no evidence was found that merited a prosecution. Ahmad was horrendously beaten on arrest by the UK police, who have since been ordered to pay him £60,000 in compensation for his injuries, and four officers face criminal trial in relation to the assault.

The US authorities put together an indictment based on exactly the same evidence on which the UK authorities had found no case to answer, and claimed jurisdiction because a single website of Ahmad's was hosted temporarily through a US sever. Senior Judge Workman described the case as 'deeply troubling', because his hands were tied by the Extradition Act, and the parallels with the case of Lotfi Raissi are striking.

It is notable that the NatWest Three were indicted in the summer of 2002, but their extradition was not sought until February 2004, some six weeks after the coming into force of the Extradition Act.

In summary, if the purpose of the US-UK Extradition Treaty was to render the UK formally the 51st State of America in matters of criminal justice, then it fulfils that purpose admirably. On any other basis, it is an affront to justice and the citizens of Britain. Renegotiation could be done with the minimum of fuss, and article 24 of the Treaty provides for termination by either side on giving just 6 months' notice through the diplomatic channels.

SHOULD REQUESTING COUNTRIES BE REQUIRED TO PROVIDE EVIDENCE?

In an ideal world, the answer to this question would be 'yes'. However, the practicalities of the Eurowarrant procedure might preclude it. I am not sufficiently well versed in European Law to know whether the requirement would involve renegotiation of the whole Framework Mechanism. The idea, however, that the legal system in Italy or Albania is of the same standard as that of the UK is naïve. Equally, the practicalities of extraditing UK citizens to certain EU countries whose prisons are of scandalously low standards, without a prima facie case ever having been made, is dreadful.

There are many possible answers to the conundrum. The first is to introduce an evidential test for all. This would be 'position A'. In the absence of that, and in recognition that we are now more than ever tied to the European law, perhaps the UK could come into line with most European countries by adopting the personality approach to extradition, and making it harder to extradite UK citizens, with the quid pro quo being an agreement to prosecute in the UK if the requesting state asks for it, which would be entirely in line with the European Convention on Extradition.

Irrespective of the outcome on the above, I believe that where a UK citizen or someone ordinarily resident in the UK is to be extradited to face trial in a foreign country for any offence other than offences against a person, it should be mandatory for the Requesting State to give assurances that the person will be returned to the UK on bail after arraignment, and will be able to serve the entirety of any sentence imposed upon conviction in a UK prison, subject to UK rules.