

JUSTICE Briefing on Extradition to the US
The UK-US Treaty of March 2003 and the EU-US Agreement of June 2003

INTRODUCTION

1. In March of this year, the UK government signed a new extradition treaty with the United States of America (US) under the Extradition Act 1989. This treaty has not yet been ratified and is currently before the US senate. It will be ratified in the UK by way of an Order in Council. If that Order is made under the current extradition legislation it will be made by way of the negative procedure. It is likely that, if it is made under the new extradition legislation currently before Parliament when that comes into force, it will be subject to positive resolution procedure and will need to be approved by both Houses of Parliament. In June of this year, the Greek Presidency of European Union (EU) signed an agreement on extradition, along with another on mutual legal assistance with the US on behalf of the EU. This agreement will need to be ratified separately in each Member State once it has been approved by the US senate.
2. This briefing aims to highlight the key issues in relation to the UK's extradition arrangements with the US posed by these two treaties. It is hoped that this information will serve to inform the ongoing debates on the extradition bill and bring into focus the implications of increasingly streamlined judicial co-operation with the US and its contingent paring down of protections for civil liberties.

A - THE UK-US TREATY

3. The UK-US Treaty was signed at the end of March 2003 but no text was available to the public until the end of May 2003. The text of the treaty itself was not, therefore, available for scrutiny or comment prior to signature and no real justification has been given for the delay in making the text public.
4. The most notable issue arising out of the text of the UK-US treaty is the abolition of the requirement for evidence of a prima facie case in requests from the United States

for extradition from the UK. Article 8(3)(c) of the Treaty, however, maintains the requirement for “probable cause” for requests issued by the UK for extradition from the United States.

5. The justification that has been given by the Government for this lack of reciprocity is that the United States has a constitutional protection which prevents it from extraditing a US citizen purely on the say-so of a foreign government. As the UK does not have such a constitutional protection, the UK is at liberty to forego this important safeguard in the interests of speeding up extraditions to the US.
6. There are a number of reasons why the United States should not be considered as equal to Council of Europe countries in terms of international co-operation despite concerns as to the human rights records of some of the Council of Europe member states.
7. Firstly, the United States maintains the death penalty whereas all Council of Europe member states have either abolished the death penalty in accordance with Protocol 6 to the European Convention on Human Rights (ECHR), or have demonstrated their commitment to doing so by suspending, de facto, the application of the death penalty. The entry into force this week of Protocol 13 to the ECHR abolishing the death penalty even in times of war is a further step for Europe in putting an end to the death penalty.
8. Secondly, the United States is not accountable to any international court and has shown in the past its disregard for judgments from international tribunals such as the International Court of Justice (ICJ). In 1999, the State of Arizona executed a German national in breach of an ICJ order for provisional measures to suspend the execution pending a judgment in relation to a breach of international obligations¹. The United States Solicitor-General in that case took the position, inter alia, that “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief”². Any breach of international obligations or human rights which might occur following extradition to the United States would not be effectively judicially reviewable. Such breach which might occur in relation to a Council of Europe country would give rise to an application under the ECHR.

¹ LaGrand Case (Germany v. USA), Judgment of 27 June 2001.

² Ibid. at para 33

9. Thirdly, while states that are members of the Council of Europe may be held politically accountable for breaches of their international obligations through pressure in the Committee of Ministers, the United States is not politically accountable to any international organisation.
10. The recent case of Lotfi Raissi, the Algerian pilot who was arrested on holding charges in a US extradition request shortly after September 11th 2001, to be released five months later when no evidence to support the request was forthcoming calls into question the validity of a decision to remove the safeguard of the prima facie evidence requirement in relation to the US. Under the new treaty, Lotfi Raissi could potentially be the subject of a new request for which no evidence would be required. The conditions of detention of many non-US nationals being held in legal limbo in the United States and Guantanamo Bay as well as the potential use of ad hoc quasi-military tribunals within the context of the “global war on terrorism” raise doubts as to the compatibility of a reduction in safeguards for extradition to the US with the human rights obligations of the UK under the Human Rights Act and the ECHR.
11. The case of Derek Bond, the British national arrested in South Africa on a US extradition request which turned out to be based on mistaken identity is another demonstration that requests for extradition to the United States cannot necessarily be taken on face value and that procedural safeguards must be maintained in extradition to countries which retain the death penalty and are not judicially accountable for their actions.
12. A further point of concern in the UK-US Treaty is the rule on specialty outlined in Article 18. The principle of specialty in extradition means that a person should not be tried, following extradition, for an offence committed prior to extradition other than that which he was extradited for. There has in the past been the possibility for the requested state to consent to prosecution for other extraditable offences after extradition. The new treaty, however, allows the Secretary of State to consent to “detention, trial or punishment” (rather than simply prosecution) of the extraditee for any offence, not just an extraditable offence, by waiving the principle of specialty. Article 18(1)(c) appears to allow for the possibility of the Secretary of State consenting to indefinite detention in Guantanamo Bay for an offence other than that which a person was extradited for once that person has been returned to the US.

B - THE EU-US AGREEMENT

13. The Agreement signed recently between the EU and the US relating to extradition is most controversial in the lack of transparency that accompanied its negotiation. The text was finally made public for scrutiny in July following letters to the Greek Presidency from the UK Parliament indicating that effective parliamentary scrutiny would be impossible unless the documents were made public.

14. The Agreement is designed to establish a base line of extradition practice between Member States of the EU and the US. It is open for Member States to go further than this agreement in setting up swifter extradition procedures in their bilateral arrangements with the US. From a UK perspective, the EU-US agreement poses no obvious concern as our bilateral arrangements go much further and deal with issues that the EU-US negotiators were unable to reach agreement upon. For example, the EU-US extradition agreement does not address the issue of evidence. It seems that this was because the United States was intractable on the issue of the “probable cause” requirement so that, in the absence of reciprocity, agreement on this point would have been impossible. There was no agreement on the issue of non-extradition of nationals but this does not affect the UK which makes no distinction between nationals and non-nationals in terms of extradition.

C - THE DEATH PENALTY AND OTHER HUMAN RIGHTS ISSUES

15. The UK-US Treaty deals with the issue of capital punishment cases at Article 7 where it states that ‘the executive authority may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.’ It is difficult to understand why the provision does not impose an absolute bar to extradition where the death penalty may be imposed in accordance with Protocol 6 of the ECHR and the European Court of Human Rights judgment in *Soering v United Kingdom*.

16. The provisions relating to the death penalty in the EU-US agreement are not as strong as might have been hoped for. The agreement allows for extradition to be

denied in the absence of assurances regarding non-imposition of the death penalty but does not make it mandatory. This means that capital punishment cases will continue to be dealt with on a case by case basis. It is clear, under European law, that extradition to a state where the death penalty may be imposed is contrary to international human rights obligations. It is a shame that the EU did not take the opportunity of clarifying the European legal position vis a vis the death penalty in this agreement by introducing a blanket bar on extradition where the death penalty may be imposed.

17. Neither the UK-US nor the EU-US Agreements address other human rights issues relevant to the current politico-judicial climate such as ad hoc military tribunals or indefinite detention in facilities such as Guantanamo Bay. These problems have not been addressed and the Agreements do leave the door open for extraditions that might result in detention or trial as an “unlawful combatant” after extradition. These agreements do nothing to enhance human rights protections in extradition in a political climate where it is crucial that those values enshrined in the European Convention on Human Rights and its Protocols be defended both at home and abroad.

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