A MESS OF POTAGE

The US/UK Extradition Treaty of 2003 is an odious document, and its history does little credit to Tony Blair's Government. From its original conception in early 2002, through to its incorporation into domestic UK law in the disastrous Extradition Act 2003, everything about it smacked of a desire by the Government to ingratiate itself with our then closest ally, at the expense of the rights and liberties of British citizens.

The Treaty was negotiated and signed in secret. During negotiations its existence was apparently concealed even from the Home Office Minister responsible for guiding the Extradition Bill through Parliament. Its text was laid before Parliament on the day before the Whitsun recess in May 2003, some two months after it had been signed, ensuring that few MPs ever noticed it.

Several years on, current and former Government Ministers remain obstinate in their refusal to accept that the Treaty (and the Act) are fatally flawed, and in maintaining that position they do this country an enormous disservice.

Even before the 9/11 atrocities, there was broad consensus that the existing extradition arrangements were inefficient, and needed to be fixed. They were cobbled together from a series of bilateral treaties, a multilateral European Convention, and the Extradition Act 1989; this framework produced a lengthy and sclerotic system where extradition requests frequently took many years to wend their weary way through numerous levels of appeals and judicial review proceedings. Its only beneficiaries, in shades of Dickens' *Bleak House*, were the armies of lawyers who could live fat off the proceeds of interminable legal wrangling.

Early in 2001, the Home Office had published a consultation paper on the subject of the UK's extradition arrangements with the rest of the world. In the foreword, Jack Straw (then the Home Secretary) stressed how important extradition was, in an age of increasing cross-border crime, to prevent criminals committing a crime in one country and then fleeing to another country to avoid justice.

The paper foresaw a radical overhaul of our extradition system, to make it less time consuming, and altogether more streamlined and efficient. It also indicated that the UK would, as part of the process, probably need to renegotiate treaties with some of our more important bilateral partners.

Then came 9/11.

In the immediate aftermath, it was natural and right that the international community should stand squarely with America in its determination to take on the increasing threat posed by international terrorism in general and Al Qaeda in particular. The US had long complained about the time taken to extradite people from the UK (the average request took 30 months to process); in the new climate, renegotiation became a priority.

We may never know exactly whose idea the substance of the new Treaty with the US was. The Home Office has refused to reveal details of the negotiation process, citing confidentiality concerns expressed by the US State Department. What is known, however, is a broad timetable of events, which indicates that the first draft of the new Treaty was sent by the US Department of Justice to the Home Office on 8th February 2002. There can be no doubt that the US drafted the treaty; in its final form it retained much US spelling, including words such as "offense", as distinct from the British "offence".

There is also no doubt that David Blunkett was responsible for overseeing the process, and if anyone is to blame for the mess it is him. He was at the helm of the Home Office throughout this period, from his appointment as Home Secretary on 8th June 2001 to the signing of the Treaty in Washington on 31st March 2003. He apparently allowed the negotiations for the treaty, which took place throughout 2002, to be undertaken almost exclusively by civil servants, without a single Ministerial level meeting.

Tony Blair subsequently defended its provisions on numerous occasions by reference to the War on Terror, but that is simply no excuse.

The Treaty breaches the most fundamental canon of international relations and comity; it is non-reciprocal. Much attention has been paid to the principle involved here. What has attracted less comment is the far more frightening practical consequence; it exposes all UK citizens to the whim of a US prosecutor.

If the UK wishes to extradite someone from the US, we must produce evidence sufficient to convince a US magistrate judge, in an evidentiary hearing, that there is "probable cause" that the alleged offence has been committed. The defendant has the right to challenge the evidence and bring forth evidence of his own. This is how it has always been; the new Treaty makes no change to the evidential position for requests from the UK to the US.

The US, on the other hand, has merely to present an allegation of wrongdoing and a simple statement of facts. There is nothing that a British

defendant can do to challenge those facts, and the British courts are powerless to intervene. The US asks for you, the US gets you, without producing a shred of evidence.

There is one legal process that is meant to stand between you and the overzealous prosecutor, but it's not on the British side of the process. It is the Federal Grand Jury.

Unsurprisingly, the US system is based in large part on the British model, and in several respects it has maintained ancient legal concepts that have long been done away with in Britain. The Grand Jury is one such concept, formally recognised in Magna Carta in 1215 but with roots that can be traced back to the time of Ethelred the Unready in the 10th Century. In the UK, it was abolished in 1933 and replaced by committal proceedings overseen by a judge who takes a view as to the sufficiency of evidence, in a process which is transparent and gives rights to both sides. Most other countries which were based on the British system (such as Canada, New Zealand and Australia) have followed suit. But in America, the Grand Jury remains enshrined, or fossilised, in the Constitution long after it has ceased to function as an effective check on government power.

The Federal Grand Jury is a panel comprised of up to 23 and no less than 16 members of the public, whose job it is to review a case produced by a prosecutor to determine whether, in their view, there is "probable cause" of an offence. This panel, which sits secretly and will likely hear only the prosecutor's side of the case, involves no judicial scrutiny whatsoever. The defendant has no rights, can produce no evidence, and indeed may not even be aware that the proceedings are happening.

To that extent, it is widely regarded as a rubber stamp, the plaything of the prosecutor, and rarely comes up with an answer other than "a true bill", meaning that the indictment (the charging document) can be brought against the defendant. The defendant has no rights in the Grand Jury proceedings, and indeed may not even be aware that they are happening. In 1985, Sol Wachtler, former chief judge of New York's court of appeals, was quoted as saying that a determined prosecutor could get a Grand Jury to "indict a ham sandwich."

Once an indictment has been handed down by the Grand Jury, the US prosecutor has substantially all that he needs to secure the extradition of a UK citizen under the 2003 Treaty. Under the old 1972 Treaty, the prosecutor would have to bring his evidence to a UK court, and demonstrate that it met the test of a "prima facie case" (the UK equivalent of probable cause), in a hearing before a magistrate at which the defendant would have the rights to challenge the prosecutor's case. No more.

Under the terms of the 2003 Treaty, the prosecutor need provide nothing beyond the indictment and some evidence of identification of the person sought. The UK courts are powerless to demand that a case be shown, and the defendant has no ability to rebut any of the allegations or bring forth evidence of his own.

The dangers of the arrangement are perhaps best illustrated by the cases of Lotfi Raissi and Alex Stone. The extradition of the former was sought under the 1989 Act (and the 1972 Treaty), when evidence was required. The latter was sought under the 2003 Act, when it was not.

Lotfi Raissi was a man of Algerian extraction, living just outside of Heathrow. On 21st September 2001, he became the first person to be arrested in the aftermath of 9/11, following an FBI claim that he had trained some of the 9/11 pilots. He had lived for a time in Phoenix Arizona, and in 1998 he attended the same flight school which earlier trained Hani Hanjour. Hanjour was named as the pilot who flew American Airlines Flight 77 into the Pentagon.

When first arrested, along with his brother and his wife, the FBI made it clear that they intended to produce clear evidence linking Raissi to the hijackers. However, the only charge on which he was initially held was of lying on his application for a pilot's license, having failed to declare knee surgery following a tennis injury. His brother and wife were released without charge, but he was remanded in custody at Belmarsh High Security Prison, pending the formal extradition proceedings which would be accompanied by evidence of the allegations against him.

These allegations, according to the Crown Prosecution Service (which acts on behalf of the US Government in extradition proceedings) sounded substantive. The FBI had supposedly discovered Raissi's name in a rental vehicle belonging to one of the hijackers, and a raid on Raissi's home had turned up video evidence of him and Hani Hanjour celebrating together on his computer. Further telephone records confirmed their suspicions that he had trained four of the hijackers in an effort to help support terrorism against U.S. interests, and his pilot logbook was missing all data from March 2000-June 2001.

After 5 months, no evidence had materialised. At the extradition hearing, the video that purported to show Raissi and Hanjour turned out to have been of Raissi with his cousin. The magistrate duly denied the extradition and released Raissi. Several years later, the FBI would admit that it was mistaken in its identification of Raissi as having anything to do with the 9/11 plot.

Luckily for Mr Raissi, he had not been extradited. The requirement for the US to provide evidence had saved him. Regrettably, however, he had lost his job, as had his wife and the wife of his brother, the former having worked for Air France and the latter at Heathrow airport. He went on to sue the UK authorities for wrongful imprisonment, and in April 2010 was told by the Justice Secretary Jack Straw that he might be able to claim up to £2 million in compensation for his wrongful detention, and the devastating consequences thereof, including having been unable to work for the previous 8 years.

It is terrifying to think what would have happened to Mr Raissi under the new extradition regime. As the senior District Judge presiding over the case, Timothy Workman, told the Commons Home Affairs Select Committee in evidence on 22nd November 2005, he would in all likelihood have been powerless to prevent the extradition, even on the limited charge of dishonestly obtaining a pilot's licence, as lack of evidence would have been no impediment under the 2003 Act.

Had he been extradited, it would in all likelihood have been the last that anyone would have seen or heard of Lotfi Raissi. A conspiracy theorist might see more than coincidence in the fact that the first draft of the new Treaty was produced by the Department of Justice at almost exactly the time that Raissi's case was being thrown out by Judge Workman.

Alex Stone was not so lucky.

Stone was a thirtysomething blind man from South London who moved to Liberty, Missouri, in November 2003 after meeting a woman called Alma through a specialist blind dating website.

Very shortly after Alex had moved in with Alma, her son Zachary was taken to hospital suffering from a persistent cold. While there, he was X-Rayed and found to have sustained fractures to both arms and legs. In the days that followed, suspicion fell on Alex. He was interviewed by the police and informed that he was a suspect, but not charged.

Alex instructed a lawyer who advised him that since there were no charges, and he was convinced of his innocence, he should return to the UK, which he duly did.

He had not been back in the UK long when he heard that he had been charged in the US with first degree assault on a minor, a felony offence carrying a penalty of 10 to 30 years in prison.

In November 2004 he was arrested pursuant to an extradition request. In mid-2005 he was put on a plane at Gatwick along with three other extraditees, and flown in chains to America.

He spent six long months in Liberty County Jail, locked up for 23 hours a day, his isolation made worse by his blindness. At the end of this time, his attorney put it to the prosecutors that they had no case. Indeed they did not. Expert witnesses for both sides agreed that the injuries sustained by Zachary had occurred substantially before Alex Stone had ever set foot in America, and suspicion had by now fallen on another family member.

Rather than just let him go, however, the prosecutors told him that if he agreed to plead guilty to the lesser offence of leaving the country in the course of an investigation, they would recommend that he was sentenced to time served. He agreed, and was finally allowed to return to Britain in February 2006, saddled with a criminal record and debts of £50,000. As he was convicted, he had no rights to seek damages from anyone.

Apologies from the Department of Justice are like rocking horse manure. Alex Stone has never had one, nor Lotfi Raissi.

The fact is that mistakes are made. Some are honest mistakes. Others perhaps less so. But the consequence of the 2003 Extradition Treaty is that the impact of these mistakes, and sadly of cases where the prosecutor knows full well that he has little or no evidence, now falls fairly and squarely on the shoulders of British citizens. They have no right to contest the matter in a UK court.

By a supreme irony, considering the gross imbalance in favour of the US in the new Treaty, it was vociferously opposed by the powerful Irish American lobby in the US, who are well represented in Congress and the Senate. The Ancient Order of Hibernians described the Treaty as a “British dagger pointed at the heart of Irish America”.

At issue was the status of “on the run” Republican terrorists, many of whom had escaped to the US from Northern Ireland in the 1970s and 1980s, and settled in places like Boston and Chicago, where republican sympathies run strong. Numerous attempts to extradite them over the years prior to the Good Friday agreement had failed to meet with a single positive result. The American courts time and again ruled that any offences committed by these people were political in nature, and the 1972 Treaty contained a clear exemption from extradition for political offences.

The new Treaty, by contrast left the decision as to whether a given crime was political in nature to the Executive branch (ie the Government), rather

than the courts. One of the many things on which America is strong is the separation of powers between the Judiciary and the Executive, and so there were clear Constitutional levers here for the disaffected.

In America, Treaties have the force of primary legislation. Unlike the UK, they do not need other legislation to give them life. As a consequence, Treaties are subject to scrutiny first by the Senate Foreign Relations Committee, and then by the full Senate, before being passed to the President for his signature. Only once this process is complete can the Treaty be ratified, at which point it becomes part of US law.

In the face of strong opposition to its provisions by the Irish Americans and the American Civil Liberties Union ("ACLU"), the Senate Foreign Relations Committee consistently kicked the Treaty into the long grass. They would doubtless have continued to do so ad infinitum had our case not provoked such outrage in the UK.

One of the things that the press were to focus on most during our fight was that we were effectively being extradited under the terms of a Treaty which the Americans themselves had not even ratified, and which was thus not law in America.

It is important to clear up a common source of confusion here: The Government rather cleverly seduced a lot of the press (and a substantial number of their own backbenchers) into believing that once the Treaty was ratified in the US, the perceived imbalance had disappeared. This was nonsense. The ratification made exactly no difference to the issue of non-reciprocity. The imbalance exists in the Treaty itself, and it remains to this day. We still have to provide evidence to a US court, exactly as under the old Treaty. They have no such obligation.

But in the short term, the US had no incentive to implement their side of the new treaty. It was a complete mess. Not only had the Home Office sold its citizens down the river when negotiating the Treaty, but they had got themselves into a position where the US could take advantage of its provisions without even having to sign up to it. As diplomatic exercises go, Neville Chamberlain would have struggled to better this one for cock-up.

This situation persisted beyond our extradition, to the acute embarrassment of the British Government. Tony Blair himself lobbied for ratification, along with Home Office Minister Baroness Scotland.

The matter was finally dealt with at the end of 2006, when the UK Government made yet another compromise to get the Senate Foreign Relations Committee and the Senate to ratify the Treaty. They agreed that

the terms of the new Treaty would not apply to any of the "on the runs" in America, and when the Senate passed the resolution agreeing the Treaty, this promise was explicitly included in it.

Tony Blair had time and again defended the arrangements by reference to the War on Terror, but you see there's "terror" and then there's "terror". As Mr Blair was to say in August 2005, a month after the tube and bus bombings in London, the rules of the game had changed.

As if to rub salt in the wound, the US in 2006 ratified new extradition treaties with Macedonia, Latvia and Estonia. In each of these, the US was happy to provide evidence to support its requests for extradition.

In fact, in the entire world the only country other than Britain that will extradite its own citizens to the US without evidence is Ireland, and they will not do so if they could try the case at home. Ours truly is a "special" relationship. Home Office Minister Caroline Flint described the arrangements as "best modern practice in extradition". George Orwell would have been proud.

Proponents of the Treaty (confined mostly to the Labour benches) have argued that since we have allowed the extradition of UK citizens to upwards of forty countries without evidence since 1990 before the 2003 Act even came into force, therefore we should have no qualms about the addition of America to their number. So why single out America for criticism?

Well, the simple answer is that forty wrongs do not make a right. Our story concerns America, and so much of this book is inevitably US-focused, but I happen to think that the concept of extraditing to *anywhere* without evidence is a bad idea. Since the implementation of the 2003 Act on 1st January 2004, hundreds and possibly thousands of UK citizens have been carted off to foreign lands to face imprisonment or trial for alleged offences which have never been in any way tested in a UK court. I find that deeply offensive. It drives a cart and horses through both the presumption of innocence and habeas corpus. It is fundamentally bad law.

Having said that, there are in any event two important issues that distinguish the US from all of these other countries.

The first is this. Every other country with which we have arrangements allowing extradition without evidence has a system where an extradition request requires some judicial analysis of evidence in the requesting country. In those Commonwealth countries where the Grand Jury has been replaced by committal proceedings, the evidence is brought by the prosecutors before a court and it is tested in a transparent forum before a

judge. In the Continental European countries (which operate an "inquisitorial" system rather than an "adversarial" system), it is an investigating magistrate who decides whether the evidence is sufficient to bring charges against an individual.

To the very best of my knowledge, therefore, the US is the only country to which we allow extradition without evidence, that has a system which involves no judicial scrutiny of evidence whatsoever. In effect, the prosecutor is the one who decides whether you are to be extradited. Now call me old fashioned if you will, but that just isn't cricket.

The second reason that the US can be distinguished from all the other countries is that it pursues an aggressive and expanding extra-territorial approach to criminal justice. The US criminalises conduct that occurs far beyond its own borders, and its prosecutors will willingly pursue people who have never set foot in the country. Whilst extra-territoriality is a feature of certain other criminal systems (notably Germany), the *practice* in these countries is generally that they prosecute crimes on their own soil only.

In the years following the enactment of the new arrangements, many compelling arguments were advanced as to why they should be changed. Outside of Parliament, the Home Office consistently refused to engage, probably because they knew that they could not win the moral or intellectual battle. Such is democracy.

This led to the most astonishingly one-sided episode of Clive Anderson's radio show *Unreliable Evidence* on Radio 4 in December 2007, a couple of weeks after we had entered our guilty pleas in Texas, and shortly before the cases of Ian Norris and Gary McKinnon were to be considered by the Law Lords. Both Norris and McKinnon had been contesting their extraditions since 2004, the former on charges of price fixing, and the latter of computer hacking.

On Clive Anderson's programme that day were Alun Jones QC, John Hardy and Ben Cooper, all barristers involved in both prosecuting and defending extradition requests, and a US attorney called Buddy Parker, who was formerly a prosecutor in the Department of Justice's narcotics division. The Home Office as usual fielded a piece of paper on which was the normal written statement.

The "debate" was nominally on the whole of the Extradition Act, but focused largely on the practical issues encountered by defendants facing extradition requests from the US, and what if any protections are provided by the Treaty and the Act.

I was particularly interested in listening to the programme since Alun Jones had defended our extradition case, while John Hardy had acted for the US Government. I was expecting there to be some fireworks, and I imagine that the producers thought that they would be able to get some contrary views on the subject. If so, they must have been disappointed. To a man, the panelists took the opportunity to say that the Treaty and the Act were singularly deficient. John Hardy described Blunkett's decision to sign the Treaty as an example of Government malfunction.

At the end of the programme, Clive Anderson asked each of the panelists in turn what they would do to make the arrangements better. John Hardy suggested scrapping the Extradition Act altogether and starting again, as it was clearly "unfit for purpose". When offered the opportunity to give his own views, Buddy Parker suggested that perhaps we just needed a better Government.