The UK/US Extradition Treaty

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In March 2003, a new extradition treaty between the United Kingdom and the United States was signed. The most significant difference between the new treaty and the previous one (which was signed in 1972) lies in the Article specifying the documents which must accompany an extradition request. The old treaty required the request to be accompanied by such evidence as would justify the person's committal for trial according to the law of the state from which extradition was sought, including evidence that the person requested was the person to whom the arrest warrant referred. The new treaty requires, *for requests made to the United States*, such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested ("probable cause"). There is no corresponding requirement for requests made *by* the US.

The new treaty did not come into force until April 2007, when the UK and the US exchanged instruments of ratification. There had been delay in completing the ratification process in the US.

As far as the UK's domestic law is concerned the US has, since January 2004, been included in a list, set out in an order made under the *Extradition Act 2003,* of "designated" countries which do not have to include prima facie evidence when making requests for a person's extradition from the UK. The new provisions under the 2003 Act are not retrospective, in the sense that they do not apply to requests the US had made before its designation under the Act, but they do apply regardless of when offences are alleged to have been committed, and it is open to the US to withdraw an old request and make a fresh one under the new provisions.

This note covers some the history of the legislation and the background to the 2003 treaty in some detail. It also includes some reactions to the treaty. A short summary of the 2003 Act extradition procedures can be found in Library standard note SN/HA/4168 on *Extradition.* Information on some cases where the US has requested extradition is provided in Library Standard Note SN/HA/4980

Contents

A. The *Extradition Act 2003*

The *Extradition Bill 2002-03* was introduced in November 2002, given Royal Assent on 20 November 2003 and brought into force on 1 January 2004.[1] The Act sought to give effect to proposals in the report of a review of extradition law which was published for consultation in March 2001.[2] The review was begun in 1997, as a result of the UK having signed two EU Conventions on extradition which required legislation if they were to be implemented. The review process halted in 1998 for the duration of the Pinochet case and, when it was restarted in March 2000, the approach taken was more radical. The introduction to the report on the review explained:

> … of particular significance to this review, was the way in which the [Pinochet] case threw into high relief many of the problems of UK extradition law, most notably the lengthy delays which can occur in complex, contested extradition cases. Much of the 17 months of the Pinochet case was taken up in court proceedings. In this respect, the case was not unusual: the inordinate length of time it can take for a person to be extradited, even to another EU member state, and the multiple avenues for appeal, form a major motivator for radical reform.[3]

A draft Bill was published for consultation in June 2002. More information on the background to the Bill which became the 2003 Act can be found in Library research paper 02/79 on *The Extradition Bill*, which is available on the internet.[4]

The scheme of the Act is outlined in the Explanatory Notes as follows:

> The Act makes provision for new extradition procedures, the main features of which are:
>
> - a system where each of the United Kingdom's extradition partners is in one of two categories. Each country is designated by order of the Secretary of State for a particular category. It will therefore be possible for a country to move from one category to the other when appropriate, depending on the extradition procedures that the United Kingdom negotiates with each extradition partner;
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> - the adoption of the Framework Decision on the European Arrest Warrant creating a fast-track extradition arrangement with Member States of the European Union and Gibraltar;
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> - retention of the current arrangements for extradition with non-European Union countries with important modifications to reduce duplication and complexity;
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> - a simplification of the rules governing the authentication of foreign documents;

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1 *Extradition Act 2003 (Commencement and Savings) Order 2003* SI2003/ 3103
2 *The Law on Extradition: A Review,* Home Office March 2001
3 *ibid*. paragraph 8
4 http://www.parliament.uk/commons/lib/research/rp2002/rp02-079.pdf

- the abolition of the requirement to provide prima facie evidence in certain cases;

- a simplified single avenue of appeal for all cases.

Under the new system each of the countries with which the UK has extradition arrangements will now be in one of two categories – Category 1 or Category 2 – designated by order of the Secretary of State. Different extradition procedures then apply, depending on whether the country requesting extradition is a Category 1 (or "Part 1") territory or a Category 2 (or "Part 2) territory.

Under the *Council of Europe Convention on Extradition*, signed by the United Kingdom in 1990 and implemented in 1991, the need for prima facie evidence for extradition between member states of the Council of Europe who are parties to the convention was excluded. The simplified extradition system set out in the *EU Framework Decision on the European Arrest Warrant (EAW) Scheme* also involves the removal of what is known as the "double criminality" requirement for certain types of conduct.[5] The Preamble to the *Framework Decision* describes the EAW Scheme as being based on the high level of confidence held by the EU Member States for one another,[6] and the decision was agreed on the basis that a defendant would receive the same level of protection under the criminal justice system of any Member State. All EU Member States are required to comply with the European Convention on Human Rights (ECHR) and alleged breaches by them of the ECHR can be referred to the European Court of Human Rights.

Three designation orders were made on 18 December 2003, to come into force with the *Extradition Act* on 1 January 2004.[7] Belgium, Denmark, Finland, Ireland, Portugal, Spain, and Sweden were the only countries to be designated Part 1 territories at that stage. The countries which have now been designated as being in Category 1 are the other 26 members of the European Union, but there is nothing in the Act which restricts designation as a Category 1 territory to EU Member States or to those countries which have implemented the EU Framework Decision on the European Arrest Warrant (EAW).[8]

Over a hundred other states, including the United States, Canada, Australia, New Zealand, and South Africa have been designated Part 2 territories.

The *Extradition Act 2003* also allows Part 2 territories to be further designated so that:[9]

- a territory need only provide "information" rather than "evidence" to satisfy tests for the issuing of arrest warrants under sections 71(4) and 73(5) of the 2003 Act

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[5] This is the requirement that the act in respect of which extradition is sought must have been committed within the jurisdiction of the state demanding extradition; must be a crime in that state and in the state from which extradition is requested and must be listed in an extradition treaty between the two states under some name or description by which it is known in both states.

[6] Framework Decision 2002/584/JHA Preamble, Para. 10

[7] *Extradition Act 2003 (Designation of Part 1 Countries) Order 2003* SI 2003/3333; *Extradition Act 2003 (Designation of Part 2 Countries) Order 2003* SI 2003/3334; *Extradition Act 2003 (Part 3 Designation) Order 2003* SI 2003/3335

[8] See Jones and Doobay on *Extradition and Mutual Assistance* (Third Edition 2005) paras. 5-007-5-010

[9] under ss.71(4), 73(5), 84(7) & 86(7)

- a judge need not apply the sufficiency of evidence test in s. 84(1) if the person whose extradition is sought has not been convicted
- a judge need not apply the sufficiency of evidence test in s. 86(1) if the person whose extradition is sought has been convicted in their absence.

Under the original designation orders a number of Part 2 territories, including the United States, were given this additional designation, enabling them to dispense with the requirement to provide prima facie evidence with their extradition requests.[10] The current list of Part 2 territories which have been given this further designation is: Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia, FYR, Moldova, New Zealand, Norway, Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine, and the United States of America.[11]

B. New UK/US treaty signed

On 31 March 2003, (during the passage of the *Extradition Bill*) Lord Falconer of Thoroton announced that the Home Secretary and the US Attorney General were about to sign a new UK/US extradition treaty. He said:

> The current UK-USA extradition treaty was agreed in 1972 and ratified in 1976, with supplementary provisions from 1986. It is outdated and can be significantly improved.
>
> The new treaty reflects best modern practice in extradition. In particular, it provides that any crime attracting a maximum sentence of 12 months' imprisonment or more in both the requesting and the requested state is extraditable rather than containing a list of offences which are extraditable, as the present treaty does. The advantage of that is that it encompasses offences such as computer related crime which did not exist when the 1972 treaty was drawn up.
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> The new treaty brings the evidential rules for requests from the United States into line with those for European countries and simplifies the procedure for the authentication of documents.
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> As with the existing treaty, the new treaty provides that in death penalty cases, extradition may be refused unless an assurance has been received that no death sentence will be carried out.
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> The new treaty also maintains the present position that political motivation cannot be used to block extradition in the case of terrorist or other violent crimes.
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> The treaty stipulates that neither nationality nor statutes of limitations will be a bar to extradition. The treaty also provides the standard speciality protection against onward extradition or surrender, and we have confirmed our understanding that this covers surrender to the International Criminal Court.
>
> Before the treaty can come into force it needs to be ratified by the United States Senate. It will be brought into force in the United Kingdom by Order in Council. Such

[10] *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003* SI 2003/3334 Article 3
[11] *ibid*.

> an order will be made under the existing Extradition Act 1989 and will carry over when the Extradition Bill, which is currently before Parliament, comes into force. At that point the United States, like all of our extradition partners, will benefit from the new streamlined extradition procedures which the Bill seeks to put in place.
>
> The United States is one of our key extradition partners and there is a significant volume of extradition business between the two countries. It is therefore important that our bilaterial extradition treaty should be as effective as possible. I am pleased that it has been possible to reach agreement on the new treaty and that the Government have the opportunity to affirm their commitment to the closest possible co-operation in the fight against terrorism and other serious crime.[12]

In a press notice issued on the same day, Mr Blunkett said:

> This new treaty will mean much closer co-operation and cut out much of the paperwork which has led to unnecessary delays in the current system and allowed criminals to exploit loopholes and deliberately thwart justice. The existing treaty was outdated and in need of replacement.[13]

At that time, the text of the treaty was not available. The Treaty was subsequently published as a Command Paper in May 2003.[14] It is now available on the FCO website[15].

There was immediate criticism that the new treaty was unbalanced. The *Financial Times* reported:

> The bilateral treaty … will allow the US to extradite people on the basis of little more than a simple request, say critics. The agreement - condemned as "totally one-sided" - does not give the UK the reciprocal right to extradite people from the US without presenting prima facie evidence of the suspected offence.
>
> The Liberal Democrats, who this week will criticise Mr Blunkett for agreeing to waive a fundamental legal right of British citizens, yesterday accused the government of trying to "smuggle out" the contentious treaty, agreed in March, by publishing it "unannounced in the usual lists" on May 22…
>
> Menzies Campbell, the Lib Dem foreign affairs spokesman, attacked as a "matter of profound regret" Mr Blunkett's decision to agree to such a "major innovation in our law" without allowing parliament the chance to debate it.
>
> "It is all the more surprising that the British government should have agreed to this course of action without reciprocity. In this relationship, Britain is definitely the junior partner," he said.
>
> The treaty will mean American prosecutors no longer have to show there are reasonable grounds to believe someone committed an offence to extradite them. Instead, article eight of the treaty requires the US only to provide a statement of the

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[12] HL Deb 31 March 2003 W93

[13] "New Extradition Treaty And Assets Sharing Agreement Signed", 31 March 2003 , Home Office press notice) 097/2003 31 March 2003

[14] Cm 5821

[15] at: http://www.fco.gov.uk/Files/kfile/USExtradition_210503.pdf

> facts of the offence. The agreement is retrospective and so could allow the US to renew extradition requests thrown out by the British courts through lack of evidence - such as the attempt to prosecute Lotfi Raissi, the UK-based pilot pursued by the US authorities after September 11.
>
> US citizens are protected by their constitution from being extradited on the word of an overseas government alone. The Home Office said this was the reason why the new treaty was one-sided. "An agreement removing the requirement for prime facie evidence for requests from the UK could not be turned into [US] domestic law ... our legal system means we can get rid of that [prima facie] requirement for US requests" officials said.[16]

An article in *The Guardian* commented that the lack of publicity was unsurprising in view of the content of the new treaty.

> When the British home secretary signed a new extradition agreement with the US in March, there was no fanfare and no public comment. Details of what had been negotiated - in unprecedented secrecy - were hard to get hold of for two months. Now that they have become public, it is clear why Mr Blunkett would prefer us not to know: the agreement effectively removes safeguards that have protected British citizens from the risk of US judicial abuse, and hands them over, on request, to their fate - at a time when the US has enacted legislation that has dramatically reduced civil rights.
>
> Until now, the US government had to offer evidence against the suspect before a British court. Thanks to Mr Blunkett, that has gone. All that will be required is that the US provide evidence that Joe Bloggs is who they say and Mr Bloggs is theirs. (Perhaps without Derek Bond, the septuagenarian Brit detained at FBI request in South Africa on the grounds that he was someone else, even that requirement might have gone.)
>
> If, on the other hand, the British government should wish to extradite a US citizen, it will have to make its case, as before. The Home Office defence against the charge that its eagerness to please does not seem to be reciprocated is that US citizens are protected by the US constitution from any such measure. Quite so. Mr Blunkett does not seem to think it his duty to protect British citizens at all….
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> And while there is an understanding that the UK would not allow extradition where the death penalty would be imposed, it offers no guarantee on conditions of imprisonment - a prisoner could, for instance, be kept on death row forever, or transferred to a military court, or added to the collection of souls in limbo in Guantanamo. As for US willingness to listen to international opinion, we have seen enough of Washington's contempt for the basic protections of the Geneva Convention, not to mention the new international court of justice, to suspect that international protest would not have the slightest effect…
>
> The most notorious request that the UK dealt with in the aftermath of September 11 was for the Algerian pilot Lotfi Raissi, who was detained for five months in Belmarsh high security prison after the US sought his extradition on suspicion of involvement in the September 11 attacks. He was eventually released when a British judge ruled that there was no evidence against him. Under Mr Blunkett's new treaty, Mr Raissi would

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[16] "Blunkett to face attack over deal on extradition", Jun 23, 2003, *Financial Times*

> be incarcerated in the United States. In fact, under the new treaty - which is retrospective - he still might be, if the US were to try again.
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> And the evidence against him? According to Amnesty International: "The US authorities' reasons for seeking Lotfi Raissi's extradition included the fact that his identity and profession fit a certain profile: an Algerian man and a Muslim, a pilot and a flight instructor in the USA." So what if he's not guilty. He just has to look the part.[17]

Lofti Raissi's application for compensation led to a detailed Court of Appeal analysis of the proceedings during Raissi's five month detention.[18] The court found that there was "a considerable body of evidence to suggest that the police and the CPS were responsible for serious defaults" (although it reached no firm conclusions on those points as the CPS and Police were not represented before the court). The proceedings (on "trivial" charges) had been brought for an ulterior purpose, and objections to bail (suggesting that terrorism charges would follow) based on unsubstantiated assertions, had also been an abuse of process The court said:

> it seems to us that the extradition proceedings themselves were a device to secure the appellant's presence in the US for the purpose of investigating 9/11 rather than for the purpose of putting him on trial for non-disclosure offences. We also consider that the way in which the extradition proceedings were conducted in this country, with opposition to bail based on allegations which appear unfounded in evidence amounted to an abuse of process. The proceedings were used as a device to circumvent the rule of English law that a terrorist suspect could (at that time) be held without charge for only 7 days.

The court was in no doubt that, in the event of conflict between its instructions from the requesting state and its duty to the court, the CPS's primary duty was to the court. It should not act unquestioningly on its instructions from the requesting state. Its duty to the court included a duty to ensure that the requesting state complies with its duty of disclosure, a duty to disclose evidence about which it knows and which destroys or severely undermines the evidence on which the requesting state relies and a duty not to take part in proceedings which it knows or ought to know are an abuse of the process of the court.

In evidence to the Home Affairs Committee, Senior District Judge Workman said that it would have been difficult to have done anything other than extradite Raissi if the new law had then been in place.[19]

Two other examples of past cases to demonstrate that US extradition requests could not necessarily be taken at face value were given in an article by Paul Garlick QC published in the *New Law Journal* on 14 May 2004*:*

> In the case of R v Governor of Brixton Prison ex parte Kashamu [2001] EWHC Admin 980 the Administrative Court quashed the order for his committal, citing as its reason

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17 "Blunkett has stripped us of protection: No wonder he kept so quiet about his one-sided US extradition deal", 4 July 2003, *The Guardian*

18 *R v Home Secretary ex p Raissi* [2008] EWCA Civ 72: the ex gratia scheme under which Raissi claimed was abolished by the Home Secretary, without notice or consultation, in April 2006

19 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/710/5112207.htm : Q33

> "the unfairness of the proceedings resulting from the non-disclosure of crucial evidence" by the US authorities. A witness had in fact identified someone other that Kashamu, and the US authorities suppressed that fact and supplied a statement from another witness who did identify him. Correspondence shown to the Administrative Court demonstrated that the non-disclosure was a conscious decision made on the part of the US prosecutors on the basis that the Extradition Treaty did not require that such disclosures should be made.
>
> The third case is the case of Derek Bond. Mr Bond was the British national arrested in February 2003 in South Africa on a US extradition request which turned out to be based on a completely mistaken identity. Mr Bond was held in custody at Durban Police Station (having been arrested at gunpoint while on holiday) for nearly three weeks as a result of a provisional warrant issued by the South African courts at the request of the FBI. After three weeks the US authorities conceded that Mr Bond was not the man that they had been seeking and he was released from custody.[20]

In his article, Paul Garlick QC also noted that the European Union had not conceded the prima facie case point when it entered into its own extradition treaty with the United States. He suggested that the US should not be treated on an equal footing to Council of Europe countries because, unlike the member states of the Council of Europe, the US was neither judicially accountable to any international court, nor politically accountable to any international organisation for breaches of international obligations.[21]

C. Commencement of the *Extradition Act 2003*

When the *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003* was debated in the House of Lords on 16 December 2003 the Home Office Minister Baroness Scotland of Asthal explained:[22]

> Our aim is to bring the Act into force for 1st January 2004, which will enable us, inter alia, to comply with our obligations under the framework decision on the European arrest warrant.
>
> …As well as those EU member states which are not yet ready to operate the European arrest warrant, this order designates all of our remaining extradition partners as category 2 partners. Every country with which we currently have general extradition relations is being re-designated. No new countries are being added and no countries are being dropped. Paragraph 3 lists the 40 or so countries that are not required to supply prima facie evidence with their extradition requests. For the most part, those are the non-EU parties to the Council of Europe Convention on Extradition and are countries that do not currently have to provide prima facie evidence.

She then turned to "the thorny issue of the United States".

> 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

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[20] Paul Garlick, "The mysterious case of the new US extradition scheme", NLJ (2004) Vol 154 No7128, p738

[21] *ibid*.

[22] HL Deb 16 December 2003 c1063-4

> Kingdom. This is in line with the new bilateral extradition treaty signed by my right honourable friend the Home Secretary earlier this year.
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> 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"... There are four countries whose inclusion in the list represents a change. One of these is the United States …As noble Lords know, the United States is a mature democracy that respects individual rights. We do not demand prima facie evidence of countries such as Albania, Turkey or Romania, and therefore we fail to see why we should impose a more stringent test on the United States of America.
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> Nor do we see why the absence of complete reciprocity affects this. We have to take an objective decision about what standards we believe incoming extradition requests should meet. We do not see how that is affected by the fact that another country cannot, for very good reasons, reciprocate.
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> We are in the business of protecting our citizens and those within our jurisdictions. If a non-prima facie requirement would be acceptable if the United States did likewise, we ask rhetorically why is it suddenly unacceptable because its constitution prevents it doing so?
>
> Complete reciprocity has never been a feature of our extradition arrangements…

The Liberal Democrats sought the withdrawal of the draft order and the substitution of a new one leaving out the United States. Lord Goodhart explained why:

> Under Section 84(1) of the Extradition Act, a judge faced with a request for extradition must decide whether there is evidence which would be sufficient to make a case requiring an answer from the subject of the request. However, under subsection (7) of Section 84, the need for that evidence is excluded if the Secretary of State makes a further designation. Paragraph 3 of the order contains the list of states which are designated under subsection (7) of Section 84 in respect of which evidence does not have to be provided. Of course, paragraph 3 also includes the USA.
>
> Paragraph 3 also includes a number of states that are not in the forefront of observance of human rights and high judicial standards. I might refer for example to Albania and Azerbaijan. Of course, I am not suggesting that the legal standards in those countries are equal to or better than those in the USA. Those countries appear in paragraph 3 because, in 1990, the United Kingdom signed up to the European Convention on Extradition. The states party to that convention are required to extradite to each other without the need for prima facie evidence.
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> The remaining country is the United States of America, and we object to its inclusion in the list of countries where extradition does not need supporting evidence. We objected to that as soon as we became aware of the terms of the treaty, and we have continued to object to it ever since.
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> We object for three reasons. The first is the fact that there is no reciprocity. We are told that the reason for that is that the USA would need to change its constitution to be able to extradite people without the need for supporting evidence. Of course we are all aware that changes in the American constitution are extremely difficult and

> take sometimes decades to achieve, if they can be achieved at all. However, reciprocity is an important principle. If the United States believes in the constitutional principle that people cannot be extradited without evidence, it should not expect or ask us to extradite people to it without evidence.
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> If the order had been in force at the time, the United Kingdom would have been required to extradite the Algerian pilot Lotfi Raissi to the United States, on the basis of blatantly inadequate evidence that resulted in his extradition being refused.
>
> Secondly, the USA has 51 different legal jurisdictions. The standards of the criminal process in the federal courts and in some American states is undoubtedly satisfactory. However, in other states—I mention Texas in particular as one—the standards are far from satisfactory. No doubt they are still better than those in Albania, but the fact that we have dispensed with evidence for extradition to some countries where the criminal process may be poor does not justify extending the same principle to other countries where standards are also poor.
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> Thirdly, we do not think that we should enter into agreements to lower the barriers for extradition to the United States at a time when the present administration have shown utter contempt for due process for the prisoners at Guantanamo Bay, and the federal courts have so far shown themselves feeble in recognising the claim of those prisoners to due process. It is not we alone who say that. It was the subject three weeks ago of an extremely powerful speech made in a public lecture by the noble and learned Lord, Lord Steyn.
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> Each of those three reasons would justify the exclusion in itself of the USA from the list of states to which we are required to extradite people without supporting evidence. Taken together, the case for excluding the USA from the list is overwhelming.[23]

The Conservatives were disappointed that the Government had ceded the UK's right to have prima facie evidence produced by the US and failed to obtain the same right from the US, but they did not oppose the Order. Baroness Scotland said that the treaty had not yet been brought into force` because it had not been signed by the US Senate. She anticipated that the treaty would be put before the Senate formally early in the 2004 and approved shortly thereafter. No difficulties were anticipated.

The Third Standing Committee on Delegated Legislation debated the draft orders on 15 December 2003.[24] The designation of the US as one of the states not required to supply prima facie evidence was among the issues debated. David Heath pointed out that the text of the treaty stated that it was intended to

> "modernise and simplify the UK's extradition arrangements with the USA."

But, he commented:

> There is modernisation and there is simplification. Minor tidying-up arrangements are sometimes proposed, but the proposals seem to change fundamentally the

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[23] HL Deb 16 December 2003 c1066

[24] Draft Extradition Act (Designation of Part 1 Territories), (Designation of Part 2 Territories), (Designation of Part 3 Territories), Order 2003 and Draft Extradition Act 2003 (Police Power: Code of Practice) Order 2003 (Third Standing Committee) 15 December 2003

relationship between the UK and the US, replacing the old treaty of 1972 and the additional protocol of 1986.

One fact that has not yet been mentioned is that the treaty changes the basis on which extradition can take place. The list of offences is now missing. Instead of a list of extraditable offences, there is a sentence threshold of 12 months. Anything that carries a sentence of more than 12 months in American or Britain now becomes an extraditable offence without a prima facie case being necessary.

The treaty has not yet been ratified by the United States Senate. There are no changes in legislation required on the part of the United States, because it is carrying on as it always has done in respect of extradition arrangements for United States citizens. The treaty has not been ratified by the United States, but we are putting the provisions of the treaty into force. As has already been said, there are no reciprocal arrangements.

There is a differential evidential requirement, which I find difficult to understand. The Minister obviously intends to argue that that is a good thing, because it may be the case in other extradition arrangements. I do not think that it is a good thing. It is not a good thing when British citizens—or those in the United Kingdom and under our judicial protection—are not given a fair crack of the whip. That is an important matter.

We are talking about a country which, although its judicial system is based on the British one, parted company with it rather a long time ago. The other examples of countries that are no longer required to produce prima facie evidence—Canada, New Zealand and Australia—have, on the whole, a system of law that is recognisably closely related to the United Kingdom system. I would venture to suggest that that is not true in the case of the United States.

The provisions are retrospective. In article 22(1), the treaty states that

> "this treaty shall apply to offences committed before as well as after the date it enters into force".

We have the prospect of old cases being raked over and people being extradited because the treaty has been applied retrospectively, albeit with a time limitation, to which the Minister referred. That proviso forms part of the code of conduct. The proposals enable retrospective action, and in general this House has rejected retrospective legislation.

Speaking as a guest of the Committee, Sir Menzies Campbell also expressed concern about the lack of reciprocity:

… there is a specific constitutional provision in the United States that prohibits extradition unless probable cause can be shown. That is a valuable feature, some might think, of a written constitution—something that I often believe, at least in the bath, would be in the best interests of the people of the United Kingdom. Were there no such constitutional bar, it is inconceivable that any Senator of the United States Senate or any Congressman of the House of Representatives would consent to circumstances in which an American citizen could be extradited without the appearance of probable cause.

I pray in aid for that assertion the attitude that the United States has taken in the White House, the Senate and the House of Representatives to the International Criminal Court. The fact is that, in spite of President Clinton's having signed the instrument as almost his last act before he left office in the White House, the United

> States has declined to ratify the statute in relation to the ICC. Indeed, President Bush has made it abundantly clear that so long as he is the President of the United States, he has no intention of submitting it to the Senate for ratification.
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> … we should consider allegations of commercial crime in which some international companies have failed to meet necessary accounting standards. We should ask ourselves whether British directors of such companies, despite having little to do with particular operations in Idaho or Delaware, might be extradited solely on the basis of identification to the jurisdiction of a court in a state that they had never visited. That is a possible consequence, and is almost certainly one reason why the US, which amends its constitution from time to time, has not seen fit to amend provisions that require probable cause.
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> …we have been offered no justification for why it was thought necessary, in contradistinction to the terms of the 1986 US-UK extradition treaty and the Extradition Act 1989, to depart from the principle of reciprocity, which was enshrined in those instruments.

The Commons divided on the motion to approve the Order, which was carried 243/43.[25]

D. Controversy over the designation and delay in US ratification

On 19 April 2004, the treaty was received in the US Senate and referred to the Committee on Foreign Relations, by unanimous consent removing the injunction of secrecy. It was then anticipated that the Senate would ratify in the autumn of 2004.[26] The US Senate's Committee on Foreign Relations held an initial hearing on the treaty on 15 November 2005 and continued its consideration with a second hearing on 21 July 2006.[27] The treaty was ratified by the US Senate on 29 September 2006, and came into force in April 2007.

A fact sheet published by the US Department of State in August 2004 summarised the treaty and sought to "provide responses to concerns that have been expressed about the new Treaty.[28] Among the responses were:

> Some critics have argued that the Treaty could interfere with the ability of Americans to exercise their First Amendment constitutional rights. In fact, a suspect can only be extradited if the offense for which he is sought by the United Kingdom is an offense punishable by one year or more (or by a more severe penalty) under United States law. Assuming the hypothetical activity is protected by the First Amendment, the U.S. would be unable to extradite a fugitive sought by the U.K. because the dual criminality requirement of the Treaty would not be met….
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> Critics have claimed the new Treaty threatens the due process rights of Americans by eliminating the role of the courts in reviewing whether extradition should be denied because the offense for which the fugitive is sought is a political offense. This criticism confuses the "political offense" and "political motivation" provisions in that Treaty. Under the new Treaty, as under the existing treaty, U.S. courts will continue to

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[25] HC Deb 17 December 2003 c1697
[26] Home Office source
[27] http://foreign.senate.gov/hearings/2006/hrg060719p.html
[28] dated 3 August 2004, http://www.state.gov/p/eur/rls/fs/34885.htm

> assess whether an offense for which extradition has been requested is a political offense. This inquiry is undertaken when determining whether the offense for which a Requesting State has sought a fugitive's extradition is an extraditable offense. In contrast, under the new Treaty, the Executive Branch would determine whether an extradition request is politically motivated.
>
> This change makes the new treaty consistent with U.S. practice with every other country around the world with which we have an extradition treaty. …
>
> Article 8(3) provides that a request for the extradition of a person sought for prosecution must be supported by: (a) a copy of the warrant or order of arrest issued by a judge or other competent authority; (b) a copy of the charging document, if any; and (c) for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is sought. The Treaty will not change the evidentiary burden required for extradition requests to the United States. However, under the new Treaty, the evidentiary requirements for extradition from the United Kingdom are lowered from a "prima facie" standard to what in practice will constitute a U.S. probable cause standard.

In the absence of progress on ratification by the US between 2004 and 2006 the treaty continued to be the subject of questions, particularly in the Lords. In December 2004 Lord Goodhart argued that extradition arrangements with all designated Part 2 territories except the US were reciprocal, and that since the US already had in effect the benefit of the treaty, the US was under no incentive to ratify it. He suggested a number of reasons why there should be no extraditions to the US without evidence. Firstly the standard of justice in the USA was very variable. In some states judges had to campaign on the basis of the severity of their sentencing. There was inadequate legal aid. The US had excessive plea bargaining, with long sentences being a real incentive for the innocent to plead guilty. Also, non-residents were unlikely to get bail, and could have to spend long periods in prison pending trial. Finally, the increasing use of extra-territorial criminal legislation by the US could result in the US seeking extradition against UK residents when the alleged offence, evidence and victims were all in the UK.[29]

In the course of his speech in reply Lord Bassam of Brighton said:

> The United Kingdom has implemented the new treaty through the general reform of our extradition law. In this respect, we have simply placed the United States on a similar footing as many other countries, notably Australia, New Zealand, Canada, and those countries which fall under the European Convention on Extradition. The treaty under which requests between the United States and the United Kingdom are made is still the 1972 treaty until the United States ratifies the new treaty agreed in 2003. As I said earlier, the US authorities have assured us that the new treaty will be considered by the Senate Foreign Relations Committee as soon as practicable and possible.
>
> In the mean time, all requests for extradition made to the United Kingdom are considered under the provisions of the Extradition Act 2003, which provides full and effective safeguards for the rights of requested persons…

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[29] HL Deb 6 December 2004 c711-714

> The requirement for the United Kingdom to establish "probable cause" in any extradition request to the United States is less stringent than providing a prima facie case, but it is broadly comparable to the requirement to provide information about the offence, which is what the United Kingdom requires of the United States of America.
>
> The position was not reciprocal before we made the recent changes. The United Kingdom has never demanded reciprocity from extradition partners; for example, by extraditing our own nationals to countries which cannot reciprocate. We are satisfied that the Extradition Act 2003 provides full and effective safeguards which allow requested persons to argue for their rights before the courts.[30]

Baroness Scotland explained in a letter that another reason for removing the requirement was

> the advice we had from the US that the requirement to show a prima facie case could in some cases undermine the chances of the case ultimately succeeding at trial, if for example an inability to rely on hearsay evidence in the extradition request exposed a prosecution witness before the trial.[31]

Writing in the *Evening Standard*, Andrew Gilligan referred to American views of the new arrangements, according to a transcript of the American Bar Association's symposium on white collar crime:

> The Las Vegas transcript shows the US authorities almost incredulous at quite how far Britain has bent to accommodate their demands. "Hearsay affidavit by the prosecutor is enough, we don't even have to provide witness affidavits," marvelled Hammond.
>
> "Appeal rights have been curtailed.
>
> From a resource perspective, it is nothing. It is a drop in the bucket compared to the bang for the buck we are getting from this."…
>
> But perhaps the most disturbing part of the Standard's Las Vegas transcript is when the Department of Justice man describes how Britain decided to reinterpret the law to help out its American friends with the Norris case. As we have heard, price-fixing was not an offence at the time in Britain. Happily, however, conspiracy to defraud was. So, said Hammond, "the UK Government looked at the information we provided in support of the extradition, and said: 'You know what? That looks like conspiracy to defraud to us'. This is the attitude shift we are talking about. These are governments who are looking for ways to co-operate as opposed to looking for ways not to cooperate"….
>
> Lord Lester, the British QC, describes the new extradition arrangements as "part of an imperial trend in United States foreign and legal policy in seeking to extend US jurisdiction beyond its territory without being prepared for reciprocity with other friendly states".

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[30] *ibid*. c720-1

[31] DEP 04/2055:MGP 05/33; HO

> No country in Europe, apart from Britain, has the same lack of reciprocity. France and Ireland, which have similar arrangements, have devised special measures to protect their citizens. The combination of the British Government's eagerness to please the Americans, the highly open, international nature of British business and the close links between the City, in particular, and the US have left British executives uniquely exposed. As this transcript shows, it is an exposure the US authorities intend to exploit to the full.[32]

The extradition arrangements between the UK and the US and the failure of the US authorities to ratify the 2003 treaty were a source of continuing controversy. Concerns have been raised particularly as a result of developments in a number of cases involving "white-collar crime".[33] Critics have included the director general of the CBI, Sir Digby Jones, and the director general of the Institute of Directors, Miles Templeman, who suggested that the current situation could make UK companies increasingly reluctant to do business in the US.[34]

On 26 May 2005 the Conservative Member Boris Johnson tabled Early Day Motion (EDM) 241 which stated:

> That this House urges the Government to defer approving the extradition to the United States of any British subjects until such time as the United States Senate ratifies the Extradition Treaty of March 2003; further calls upon the Government to amend the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 and replace it with a new Order which requires the United States to supply prima facie evidence to accompany its extradition requests to the United Kingdom, as the UK has to do in relation to an extradition from the US; and further calls upon the Government to amend the Extradition Act 2003 to reflect the terms of Article 7 of the European Convention of Extradition on Place of Commission.

The EDM was signed by a large number of Members from all the major parties.

On 12 July 2006, following controversy about the imminent extradition of the three former Nat West bankers on charges of fraud related to the collapse of Enron, the Liberal Democrats secured an adjournment debate during which then Solicitor–General, Mike O'Brien, commented on what he described as "myths" about current arrangements for extradition from the UK to the US:

> The first myth is that the Extradition Act 2003 is intended solely to deal with terrorists. We heard that from Conservative Back Benchers. In fact, the Act covers all manner of crimes serious enough to attract a maximum sentence of more than 12 months' imprisonment. That was clear throughout the passage of the legislation. It was not drafted in response to 9/11, as has also been suggested. Its origins lay in the early development of the European arrest warrant in 1999, and it was intended to update an extradition system that dated back to Gladstonian times. The Home Office published a review in March 2001—I emphasise the month, because it was well before September—to set out the basics of what was to become the Act. Although much was made of fraud cases, the majority of cases brought under the Act are likely

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[32] "Extradition one-way street", 20 May 2005, *Evening Standard*

[33] see Part F, post

[34] "Treaty is a crime against justice" – *Daily Telegraph* 9 March 2006

> to include murder, rape, drugs, money laundering, child pornography and robbery. It will also help to extradite people accused of terrorism, but the basis of the Act predates 9/11 and it is a myth that that is not the case.
>
> A further myth is that the US needs to provide us with more information when making a request. Indeed, I heard the hon. Member for Sheffield, Hallam on Radio 4 this morning saying that the US needed only to prove the identity and whereabouts of a defendant, and not much else. That is not the case. In order to meet our information requirement, the United States needs to supply information that will provide a reasonable basis to believe that the person sought has committed the offence for which extradition is being requested.[35]

He went on to say:

> Exact reciprocity between two legal systems is almost impossible to achieve. We have been asked to look at the particular question of reciprocity many times since it was first raised during the passage of the 2003 Act, when we thought that probable cause might be a slightly higher test than others. We have gone into that in great detail. We have discussed the matter with the US, and we are entirely satisfied that it interprets the phrase that I have just used—such information as would provide a reasonable basis to believe that a person sought to commit the offence for which that extradition is requested—in a way that is broadly equivalent to our approach. That is our view, and I hope that Opposition Members will accept that there is such a view—that although the approaches are not entirely equivalent, they are broadly so, in a rough and ready manner. It may well be the case that probable cause is a slightly higher test than information, but we must remember that there is a two-door scenario going both ways. The test has to be proved to a probable-cause standard going both ways; that test is in the US courts.
>
> …The three individuals in [the Nat West] case face very serious allegations. Their case has been reviewed at length in the UK courts. It is a myth that this matter is all about events in the UK alone; that is pure myth. They are innocent until proved guilty, as are all accused. But we must remember that Enron was the biggest fraud in US history, and the US authorities are very concerned about any issues relating to it. The balance in the test for extradition that exists between the two countries is not identical but it is very similar. We believe that the treaty that we have entered into is the right one, and we also believe that about the Extradition Act 2003.
>
> That Act is the real focus, not the treaty. This debate is all about that Act; it is about whether an Act that this House passed—that this House voted for—is the right Act.[36]

During the debate Ian Taylor asked him to

> underline the fact that one of the reasons why many Conservative Members supported the measure in the Chamber was that we thought it was to be used against potential terrorists? That is why there were grounds for passing the legislation; we did not expect the Government to encourage its use for purposes such as those we are discussing.

Nick Clegg commented:

> Surely, we should be asking why we have no ratification process in this country similar to that enjoyed by the US Senate. Why is there no proper parliamentary

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[35] HC Debates 12 July 2006 c1411
[36] ibid. c1411-1413

scrutiny, and no written constitution to protect us from the Government's willingness to hand away vital legal protections?[37]

E. The *Police and Justice Act 2006*

During the passage of the *Police and Justice Bill 2005-06* the Government included a clause and schedule designed to make a number of amendments to the *Extradition Act 2003*.[38] During both the Bill's second reading debate and the debate on the clause in committee in the House of Commons a number of Members referred to the imbalance in the UK's extradition arrangements. The Conservative Member, Nick Herbert, sought to move amendments designed to bar extradition to category 2 territories where the conduct constituting the offence in respect of which extradition was sought was committed partly in the UK, unless it appeared to the judge at the extradition hearing that, in the light of all the circumstances, it would be in the interest of justice for the person to be tried in the category 2 territory.

During the debate on the amendments the Home Office minister, Hazel Blears, said they were unworkable and unnecessary. [39] She reiterated the Government's view that opponents of the UK's extradition arrangements with the US misunderstood the position on extradition. She added that opponents failed to express similar concerns about other countries with the same designation as the US for extradition purposes, such as Canada and Australia. In a subsequent vote the amendments were rejected.[40]

On 11 July 2006 the Government suffered defeats during committee proceedings in the House of Lords when the Conservative peer Lord Kingsland successfully moved amendments which sought:[41]

- To remove the US from the designation order under the 2003 Act listing those Part 2 territories which are not required to provide prima facie evidence when seeking a person's extradition from the UK;[42]
- To prevent the Home Secretary designating the US as a Part 2 territory which is not required to provide prima facie evidence UK until reciprocal arrangements have been made, in respect of the extradition of people who have not been convicted, in relation to the information and evidence required to support an extradition request.[43]

In unsuccessfully opposing these amendments the Home Office minister Baroness Scotland said the Government shared the feeling of frustration that (at that time) there had been no progress on the ratification of the treaty by the US. She commented in detail on a number of arguments which the Government regards as "myths" about the treaty. In summary, these "myths" were:

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[37] C1402

[38] see Library Research Paper 06/11 on the *Police and Justice Bill 2005-06* for discussion of the amendments in the version of the Bill that was first presented in the House of Commons.

[39] HC Standing Committee D 28 March 2006 c271-299

[40] *ibid*. c299

[41] HL Deb 11 July 2006 c625-659

[42] Lords amendment 36, which inserted a new clause after Clause 46 of the version of the bill introduced in he House of Lords

[43] Lords amendment 85,which amended provisions in Schedule 14 of the Bill

- That the *Extradition Act 2003* was intended solely or primarily to deal with terrorism
- That the US is required to provide no, or next to no information when making a request,
- That there is no reciprocal arrangement or direct reciprocity
- That the basis on which cases such as those involving the three former Nat West bankers have been decided is fundamentally flawed and that they are only being extradited because of a failure to ratify the treaty
- That the UK has insufficient safeguards for its citizens within the arrangements.

On 11 July 2006 Lord Kingsland also successfully moved amendments which sought to address concerns raised in a number of recent cases about the extradition of individuals for offences with which they were never charged or prosecuted in this country, although the offences they are alleged to have committed were partly or largely committed here. [44] Lord Kingsland's amendments were intended to prevent a judge ordering the extradition of a person to a Part 1 territory or a Part 2 territory if the conduct disclosed by the extradition request was committed partly in the UK, unless it appeared in the light of all the circumstances that it would be in the interests of justice that the person be tried in the Part 1 or the Part 2 territory rather than the UK. In deciding whether extradition is in the interests of justice the judge would be required to take into account:

> whether the competent United Kingdom authorities have decided to refrain from prosecuting the person whose surrender is sought for the conduct constituting the offence for which extradition is requested.

In unsuccessfully opposing these amendments Baroness Scotland set out the Government's view as follows:

> The effect of the amendments would be to require the district judge in an extradition hearing to decide whether the wanted person should be tried in the United Kingdom if the person is not to be let free. I would suggest that that would not be practicable in the United Kingdom, as it is not required of judges in any other context. It is the prosecuting authorities in the United Kingdom which decide whether to bring a prosecution, basing their decision on the usual public interest test. When a person is sought for extradition, there is right now no legal bar to stop the prosecuting authorities from deciding to launch a domestic prosecution for the extradition offences, provided there is the jurisdiction to do that. If a domestic prosecution was launched, the extradition request would be adjourned. It would almost always be terminated if the person was later acquitted or convicted of the offence.
>
> That part of the amendment which requires the judge to take into account whether the competent UK authorities have decided not to prosecute would introduce a possible cause of delay to extradition proceedings, as judges might have to adjourn to ascertain the position of those authorities which may not even be aware of the allegation. If the authorities decline to take a decision on these matters, to what extent would that help the judge decide whether it is in the interest of justice that a person should be tried in the requesting state? Those matters were not dealt with by the noble Lord, Lord Kingsland.

[44] Lords amendments 81-84 which amended provisions in Schedule 14 of the Bill

> Even if the judge had such a thing as a clear decision before him, would that really assist him? A decision not to prosecute domestically might be an indication that the circumstances favoured prosecution taking place in the requesting state; but that is not a test which our prosecuting authorities are required to apply. Nor could a judge take such a decision as an indication that no prosecution should take place, even in the requesting state. A decision on that basis would risk breaching our international obligations to the state which has decided that it is able to try the wanted person.
>
> In summary, this part of the amendment would not have the effect that the noble Lord anticipates. It would not provide the necessary assistance to the judge. Although both the framework decision on the European arrest warrant and the European Convention on Extradition have an optional ground for refusal of extradition where the offence was committed in whole or in part in the territory of the requested state, the United Kingdom has chosen not to implement this ground for refusal explicitly in its law.
>
> The United Kingdom has in the 1989 and the 2003 Extradition Acts implemented a slightly different ground for refusal. It is based on dual criminality where the offences for the wanted person were committed outside the requesting state. In the interests of justice, the United Kingdom took the view when enacting both Acts, that extradition could proceed where the person was wanted for conduct committed at least partly in the United Kingdom, providing that the UK had the same jurisdiction to try the conduct if it had occurred outside the UK. That degree of flexibility is important in many extradition cases where the person is wanted for complex cross-border crimes concerning, for example, people trafficking, drugs trafficking and money-laundering, and where in theory a number of states had jurisdiction to try the case. An example, of course, is the Enron Three case where the court, in reviewing the decision by the Serious Fraud Office not to prosecute, came to the conclusion that this was an American case and that the prosecution should take place in that country.
>
> Finally, if there was to be any way forward on the issue of forum, it would have to take into account the need not to fetter the discretion of our independent prosecuting authorities. It would have to be a solution that would not introduce unnecessary delays in the system. It would have to meet our international obligations; and it would indeed have to operate in the interests of justice. We have a proud history of our prosecutors being able to make independent decisions free from the Executive and free from any other improper influence. I therefore urge your Lordships not to confuse the two amendments—they are separate and distinct—and not to press this amendment at this time.[45]

The forum amendments were left in but subject to a 12 month sunrise clause and a proviso that the Secretary of State was not obliged to make a commencement order bringing them into force unless both Houses of Parliament had passed a resolution requiring him to do so. Likewise, the amendments removing the special designation of the US were subject to a sunrise clause, which also prevented them from being brought into force once instruments of ratification of the 2003 treaty had been exchanged - as has now happened.

Shortly after he took office as Prime Minister, it was reported that Gordon Brown was sympathetic to changing the law to provide greater safeguards for British citizens.[46] It was suggested that the Government would amend the rules so that US extradition requests concerning alleged crimes committed primarily on UK soil would be refused.[47] In December

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[45] HL Debates 11 July 2006 c653-655

[46] "'Unfair' US extradition law to be reviewed", 2 July 2007, *Daily Telegraph*

[47] "Revised US extradition treaty won't help Norris", 22 July 2007,

2007, the Home Secretary, Jacqui Smith, referred to “inaccurate claims in the press” that she was about to introduce an additional statutory bar to extradition called “’forum’ which could prevent extradition where a case could be tried in the UK”, adding that the key issue was to ensure that offences were dealt with in the place where they could be most effectively prosecuted, and that she was satisfied that the right balance had been struck between the need to safeguard the rights of defendants against the need to uphold the rule of law.[48] A similar answer was given by Lord West of Spithead, shortly after the Court of Appeal judgment in the Raissi case.[49]

[48] HC Deb 3 December 2007 c771W
[49] HL Deb 20 February 2008 c173