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CASE AND COMMENT

EXTRADITION—JURISDICTION

EXTRADITION from the United Kingdom, save to the Republic of Ireland, is now governed by the Extradition Act 1989. It repealed the Extradition Act 1870 and the Fugitive Offenders Act 1967.

Extradition ordinarily depends upon an extradition treaty and statutory power exists to give domestic effect to such treaty by Order in Council. Such Orders were formerly made under the 1870 Act, s. 2; they are now made under the 1989 Act, s. 4. But when the 1989 Act came into force a number of Orders made under the earlier Act were in force; they are expressly preserved by the later Act (s. 2(1) and Schedule 1). Thus, the Act includes proceedings (1) under the 1989 Act itself and (2) under the 1870 Act. Which scheme will apply in given proceedings depends upon the date of the relevant treaty and Order. The extradition treaty with the United States 1972 was implemented by the United States of America (Extradition) Order 1976 (SI 1976/2144). Their scope was considered in *R. (Al Fawwaz)* v. *Governor of Brixton Prison* [2001] UKHL 69, [2002] 2 W.L.R. 101.

Al Fawwaz was accused in the United States of conspiring with Osama Bin Laden to murder United States citizens in the United States and elsewhere and also to bomb the United States embassies in Nairobi, Kenya and Tanzania. A large number of persons were killed. On a request from the United States Government for his extradition, he was arrested in London. He had probably performed no act in the United States. The Metropolitan Magistrate, committing him to await extradition at the discretion of the Secretary of State, ruled that it was unnecessary to allege that

any offence had been committed in United States territory. The Divisional Court held that it was necessary ([2001] 1 W.L.R. 1234); the House of Lords unanimously disagreed though "the statutory provisions are not entirely simple" (Lord Slynn) and involve a "legislative paper chase" (Lord Rodgers).

Clearly, the United States' request was based upon a claim to extra-territorial jurisdiction and "when the 1870 Act was passed crimes were no doubt largely committed in the territory of the state trying the alleged criminal", but the question had to be decided, probably for the first time, "whether the treaty provides or requires extradition only in respect of crimes committed and acts done exclusively in the territory of the requesting state" (Lord Slynn at para. [25]) and, of course, whether the Act and Order so permit.

Section 1(3) of the Extradition Act 1989 provides:

> Where an Order in Council under section 2 of the Extradition Act 1870 is in force in relation to a foreign state Schedule 1 to this Act (the provisions of which derive from that Act ...) shall have effect in relation to that state, but subject to the limitations, conditions, exceptions and qualifications contained in the Order.

In other words, "the Order may limit but cannot extend the scope of the extradition legislation" (Lord Rodger at para. [124]). Schedule 1, para. 20, provides:

> "extradition crime" in relation to any foreign State, is to be construed by reference to the Order in Council under [section 2 of the 1870 Act] applying to that state as it had effect immediately before the coming into force of this Act ... [and] "fugitive criminal" means any person accused or convicted of an extradition crime within the jurisdiction of any foreign state.

Section 26 of the 1870 Act provides further that an extradition crime "means a crime which if committed in England *or within English jurisdiction* [emphasis supplied] would be one of the crimes described in the first schedule to this Act", which includes "murder and attempt and conspiracy to murder", a provision included in the treaty of 1972, reproduced as a Schedule to the Order of 1972.

From all this, the following questions arose for decision:

(1) Was the applicant a "fugitive criminal"? As Lord Millett put it, this depended upon whether the offence was "within the jurisdiction of the requesting state [and that question] serves a purely practical purpose. There is no point in extraditing a person for an offence for which the requesting state cannot try him." *This* rule is "not to protect the accused from the

exercise of an exorbitant foreign jurisdiction". None of the members of the House of Lords doubted that this extended to an assertion of extra-territorial jurisdiction by the requesting State: "most countries exercise some degree of extra-territorial jurisdiction and were doing so well before 1870" (*e.g.* in respect of piracy *iure gentium*).

(2) Was this an "extradition crime" which "if committed in England *or within English jurisdiction*" would be one of the crimes described in Schedule 1 to the 1870 Act? This "serves to protect the accused from the exercise of an exorbitant foreign jurisdiction" (Lord Millett at para. [105]). And it is necessary to suppose that England is substituted for requesting State (*ex p. Tarling* (1978) 70 Cr. App. Rep. 77, 136 *per* Lord Keith, and, especially, *Liangsiriprasert* v. *United States* [1991] 1 A.C. 225, 250 *per* Lord Griffiths). Such substitution, however, does not necessarily require the conspiracy to have been directed at the United Kingdom itself: "a conspiracy to plant bombs at British owned properties abroad and kill British subjects [*sic*] wherever they may be ought not to be less triable in England because the conspirators do not plan to carry out their murderous campaign in England itself" (Lord Millett at para. [112]).

There is a certain sleight of hand in this admirable statement. Lord Millett slides with ease and without much, if any, discrimination between concepts of prescriptive jurisdiction known to international lawyers upon the bases of, at least, territoriality, nationality, protection and passive personality. He added: "I should not wish it to be thought that the inclusion of internationally protected persons among the potential victims is necessary to found the jurisdiction". Indeed, none of the judges based his opinion principally upon the Internationally Protected Persons Act 1978 (though cp. Lord Slynn at para. [14], Lord Hutton at paras. [53] and [57], Lord Rodgers at para. [145]). The topicality and potential importance of *Al Fawwaz* are all too obvious in light of the events of 11 September 2001. It is submitted that Lord Millett's judgment is likely to be of the greatest influence.

Two final matters: first, the case has important things to say about the interpretation of treaties: "to apply to extradition treaties the strict canons appropriate to the construction of domestic statutes would often tend to defeat rather than to serve [their] purpose" (Lord Slynn at para. [39], citing Lord Bridge in *ex p. Posthlewaite* [1968] A.C. 924, 947). But is it *really* true to say with Lord Rodgers (at para. [146]) that "the terms of an extradition

treaty cannot be used to construe" the Act which gives effect to the treaty? What if the Act is ambiguous? Second, had the treaty with the United States and the Order been made after 1989, the whole question would have been a lot easier: Extradition Act 1989, ss. 1, 2(1) and 2(2).

JOHN HOPKINS

IMMUNITY FOR INTERNATIONAL CRIMES: A REAFFIRMATION OF TRADITIONAL DOCTRINE

IN *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, decided on 14 February 2002, the International Court of Justice held that an incumbent Minister for Foreign Affairs was immune from criminal proceedings before a foreign domestic court, even if the charges involved crimes against humanity. Human rights advocates might well regard this decision as a serious setback. Decided against a widespread euphoria brought forth by, and largely due to a neglect of an important dictum in, the historic holding in *Pinochet No. 3* [2000] 1 A.C. 147, the case serves further to clarify a crucial point of State immunity in current international law. The *Pinochet* case dealt with the immunity of a former, as opposed to a serving, Head of State. While the majority of the Law Lords only mentioned in passing that the immunity enjoyed by a serving Head of State *ratione personae* was absolute, the International Court of Justice stated, in unambiguous language, that:

> ... in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.

The case concerned an international arrest warrant *in absentia* issued on 11 April 2000 by a Belgian investigating judge against the then Minister for Foreign Affairs of the Congo, Mr. Abdulaye Yerodia Ndombasi, charging him with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity, on the basis of his alleged speeches inciting racial hatred in the Congo in August 1998. The arrest warrant was issued under a 1993 Belgian Law, as amended in 1999, which provides that Belgian courts have jurisdiction in respect of such offences wherever committed.