intention of obstructing an investigation by a duly appointed UK body into possible criminal conduct in relation to price-fixing, tampered with witnesses and evidence as he was alleged to have done, he would have been guilty of either obstructing or conspiring to obstruct justice, both of them offences punishable by 12 months' imprisonment and therefore extradition offences within the meaning of section 137(2)(b) of the Extradition Act 2003.

The Lords' decision on both points is unimpeachable. But certain dicta raise, and not for the first time, questions as to the rationale for the requirement of double criminality. Prior to *R* v. *Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147, the stipulation had been characterised as one of the public policy of the forum which obviated the invidious necessity for English criminal justice to lend its assistance to the punishment by Johnny Foreigner of the freedom to offend officialdom, the practice of Christianity, the legitimate pursuit of commercial advantage or, indeed, any conduct considered unworthy of criminal sanction by the law of England. In *Pinochet (No. 3)*, however, the Lords, in holding that the time by reference to which double criminality was to be assessed was the time of the alleged offence rather than, as had been thought, the time of surrender, characterised the double criminality rule as a safeguard of the principle *nullum crimen nulla poena sine lege*, a guarantee of the defendant's entitlement to fair warning under the criminal law. The invocation of *Rimmington* in the present judgment and their Lordships' statement that "the underlying rationale of the double criminality rule [is] that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state" endorse this second view. But this view is open to doubt, for the reason that the criminal law under which a defendant to extradition proceedings will eventually be tried, and thus the law in relation to which any issues of fair warning would relate, is that of the requesting, not requested state – here, US, not English law. And there was never any suggestion in this case that the US offence of conspiracy to operate a price-fixing agreement or cartel was retroactive.

ROGER O'KEEFE

SHINING THE TORCH ON PLEA-BARGAINING

GARY McKinnon is a British unemployed computer systems administrator wanted in the US for allegedly gaining unauthorised access to 97 US Government computers from his home computer in London. Amongst other things, he apparently deleted data from operating

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systems which caused the US army's network of over 2000 computers in Washington to shut down for 24 hours. The House of Lords' decision to uphold his extradition in *McKinnon* v. *Government of the USA* [2008] UKHL 59, [2008] 1 W.L.R. 1739 doubtless sheds light on the vulnerability of computing systems. But what does it tell us about the murky world of plea bargaining?

McKinnon was originally arrested under the Computer Misuse Act 1990, but was never charged. But the US Government decided to proceed: in 2002 indictments were returned against him by grand juries in New Jersey and Virginia. Discussions then took place over several months between US prosecutors and McKinnon's lawyers. A meeting took place in London between three senior US Government officials and a Q.C. and solicitor representing McKinnon. A bargain was on offer, the essence of which was that, if McKinnon agreed to extradition and to plead guilty, he would face 37–46 months' imprisonment, probably at the shorter end, and that he would be repatriated after 6–12 months' to complete his sentence in the UK. Thereafter he would be released under English rules (which appear to have been misunderstood), probably facing only 18 months to two years in prison. If he did not cooperate, he faced 8–10 years, possibly longer, without repatriation, to be served in a high security prison, with only 15% remission. The deal was refused.

The main argument for challenging his extradition was that the pressure put on McKinnon was disproportionate and subjected him to impermissible pressure to surrender his legal rights. It was an abuse of process, calculated to interfere with the extradition proceedings. The House of Lords unanimously dismissed his appeal. Lord Brown, who gave the only judgment, "unhesitatingly" (para. [38]) rejected the arguments. "It is difficult, indeed, to think of anything other than the threat of unlawful action which could fairly be said so to imperil the integrity of the extradition process as to require the accused, notwithstanding his having resisted the undue pressure, to be discharged irrespective of the strength of the case against him" (para. [41]).

Lord Brown distinguished the case of *USA* v. *Cobb* [2001] 1 S.C.R. 587 as "wholly extreme". There the Supreme Court of Canada held that Canadian citizens had indeed faced undue pressure to forgo their due process rights, and that extradition would have violated "those fundamental principles of justice which underlie the community's sense of fair play and decency": the trial judge in a connected case had said "as to those people who don't come in and cooperate and if we get them extradited and they are found guilty, as far as I am concerned they are going to get the absolute maximum jail sentence that the law permits me to give". A prosecuting attorney had said on Canadian

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television that, if they did not cooperate, the suspects faced longer sentences under more stringent conditions, including "being the boyfriend of a very bad man" in prison (taken to mean, subject to homosexual rape).

As Lord Brown recognised, the difference between the US and English systems are not so great. Both allow, and perhaps even encourage, off-the-record discussions which result in guilty pleas to lesser charges (or on a lesser factual basis). Indeed, in some senses the English system is more problematic than that of the US: the US system is more open. And, since the decision of the Court of Appeal in *Goodyear* [2005] 1 W.L.R. 2532, English trial judges have been able to give indications as to the likely sentence in advance of plea. The case law following this decision shows the practical advantages of the process, but also the dangers: the judge is bound by his indication even if the full facts are only revealed at a later stage.

The Divisional Court had expressed its "cultural reservations" about US plea-bargaining, [2007] EWHC 762 (Admin), at [60], and in particular "a degree of distaste" as to the American authorities' approach towards providing or withdrawing support for repatriation: "viewed from the perspective of an English court the notion that a prosecutor may seek to induce a plea of guilty on the basis that substantial benefits will be withdrawn if one is not forthcoming is anathema" (para. [54]). Lord Brown surprisingly described these comments as "somewhat fastidious" (para. [37]). Surely the power of the prosecutor to influence not only the length of the sentence, but also the conditions in which it is to be served, causes concern. The prosecutor is not only initiating the negotiation, but also undermining the role of other supposedly "independent" players in the process.

The UK may be moving in this direction. In April 2008 the Government issued a consultation on "the introduction of a plea negotiation framework for fraud cases in England and Wales" (see www.attorneygeneral.gov.uk). Would this system long be restricted to fraud? Whilst there is much to be said for open recognition that prosecutors do indeed negotiate with defendants (or defence lawyers), suspects should not be pressured into pleading guilty. There are two main reasons. One is that the contours of criminal liability are not clear: it is easy to think of cases where a suspect should be able, or possibly even encouraged or compelled, to ask a court to judge the question of guilt. For example, was this legitimate self-defence or was this behaviour really dishonest? The second is the impact that such negotiations have on sentencing decisions. It is for the judge to sentence, in the light of the facts known at the time of sentence. It should also be for the judiciary to supervise the fairness of the process, including the implementation of sentences.

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The consultation devotes a little over a page to the "international perspective" (pp. 37–8) and does not attempt to analyse the very different roles of prosecutors, judges, and indeed sentence review and parole courts in different jurisdictions. Nor does Lord Brown. The Extradition Act 2003, designed to facilitate extradition, has it seems encouraged a blinkered approach. Is it right to assume, as Lord Brown appears to do, that all pressure (apart from the unlawful) is legitimate? Surely not. The consultation states, apparently admiringly, that in the USA over 98% of criminal offenders plead guilty (page 5). But that (if true) is a terrifying figure: can we be confident that all those offenders really are guilty, or does the figure reflect the relative powerlessness of many suspects faced with an over mighty and ill-monitored prosecution system? I do not know, but *McKinnon* illustrates the extraordinary pressure the US system can impose, and its depressing reliance on lengthy and bleak prison sentences. It offers insights into how Sentencing Guidelines can be manipulated by prosecuting authorities. It shows the importance of having strong defence lawyers. It reminds us that "easier" extradition processes have resulted in English courts being rather less interested in fair trials abroad than they are in fair trials at home.

McKinnon's application to the European Court of Human Rights was also unsuccessful (application no. 36004/08): he continues to challenge his extradition in the English courts, now on the grounds of his mental state.

NICOLA PADFIELD

JUDICIAL REVIEW OF PREROGATIVE ORDERS IN COUNCIL

PREROGATIVE Orders in Council are anachronistic because in substance they are executive legislation made without parliamentary approval or scrutiny. The existence and extent of the prerogative to legislate by Order in Council is therefore a matter of great constitutional importance. The question for the House of Lords in *R. (Bancoult)* v. *Foreign Secretary (No. 2)* [2008] UKHL 61; [2008] 3 W.L.R. 955, was whether a prerogative Order in Council exiling an entire indigenous population was valid.

In 1965 the Chagos Islands in the Indian Ocean were constituted a separate colony – the British Indian Ocean Territory ("BIOT"). To enable Diego Garcia, the principal island in the archipelago, to become an American military base an Immigration Ordinance was made in 1971 to remove all inhabitants of BIOT compulsorily. The 1971 Ordinance was quashed by the Divisional Court in 2000 because the

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