Destruction of Documents May Constitute Grounds for Extradition to United States, Even Where Underlying Prosecution Could Not

APRIL 4, 2008

In what is being described as a landmark decision, on 12 March 2008, the House of Lords--Britain's highest court--issued a decision in the *Norris* case that has important implications regarding the extradition of UK citizens who face US criminal charges as well as the extra-territorial reach of US laws. [1] The House of Lords decision is the most recent development concerning the application of the controversial Extradition Act 2003. (For previous discussions of the Act, see WH English Law Update 13 February 2007.)

In its decision in *Norris*, the House of Lords unanimously ruled that Ian Norris, a UK national, should not be extradited to the United States to face criminal price-fixing charges because the alleged price-fixing activity was not a criminal offence in the United Kingdom at the time it took place (even though such activity would now be criminal). At the same time, the House of Lords opened the door to Norris's extradition on the grounds of alleged obstruction of justice, rejecting his argument that obstruction of justice could not be an extraditable offence if the underlying judicial process at issue (in this case the US price-fixing investigation) did not relate to an extraditable offence.

The case arose when Norris, former head of Morgan Crucible, a UK manufacturing company, was charged in the United States with conspiracy to fix prices of carbon products between 1989 and 2000. [2] Norris challenged the executive order to extradite him to the United States in the English High Court on the basis that price fixing was not a criminal offence in the United Kingdom until it was made so under the Enterprise Act 2002. In a decision in January 2007, the High Court held that the English offence of conspiracy to defraud encompassed price fixing and ordered Norris to be extradited to stand trial in the United States. That decision was overturned by the House of Lords' 12 March 2008 decision.

Extradition from the United Kingdom to the United States is governed by the Extradition Act 2003. The Extradition Act has been the subject of controversy since it came into force on 1 January 2004, because it dispensed with the previous requirement under English law that US authorities had to demonstrate a *prima facie* case on the merits against a defendant as a prerequisite for extradition.

The Extradition Act is controversial at least in part because US law does not allow US citizens to be extradited to the United Kingdom on a similar standard. Although the United Kingdom and the United States agreed to a new extradition treaty in March 2003 which would lower the standard of proof for extradition from the United States, the United States has not ratified that treaty. As a result, UK authorities still need to establish probable cause in order to obtain extradition of suspects from the United States. This disparity received considerable attention in connection with the so-called "NatWest Three" case, where the High Court rejected the challenge by three UK nationals of a Home Office extradition order to face charges in the United States that they defrauded their employer (a UK bank) as part of the broader Enron scandal. [3]

In the *Norris* case, the House of Lords focused on the notion of an "extradition offence" in s.137 of the Act, narrowly construing this term and reaffirming that a person's liberty is "not to be restricted as a consequence of offences not recognised as criminal by the requested state" at the time of the alleged offence and concluding that the focus on the offence rather than conduct of the accused "avoids the need always to investigate the legal ingredients of a foreign offence." [4] Because, absent certain aggravating factors [5], price fixing (as defined in US law) was not a criminal offence under English law before the Enterprise Act 2002, the House of Lords held that Norris could not be extradited.

While the House of Lords rejected the specific basis that had been relied on in the Norris extradition order, it did not foreclose the possibility of extradition on other grounds, including obstruction of justice. Indeed, the House of Lords expressly rejected Norris's argument that, because price fixing was not itself an offence under English law at the time, obstruction of the progress of an "equivalent investigation by [an] appropriate body" would not be an offence under English law and so concluded that conspiring to obstruct justice or obstructing justice are "extradition offences" under s.137 of the Extradition Act. [6]

The US Department of Justice is now seeking to extradite Norris on obstruction of justice charges, and the case has been returned to a lower court to consider whether extradition on the basis of these charges (including document destruction and witness tampering) would violate the European Convention on Human Rights. [7] If not, under the existing legislative scheme, a defendant can be extradited based on alleged obstruction of justice charges without a *prima facie* showing by the US authorities.

The immediate effect of the *Norris* case is to identify a limited additional hurdle for US authorities seeking to use the otherwise broad power set out in the Extradition Act, and it has been perceived by some to signal a reluctance to respond favourably to foreign extradition requests where the criminal charge that forms the basis for the request does not have a close analogue in English criminal statutes. [8] Conversely, *Norris* may also signal a broader opening for US authorities—i.e., where the criminal charge that forms the basis for the request does have a close analogue under English criminal law—even, for example, where the charge stems from subsequent alleged conduct intended to mask evidence of a prior foreign crime that is not an extraditable offence.

[1] *Norris v Government of the United States and others* [2008] UKHL 16 on appeal from [2007] EWHC 71 (Admin) (*Norris*).

[2] US antitrust law criminalises certain anticompetitive activities between the United States and any other country, and can subject foreign national defendants to criminal penalties even if they have never entered the United States pursuant to the Sherman Act 15 U.S.C. § 1.

[3] This case was the subject of a previous WilmerHale case update dated 13 March 2006.

[4] See *Norris*, paras 88-89.

[5] Such aggravating factors include fraud, misrepresentation, violence, intimidation or inducement of a breach of contract.

[6] See *Norris*, para 100.

[7] Section 87(1) of the Extradition Act requires the extradition judge to decide whether a person's extradition would be incompatible with his Convention rights scheduled to the Human Rights Act 1998. This calls for a judgment on the proportionality of an order of extradition in all the circumstances, having regard to the defendant's rights under article 8 and any other relevant article (see *Norris*, paras 110-11).

[8] The *Norris* decision will likely have limited impact on future price-fixing cases because the Enterprise Act has criminalized price fixing as of 2002. Defendants in cases that involve facts arising before the Enterprise Act was enacted continue to face extradition if there are aggravating factors, such as an explicit agreement to deceive customers, which the Law Lords concluded could constitute fraud, a longstanding offence under English common law.

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