HOUSE OF LORDS

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[2008] UKHL 16

on appeal from:[2007] EWHC 71 (Admin)

APPELLATE COMMITTEE

Norris (Appellant)
v
Government of the United States of America and others (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)

REPORT

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REPORT

from the Appellate Committee

12 MARCH 2008

Norris v Government of the United States of America and others

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Lord Carswell, Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury) have met and considered the cause *Norris v Government of the United States of America and others*. We have heard counsel on behalf of the appellant and respondent, and received submissions on behalf of JUSTICE.

1. This is the composite opinion of the committee.

2. The appellant, Mr Ian Norris, is a national of the United Kingdom. The Government of the United States, the respondent, seeks to extradite him to the United States to stand trial in the Eastern District of Pennsylvania on an indictment containing four counts. On 1 June 2005 Evans DJ sent the case to the Home Secretary for his decision whether Mr Norris should be extradited ([2005] UKCLR 1205), and on 29 September 2005 the Home Secretary ordered that he should. The district judge's decision was upheld by the Queen's Bench Divisional Court (Auld LJ and Field J, [2007] EWHC 71 (Admin), [2007] 1 WLR 1730) in the decision subject to this appeal to the House.

3. Mr Norris worked in the carbon division of the Morgan Crucible group of companies for 29 years, retiring on grounds of ill-health in 2002 after four years as chief executive officer of the group. The parent company of the group is an English company, based in Windsor. Subsidiary companies of the group were based in North Carolina and Pennsylvania. In 1999 the respondent began to investigate allegations of price-fixing in the carbon industry in the United States. In due course the two American Morgan subsidiaries paid substantial fines. Most of Morgan's directors, officers and employees were granted immunity from prosecution as part of a plea bargain arrangement, but Mr Norris and some others were not. In September 2004 a grand jury sitting in the Eastern District of Pennsylvania returned the indictment on which it is now sought to extradite Mr Norris.

4. This indictment contains four counts. The first count alleges that Mr Norris conspired with certain other European producers of carbon products used in the transport, industrial and consumer product markets to operate a price-fixing agreement or cartel in a number of countries, including the United States. The agreements are said to have been made outside the United States, in Europe, Mexico and Canada, but to have been given effect in the United States. The cartel is said to have operated from at least 1989 to 2000. The charge is laid under 15 USC §1, familiarly known as the Sherman Act, which provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony…".

This is a statutory offence of strict liability. It does not require proof of fraud, deception or dishonesty, and count 1 of the indictment contains no such allegation. Among the extradition papers served on Mr Norris was an affidavit of Lucy McClain, a prosecutor in the Anti-Trust Division of

the United States Department of Justice, who deposed that the conspirators including Mr Norris "[i]n effect … defrauded their customers by requiring that they pay higher prices than they might otherwise have paid had there been no conspiracy." This allegation formed no part of the indictment. In the charges sheet prepared by the Crown Prosecution Service on behalf of the respondent, to translate the charges in the indictment into particulars of English offences, it was alleged that Mr Norris conspired to "defraud buyers of carbon products by dishonestly entering into an agreement to fix, maintain and co-ordinate the price for the supply of carbon products in the United States of America."

5. Counts 2, 3 and 4 of the indictment allege conspiracy to obstruct justice, witness tampering and causing a person to alter, destroy, mutilate or conceal an object with the intent to impair the object's availability for use in an official proceeding, in violation of 18 USC §§371, 1512(b)(1) and 1512(b)(2)(B). The English charges sheet asserted that Mr Norris conspired "to pervert the course of public justice namely the process of a criminal investigation being conducted by a federal grand jury in the Eastern District of Pennsylvania into price-fixing in the carbon products industry".

A. COUNT 1

6. In resisting extradition on count 1 Mr Norris contends that participation in a cartel, in the absence of aggravating conduct, was not at the material time (1989-2000) a criminal offence at common law or under the statute law of this country. Accordingly, it is submitted, the conduct of which he is accused in the United States would not, at the time, have been criminally punishable here, with the result that the requirement of the Extradition Act 2003 that conduct should be criminal in both the requesting and requested states is not satisfied, and Mr Norris cannot be extradited under the Act. This submission raises a number of issues which call for separate consideration.

(1) *The common law*

7. In earlier days, as recounted by Sir William Holdsworth (*A History of English Law*, vol 4, 3rd ed (1945), pp 340-362, vol 8, 2nd ed (1937), pp 56-62), the prevention of abusive practices in the course of trade was the subject of parliamentary intervention and judicial decision. But the Repeal of Certain Laws Act 1772 (13 Geo 3, c.71) and the Forestalling, Regrating etc Act 1844 (7 & 8 Vict, c 24) repealed earlier statutes, leaving the way open for development of the law by the courts.

8. By the end of the 19th century it was established that as between master and servant, principal and agent and the buyer and seller of a business covenants in restraint of trade were, in general, void and so unenforceable, unless the restrictions they contained were shown to be reasonable in the interests of the parties themselves and reasonable in the interests of the public. The House so ruled in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, and that ruling continues to represent the law today.

9. In the field of restrictive trade agreements more generally, the law was developed in a series of decisions of which five in particular were relied on in argument. It was pointed out, quite correctly, that some of these cases arose on facts different from those of the present case.

10. In the first of the cases, *Jones v North* (1875) LR 19 Eq 426, four parties were invited to tender for the supply of stone to a public authority. They made a collusive agreement by which one party was to buy stone from the other three and submit the lowest tender, two parties were to submit a higher tender and the fourth party was to submit no tender. There is nothing in the report to suggest that the public authority knew of this agreement, and every reason to suppose that it did not. The matter came before the court when the defendants, in breach of the agreement, submitted a tender, which was accepted, and the party which was to supply under the agreement brought proceedings to restrain performance by the party which had broken ranks. The action succeeded. Bacon V-C considered the plaintiff's case (p 429) as "very honest". It was submitted (p 428) that the plaintiff could not obtain equitable relief since the arrangement was a device to compel the authority, under the fiction of a public competition, to accept tenders not representing the real market price of the commodity, but this submission the vice-chancellor rejected, finding the

agreement (p 430) to be "perfectly lawful", to contain "nothing illegal", and not deserving to be characterised as a conspiracy.

11. The case of *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1888) 21 QBD 544 was tried at first instance by Lord Coleridge CJ without a jury. The plaintiff company claimed damages for a conspiracy to prevent it carrying on its trade between China and Europe. Its complaint was made against a group of shipowners who banded together in order to keep the trade between China and London in their own hands for their own commercial benefit and to that end offered a very low rate and an agreed rebate to shippers who shipped tea on their vessels but not, in the relevant year, on the plaintiff's, the object being to exclude the plaintiff from the trade. The efficacy of the defendants' agreement depended on its being known in the market, so there was no element of secrecy or non-disclosure, but the plaintiff attacked the agreement as wrongful and malicious, supported by bribery, coercion and inducement. The chief justice (pp 552-553) found no evidence of bribery, coercion or (in the relevant sense) inducement, and held (p 554) that the agreement was not unlawful, wrongful or malicious.

12. In the Court of Appeal ((1889) 23 QBD 598) Lord Esher MR, dissenting, held the agreement to be an indictable conspiracy (p 610). But a majority of the court agreed with Lord Coleridge. Bowen LJ, in a justly-celebrated judgment, held that in the absence of aggravating features such as (pp 614, 615, 618) fraud, intimidation obstruction, violence or interference with contractual or other rights, there was nothing in the defendants' agreement or conduct to make it unlawful or actionable, and even if it were held to be a restraint of trade (pp 619-620) the agreement would be void and unenforceable, not actionable or criminal. Fry LJ gave a reasoned judgment, upholding the judgment of the chief justice (p 632).

13. A further appeal to the House was unanimously dismissed by a seven-member bench: [1892] AC 25. It was accepted that the defendants had acted to advance their own commercial interests, and with no malicious or wrongful object of injuring the plaintiff company, although their gain was inevitably its loss. In the absence of any aggravating feature such as misrepresentation, compulsion, intimidation, violence, molestation or inducement of breach of contract, the defendants' conduct would not have been unlawful if done by a single independent party and was not rendered unlawful by their combination. Even if a restraint of trade, the defendants' agreement was at most void and unenforceable, not actionable or indictable.

14. The decision of the Privy Council in *Attorney General of the Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 concerned an agreement between a group of colliery owners and a group of shipowners which was ancillary to an agreement between the colliery owners themselves. No more need be said of these agreements than that, as the Board held (pp 806, 808), both were very obviously in restraint of trade. The appeal turned on the Australian Industries Preservation Act 1906 which, analogously with the Sherman Act which featured in the argument and the judgment, criminalised certain anti-competitive acts done with (sections 4 and 7) the intention or (section 10) the effect that such act should be to the detriment of the public. The judgment of the Board was given by Lord Parker of Waddington, who took the opportunity to conduct a detailed review of the relevant common law principles. He summarised their effect at p 797:

> "It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful, or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is

> undertaken with a single view to the interests of the combining parties and not with a view to injure others (*the Mogul Steamship Case* 23 QBD 598; [1892] AC 25)."

The attorney-general's appeal failed because the Board found (p 816) no satisfactory evidence of an intention to act to the detriment of the public and no sufficient evidence of injury to the public.

15. In *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422 an obviously restrictive agreement came before the Court of Appeal and Farwell LJ said ([1914] AC 461, 465, although this does not appear in the incomplete Court of Appeal report):

> "In the present case, no circumstances in my opinion could justify such a contract made for the mere purpose of raising prices, with the inseparable incident of depriving the members of the public of the choice of manufacturers, while hoodwinking them into the belief that such choice is open to them …"

The Court of Appeal accordingly held, by a majority, that the agreement was in restraint of trade, and so unenforceable, despite the defendants' failure to plead this defence. An appeal to the House succeeded. Clearly the combination in question was one the purpose of which was to regulate supply and keep up prices (p 469) but the public interest had not necessarily or even probably been damaged (p 471) and the Court of Appeal had no material before it to decide whether it had been damaged or not (pp 469, 470). The agreement had not been shown to be in unreasonable restraint of trade and was therefore enforceable.

16. *Rawlings v General Trading Co* [1921] 1 KB 635 concerned an agreement made between prospective bidders at an auction of military surplus stores. They agreed that in order to avoid competition only one of them should bid. Thus the defendant was to bid on their joint account, and the goods purchased were to be shared equally, each paying half the purchase price. The goods were duly knocked down to the defendant, but he reneged on the agreement, which the plaintiff then sued to enforce. At first instance ([1920] 3 KB 30, 35) the judge held that, at any rate where goods were the property of the public, it was against public policy that people should combine at an auction to procure that goods were sold at a price considerably below their fair value, with the necessary result that the public were defrauded. It was the equivalent (p 34) of secretly using a puffer to drive the price up. He dismissed the action. In the Court of Appeal ([1921] 1 KB 635), Scrutton LJ agreed with the judge. He thought it clear that the agreement was neither criminal nor actionable at the suit of the vendors (p 643), but considered that the restrictions accepted in the agreement, although reasonable in the plaintiff's interest, were contrary to the interest of the public and thus an unjustified and unenforceable restraint of trade (pp 643, 644, 647). A majority of the court held otherwise. Bankes LJ regarded the judge's conclusion as contrary to settled authority (pp 640-641). Atkin LJ shared that view (p 652), but also held that the agreement was one the parties were free, in the absence of express or implied misrepresentations intended to deceive, to make and enforce (p 648), and there was nothing in this agreement which was ex facie illegal (p 652).

17. The effect of these authorities may be succinctly summarised. The common law recognised that an agreement in restraint of trade might be unreasonable in the public interest, and in such cases the agreement would be held to be void and unenforceable. But unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, such agreements were not actionable or indictable. In the course of the authorities a number of different reasons were given for this conclusion. They included the following:

(1) While commercial parties could not lawfully act with the wrongful and malicious object of injuring another party, they were free to promote their own business as they thought fit, "however severe and egotistical" such means might be, even though this might inflict loss on others. See *Mogul*: Lord Coleridge CJ (pp 552-553); Bowen LJ, p 614, 620; Fry LJ, pp 622, 624, 625; Lord Halsbury, pp 36, 40; Lord Hannen, pp 58-59.

(2) While agreements in restraint of trade might be injurious to the public interest, they might also confer benefits on the public, as by preventing cut-throat competition, loss of supplies or

services or production facilities, lowering of wages or unemployment. See *Mogul*: Lord Coleridge CJ, p 548; Bowen LJ, p 619; Fry LJ, pp 626-627; Lord Bramwell, p 46; *Adelaide Steamship*, Lord Parker, pp 809-810; 813, 816; *North Western Salt*, Lord Haldane LC, pp 469-471; Lord Parker, p 480; Lord Sumner, p 481.

(3) Other than in very clear cases the courts were not well-fitted to assess whether restraints of trade were injurious to the public or not, and it was not "the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy". See *Mogul*: Bowen LJ, pp 615, 620; Fry LJ, pp 625-626; Lord Watson, p 43; Lord Bramwell, pp 45, 49; Lord Morris, pp 50-51.

(4) To limit the bounds of competition would be contrary to what modern legislation had shown to be the present policy of the state. See *Mogul*: Fry LJ, p 626.

(5) The victim of an anti-competitive practice could show no legal right which had been infringed. See *Mogul*: Lord Halsbury LC, p 38.

(6) There was no authority for the proposition that it was actionable for one party to compete against another for the purpose of gain and not out of actual malice, even though the object was to drive that party away from his place of business and did so. See *Mogul*: Fry LJ, pp 630-632; Lord Bramwell, p 46; Lord Field, p 57.

18. The contemporary relevance of these common law principles was affirmed by the House relatively recently in *British Airways Board v Laker Airways Ltd* [1985] AC 58, 79. Laker had brought proceedings in the United States District Court for the District of Columbia claiming large damages under the Sherman and Clayton Acts against a number of airlines, including British Airways and British Caledonian Airways. The text of Laker's Complaint was annexed to the judgment of the Court of Appeal ([1984] QB 142, 203-209). It alleged that the defendants had conspired to drive Laker out of business on the North Atlantic route by (among other things) carrying passengers at loss-making fares, supplying free in-flight services to low-fare passengers, seeking to discourage potential participants in a scheme to rescue Laker from the financial straits to which it had been reduced and paying very high secret commissions to travel agents to divert potential Laker passengers. British Airways and British Caledonian brought counter-proceedings in the English court, seeking to restrain Laker from proceeding in the US District Court. This action was not, however, based on the contention that England was a more convenient forum for pursuit of Laker's claim, although plainly Laker would have had no difficulty serving those airlines here. It was accepted before Parker J at first instance ([1984] QB 142, 150) and before the Court of Appeal (p 186) that neither Laker's claim nor substantially the same claim could be pursued in the English court. In an opinion with which the other members of the House agreed, Lord Diplock fastened on two propositions which were decisive of the civil appeals before the House. The second, alone relevant for present purposes, was stated in these terms ([1985] AC 58, 79):

> "The second proposition, that of English law, was understood by your Lordships to have been common ground between the parties, at any rate throughout the lengthy hearing of the appeal; no argument casting any doubt upon it was advanced. The proposition is that, even if the allegations against B.A. and B.C. in the complaint in the American action can be proved, they disclose no cause of action on the part of Laker against B.A. or B.C. that is justiciable in an English court. The Clayton Act which creates the civil remedy with threefold damages for criminal offences under the Sherman Act is, under English rules of conflict of laws, purely territorial in its application, while because the predominant purpose of acts of B.A. and B.C. that are complained of was the defence of their own business interests as providers of scheduled airline services on routes on which Laker was seeking to attract customers from them by operating its Skytrain policy, any English cause of action for conspiracy would be ruled out under the now well-established principle of English (as well as Scots) law laid down in a series of cases in this House spanning 50 years of which it suffices to refer only to *Mogul Steamship Co Ltd v McGregor*,

Gow & Co [1892] AC 25 and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435."

19. In cases where aggravating elements, notably misrepresentation and deception, have been found, defendants have been successfully prosecuted for conspiracy to defraud. Thus in *R v De Berenger* (1814) 3 M&S 67 the defendants were successfully prosecuted for conspiring by false rumours to raise the price of the public funds, causing loss to those who bought during this temporary rise. In *R v Lewis* (1869) 11 Cox CC 404 the defendants were convicted of conspiring to obtain money by divers false pretences and deceptive practices. In *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, a civil case, the plaintiff was found to have created a false market in shares by false and fictitious acts. All these cases fall very clearly on the wrong side of the line drawn in the authorities summarised above.

20. In his judgment in the present case, with which Field J agreed, Auld LJ reviewed most of these authorities. He was sympathetic to submissions that the decision in *Jones v North* turned on the Vice-Chancellor's questionable view that there was no dishonesty, and that such an agreement would, certainly since the Second World War, have been regarded not only as unenforceable but also criminal (para 50). Either way, the decision was hardly a firm foundation for the broad proposition that the common law had never recognised dishonest price fixing as a common law conspiracy to defraud. Of the *Mogul* case, Auld LJ observed that there was no complaint or finding of dishonesty or of other unlawful conduct, and the judgments of the Court of Appeal majority and the House of Lords showed that the result would have been different if there had (para 51). It was moreover accepted that the purpose of the arrangement was to advance the trade interests of the defendants and not to harm others. The *Adelaide Steamship* judgment was discounted on the ground that there was no finding of dishonesty or of intention to injure others, elements which, if present, would have led to a different result (para 52). Auld LJ pointed out that in *Rawlings* there was no convincing evidence that the price paid was below the fair value and observed that "the court, as a whole, did not regard the conduct as criminal, no doubt because, as Scrutton LJ indicated, at pp 643, 647, and Atkin LJ at pp 647, 648, there was no allegation or evidence of misrepresentation or fraud on the vendor …" (para 53). Auld LJ regarded *R v De Berenger, R v Lewis and Scott v Brown, Doering, McNab & Co*, as useful examples of what was lacking in the civil cases on which Mr Norris relied, plain dishonesty. They showed, he said (para 55), that the critical point is not one of law as to the applicability or otherwise of the common law offence of conspiracy to defraud to price-fixing agreements, but one of fact or evaluation on a case by case basis as to the presence of dishonesty. *Laker* was not cited to the Divisional Court.

21. The Divisional Court's treatment of these authorities cannot, with respect, be supported.

(1) The defendant in *Jones v North* attacked the agreement as being contrary to public policy, and failed because the parties were held to be free to make the agreement they did. That was what, in the heyday of Victorian capitalism, public policy was held to require. The decision has never been overruled. The criminal law, to be fair, must be certain, and the requirement of certainty is not met by asserting that at some undefined later time a different view would have been taken.

(2) The Divisional Court did not address the principles for which *Mogul* has long stood as classic authority. It cannot be dismissed on the ground that there was on the facts no dishonesty. Mr Norris does not advance the contention that price fixing agreements can never be conspiracies to defraud even if accompanied by aggravating features such as dishonest misrepresentations, a proposition expressly and repeatedly contradicted by *Mogul*. He contends that agreements to fix prices, whether disclosed or not, have not been treated as in themselves dishonest. That contention is supported by *Jones v North* and *Mogul* or the decisions in those cases would necessarily have been different.

(3) The Divisional Court did not address the central point in *Adelaide Steamship*, which was the court's recognition, foreshadowed in *Mogul*, followed in *North Western Salt* and later reflected (as will be seen) in statute, that a restrictive trade agreement lacking aggravating features of the kind noted above may operate to the benefit of the public. This is why, as Lord Hoffmann

recently put it in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, para 56, the "common law has traditionally been reluctant to become involved in devising rules of fair competition," the judges regarding themselves as ill-fitted for the task.

(4) *Rawlings* cannot be distinguished on the basis suggested. None of the four judges, including the two who found for the defendant, suggested that the agreement could be criminal (Scrutton LJ was clearly of opinion that it was not: p 643). Had it been, the agreement would have been criminal when made, and the price at which the goods were actually knocked down would have been irrelevant.

(5) *R v Berenger, R v Lewis* and *Scott v Brown, Doering, McNab & Co* are authority for the proposition that a conspiracy to deceive the public by express or implied misrepresentations is and has for many years been criminally indictable. But the correctness of that proposition is not in doubt, and has certainly not been challenged by Mr Norris. They are no authority for the proposition that a price-fixing agreement without aggravating features was indictable in this country at common law.

22. The Divisional Court did not have the opportunity to consider *Laker*. The respondent submits that *Laker* is not authority for the proposition that dishonest price-fixing is lawful at common law. That is partly true. It does not establish that a price-fixing agreement with aggravating features, or an agreement with the predominant purpose of injuring another rather than defending one's own business interests, is lawful at common law. The authority which Lord Diplock cited is inconsistent with such a proposition. *Laker* is, however, clear authority that an anti-competitive price-fixing agreement of the kind alleged in the complaint against British Airways and British Caledonian would have given *Laker* no cause of action which it could have pursued in the English court. That complaint alleged price-fixing and much besides.

23. At no time up to the present has anyone, whether an individual or a company, been successfully prosecuted for being party or giving effect to a price-fixing agreement without aggravating features. The respondent did not suggest that they had. At the date of the respondent's indictment against Mr Norris, no such prosecution had been brought.

(2) *Statutory and other relevant non-judicial material*

24. In the past 60 years, the law relating to price-fixing has been radically, if somewhat gradually, changed through the medium of legislation. The Restrictive Practices (Inquiry and Control) Act 1948 created the Monopolies Commission, which was required, upon a reference by the Secretary of State, to report on whether certain cartel arrangements operated contrary to the public interest. The 1948 Act also empowered the Secretary of State to make orders giving effect to any recommendations contained in a report, which included declaring such an agreement or its carrying out unlawful. By section 11, no criminal proceedings could be brought against a person who committed, aided, abetted, counselled, conspired, incited or attempted a contravention of such an order.

25. Five years later, in 1953, the Government commissioned a report from the Monopolies Commission on the issue of restrictive trade practices. The result was the Cairns Committee Report (Cmd. 9504), entitled "Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices", published in June 1955. The view of the majority of the Committee, summarised at paras 242 to 247, was that, with relatively few exceptions, cartels (including price-fixing agreements) generally operated against the public interest, and that it should be made a criminal offence to operate at any rate most such arrangements. However, at paras 255 to 259, the minority said that, particularly as some cartels could operate in the public interest, criminalisation was inappropriate, and they proposed a scheme of compulsory registration, coupled with unenforceability of cartels which were not in the public interest.

26. The Government accepted the view of the minority, as was explained by the Lord Chancellor, Viscount Kilmuir, in a speech in this House on 27 July 1955. He said that the policy of the legislation then laid before Parliament would "obviate the need for creating new criminal offences". He also emphasised that the Government rejected the majority view of the Cairns Committee, on the basis that it was "better to deal with" undesirable cartels "as a civil matter, by injunction, rather than as a criminal offence".

27. This view was reflected in the ensuing Restrictive Trade Practices Act 1956. The principal reforms effected by Part I of that Act for present purposes were as follows. Section 9(1) introduced compulsory registration, recorded on a publicly accessible register, for cartel agreements to which the Act applied. By section 6(1)(a), such agreements included price fixing agreements if they operated in the United Kingdom. Section 14 gave the Registrar power to seek information in connection with such agreements. By section 20, the Registrar could refer any such agreement to the court to determine if it was in the public interest. Section 21 introduced a presumption that such an agreement was not in the public interest unless it satisfied one of eight requirements. The only criminal sanction was in section 16(1), which rendered it an offence not to comply with a notice from the Registrar seeking information.

28. Part II of the 1956 Act included section 24, which rendered it "unlawful" to enter into or to carry out any agreement involving what the statutory headnote described as the "collective enforcement of conditions as to resale prices". However, subsection (6) provided that no criminal proceedings should lie against any person who committed, aided, abetted, counselled or procured any contravention of the section, or who conspired, attempted or incited others so to do.

29. In their book, first published in 1956, The *Law of Restrictive Trade Practices and Monopolies* (2nd ed (1966), p 148), Lord Wilberforce, Alan Campbell and Neil Elles pointed out that, unlike the Sherman Act, or the equivalent French and German legislation, the 1956 Act "does not deal with the categories of practices which it desires to prevent by making them criminal offences but only by providing a civil remedy exercisable by the Crown". On the following page, they made the point more colourfully, stating that "the 'odour of criminality' is kept away from the world of restrictive practices in trade".

30. The Resale Prices Act 1964 took the law a little further. It prohibited any contract which required a buyer to charge a minimum price, or to impose a corresponding provision on a purchaser from him. Section 4 of the 1964 Act authorised the bringing of civil proceedings in relation to any breach. However, by subsection (1), any criminal proceedings were excluded in similar terms to those in section 24(6) of the 1956 Act.

31. In 1968, Parliament passed the Restrictive Trade Practices Act of that year, which had two principal functions. The first was to prevent cartel regulation from conflicting with the Government's programme then under way for industrial re-organisation. The second was concerned with honouring certain Treaty obligations. So far as the first function is concerned, section 1 effectively exempted from registration under the 1956 Act any agreement of substantial importance to the national economy, whose main object was to promote efficiency or improve productive capacity, which could not be achieved except by such an agreement. As to the second function, section 12 enabled the Secretary of State to annul any agreement which conflicted with obligations under the European Free Trade Area Agreement, to which the UK was then a party.

32. In 1973, the United Kingdom ceased its membership of EFTA and joined the European Community. Accordingly, the UK became subject to what are now articles 81 and 82 of the EC Treaty. The practical effect, in summary terms, of those provisions was to create a new tort of breach of statutory duty in respect of cartel agreements which affected intra-Community trade. They also exposed the parties to such agreements to civil penalties at the hands of the Commission, subject to review by the European Court of Justice. However, they did not give rise to any criminal liability.

33. The next step taken by Parliament was to pass the Restrictive Trade Practices Act 1976, which is particularly important in the present context as it contained the principally relevant

legislation in force at the time of the activities complained of in Count 1. It was, in the main, a consolidating statute. Its general structure was the same as the 1956 Act, albeit that it sometimes used different terminology. Like the 1956 Act, which it repealed and replaced, the 1976 Act, by section 1, required registration of a number of types of agreement including those set out in section 6. The same section entitled the Director General of Fair Trading to register such agreements, and to take proceedings in court to test their validity. Section 2 provided that, where the court concluded that an agreement was against the public interest, it might be declared void and an injunction made to prevent its performance.

34. By section 6(1), it was provided that the 1976 Act applied to "agreements" between suppliers of goods "under which [specified] restrictions are accepted". They included restrictions in respect of "the prices to be charged, quoted or paid for goods supplied [or] offered". Section 10 stated that an agreement to which the Act applied was presumed to be contrary to the public interest, unless it satisfied certain requirements, which were similar, but not identical, to those in section 21 of the 1956 Act. Section 29 preserved the first of the two functions of the 1968 Act.

35. Section 35 of the 1976 Act was similar in effect to section 24 of the 1956 Act, although it was somewhat differently expressed. Subsection (1) provided that, if an agreement was not registered appropriately, (a) it would be "void" in respect of all "restrictions" it contained, and (b) it would be "unlawful" for any person "to give effect to", or to "enforce or purport to enforce", any such restrictions. Subsection (2) stated:

> "No criminal proceedings lie against any person on account of a contravention of subsection (1)(b) above; but the obligation to comply with that paragraph is a duty owed to any person who may be affected by a contravention of it and any breach of that duty is actionable accordingly…".

36. The Director General was given power under section 36 to request a person to state whether he was party to a cartel agreement, to specify the terms of any such agreement, and to provide such further information and documentation as he might request. As with the 1956 Act, the only criminal offence created by the 1976 Act was in section 38, which rendered it an offence not to comply with a request under section 36. Section 37(1) enabled the Director General to apply for a formal examination of any such person before the court, and subsection (2)(b) required such person to answer all questions properly put to him in such proceedings.

37. In 1998, Parliament enacted the Competition Act, which took effect in 2000 and remains in force. It repealed the 1976 Act, and introduced a general prohibition on anti-competitive activities derived from the EC Treaty and in particular articles 81 and 82. It prohibits cartel activity, which is defined in terms fairly similar to those in the 1976 Act, and it allows fewer exceptions, most of which were those permitted by the European Commission. The Office of Fair Trading ("OFT") is given wide powers of investigation in section 25 to 29. Sections 32 to 41 are concerned with "Enforcement", and they include the imposition of substantial fines where forbidden cartel activity has occurred. Although there is no question of such anti-competitive activities being thereby criminalised, the 1998 Act contains no equivalent to section 35(2) of the 1976 Act. Sections 42 to 44 do create criminal offences, but they all are based on failure to comply with most of the investigation procedures in sections 25 to 29.

38. Statutory criminalisation of cartels was first introduced by the Enterprise Act 2002. This statute was heralded by a paper jointly published by the Treasury and the Department of Trade and Industry in June 2001, which was entitled "Productivity in the UK: Enterprise and Productivity Challenge". The paper stated in para 3.23 that "the Government intends to consult upon a proposal that there should be a new criminal offence for individuals who engage in cartels…." The following month, a White Paper (Cm 5233) was issued by the DTI, entitled "A World Class Competition Regime". In her foreword to that Paper, the Secretary of State, after referring to the desirability of increasing "business certainty", stated that she proposed to "introduce strong deterrents to anti-competitive behaviour by introducing a new criminal offence for those engaged in cartels."

39. The DTI then publicly consulted on issues relating to the new proposed competition regime. As part of the consultation process, a paper was commissioned by the OFT on the criminalisation of cartel offences from Sir Anthony Hammond QC (the former Treasury Solicitor) and Professor Roy Penrose (the former Director General of the National Crime Squad). That paper (OFT 365) was published in November 2001.

40. While the paper recommended that the law be changed in this and other respects, it stated in para 6.1 that "[i]t should be noted that engaging in a cartel currently only constitutes a civil law infringement in the United Kingdom and only undertakings are subject to penalties". In para 6.2 the paper went on to say that "individuals are not currently subject to any personal sanctions for participating in a cartel and it may only be the fear of a custodial sentence for a criminal offence which may serve as a sufficient deterrent against them engaging in any activity." The paper recommended that undertakings "should continue to be subject to the existing civil law sanctions … and should not additionally be subjected to criminal sanctions, which should be reserved for individuals": para 1.19. Sir Anthony and Professor Penrose are recorded as having received views from a number of sources, including Government departments, the police and the director and assistant director of the Serious Fraud Office.

41. After considering the paper and other representations from interested parties, the Department issued its "Response to Consultation" in December 2001, under the title "Productivity and Enterprise", which stated at para 52 that the Government "sees no reason to delay the introduction of the new criminal offence to supplement the civil provisions in the Competition Act."

42. When the Bill came before Parliament, ministers in both Houses stated that there was no question of criminal prosecutions in relation to conduct before the 2002 Act came into force. On 23 April 2002, when asked whether Sir Anthony Tennant, who had been alleged by the US authorities to be involved in price-fixing, could be extradited, the responsible Minister said: "There is no possibility of that at this moment because the matter is not defined as criminality at this point. There is no regime that covers it. Were this Bill enacted, my understanding is that Sir Anthony Tennant probably could have been extradited". Much the same point was made on behalf of the Government in this House by Lord McIntosh of Haringey on 22 July 2002.

43. The 2002 Act was duly passed into law. Its long title describes it, inter alia, as an Act "to create an offence for those entering into certain anti-competitive agreements". Section 188 is headed "Cartel offence", and subsection (1) provides that

> "An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B)".

Those arrangements include, by section 188(2)(a), ones which "would directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service". Section 190 states that, on indictment, a party guilty of an offence under section 188 should be liable to a maximum term of imprisonment of five years.

44. The 2002 Act introduced a new section 30A into the 1998 Act. This section provided that any response by a person to a request made pursuant to the investigatory powers contained in sections 26 to 28 "may not be used in evidence against him on a prosecution for an offence under section 188 [of the 2002 Act]" subject to certain exceptions.

45. The Divisional Court considered that neither these statutory provisions enacted over the past 60 years nor the observations from Ministers and others called into question the conclusion that price-fixing could, without more, constitute an offence at common law. Auld LJ pointed out that the introduction of a new statutory criminal offence did not, as a matter of logic or precedent, negative the existence of a pre-existing common law offence with a wider range. As for section 35(2) of the 1976 Act, and its statutory predecessors, he considered that they were merely included to emphasise

that those statutes did not themselves create any new offence. He dismissed the ministerial and other statements, as they either did not satisfy the well known tests set out in *Pepper v Hart* [1993] AC 593, or were irrelevant, as they merely sought to identify the purpose of the projected legislation in question.

46. The Divisional Court's conclusion, that this legislative and other material does not assist the contention that price-fixing was not a criminal offence at common law, does not, with respect, bear analysis:

1. It is clear that, from 1948 until 2002, Parliament, like the courts, did not regard cartels, and, in particular for present purposes, price-fixing agreements, as necessarily being contrary to the public interest: that is clear from sections 20 and 21 of the 1956 Act, section 1 of the 1968 Act, section 10 of the 1976 Act;

2. It is equally clear that, during that period, Parliament was consistently of the view that undesirable cartels should be dealt with by regulation rather than through criminal sanctions: that is apparent from sections 6, 9, 20 and 24 of the 1956 Act, sections 1,2, 10, 21 and 36 of the 1976 Act, and sections 32 to 41 of the 1998 Act; indeed, the very fact that cartels had to be registered and publicly disclosed under the 1956 and 1976 Acts suggests that it is very unlikely that Parliament could have envisaged that such agreements could, of themselves, be criminal;

3. In section 35(2) of the 1976 Act, as in section 11 of the 1948 Act, section 24(6) of the 1956 Act and section 4(1) of the 1964 Act, Parliament made it clear that, while carrying out an unlawful cartel agreement contrary to the provisions of that Act could give rise to civil remedies, it could not give rise to criminal sanctions; although section 35(2) appears to have a relatively limited reach and would not necessarily rule out the possibility of a common law offence of carrying out a cartel agreement, it strongly suggests that Parliament did not believe that such an offence existed;

4. The 1976 Act appears to have represented an attempt to introduce a comprehensive and detailed regulatory non-criminal code to deal with cartel agreements and to strengthen the pre-existing law on the topic; it seems unlikely, in those circumstances, that Parliament could have believed that there was, or intended that there should be, an extra-statutory system, particularly involving criminal sanctions, running alongside that statutory code;

5. The 2002 Act itself seems inconsistent with the notion that Parliament believed that there was a common law offence of price-fixing; first there is the extract from the long title, with its reference to the "creat[ion]" of an offence; secondly, there is the limitation of the criminal sanction in section 188 to individuals, which would be a little curious if there was a generally applicable common law offence; thirdly, it is clear from section 189(1) that section 188 refers only to horizontal arrangements, not to vertical ones, which therefore appear to be exempt from criminal sanction, even now; fourthly, the maximum term of imprisonment in section 190 of five years for the new statutory crime of operating a cartel seems somewhat hard to reconcile with the contention that it was already a common law offence, which would carry a maximum term of ten years under section 12(3) of the Criminal Justice Act 1987;

6. Parliament's assessment that the creation and operation of cartels was not within the reach of the criminal law was reflected in the majority and minority views in the Cairns Committee in 1955, in the leading textbook on the topic (Wilberforce, Campbell and Elles), and in the views of the OFT in 2002; in no legal text book or article before 2005 does it seem to have been suggested that price-fixing or other cartel behaviour could constitute an offence at common law;

7. The same picture emerges from ministerial statements during this period, including Viscount Kilmuir's speech in 1955, and statements in and out of Parliament even as recently as 2001 and 2002; indeed, the ministerial statements appeared to suggested that cartels were outside the ambit of the criminal law generally; in the present context, namely the actual and perceived state of the common law, such ministerial statements are not excluded from consideration by the rule in *Pepper v Hart*.

47. The Divisional Court did not have the benefit of a further argument based on the absence of any provision in the 1976 Act or the 1998 Act in relation to self-incrimination in respect of the alleged common law offence of operating a cartel. The obligations in the 1976 Act relating disclosure of information and documents imposed by section 36 (with the consequence of criminal sanctions in the event of non-compliance), and relating to answering questions in section 37 (with the presumed consequence of contempt of court proceedings in the event of non-compliance), appear to have no protective provision so far as subsequent criminal proceedings are concerned. One would have expected them to be subject to some protective provision in relation to self-incrimination, if Parliament had believed that there was a common law offence of price-fixing and cartel activity generally. Without such a provision, the investigative powers in those sections could have effectively been stifled, as the right against self-incrimination would almost inevitably have been invoked as a reason not to provide information. The same point may be made in relation to the current investigative provisions of the 1998 Act: section 30A only operates in respect of the statutory offence created by section 188 of the 2002 Act.

48. Two further points must be addressed. The first concerns the ambit of section 35(2) of the 1976 Act, which at first sight adds nothing because section 35(1) does not purport to create a crime. It appears to have been included for the purpose of ensuring that no criminal charges based on unlawful means conspiracy could be brought against people agreeing to engage in cartel activity contrary to section 35(1)(b). Until section 5 of the Criminal Law Act 1977 abolished the common law offence of criminal conspiracy, it could, in the absence of a provision such as section 35(2) of the 1976 Act, have been an offence to agree to enforce or carry out an arrangement which contravened section 35(1). While this would explain the predecessors of section 35(2), it was argued that, as the 1977 Act was going through Parliament at roughly the same time as the 1976 Act, it would not explain section 35(2). That does not seem right: the 1976 Act passed into law just over a year before the 1977 Act. The exclusion of any equivalent section from the 1998 Act, passed more than 20 years after the 1977 Act, reinforces the conclusion.

49. It is convenient at this point to mention an argument not advanced on behalf of Mr Norris but advanced by counsel for one of the appellants in *R v GG PLC and others* ([2008] UKHL 17) heard by the House immediately following the present appeal. This argument was that the effect of section 35(2) was to render any activity, however dishonest and however otherwise criminal, free from the threat of prosecution provided that the activity could be said to fall within the ambit of a "restriction" as identified or defined in the 1976 Act. In the light of both the statutory language and common sense, this cannot be correct. All that section 35(2) did was to ensure that "the odour of criminality" was excluded from applying to activities just because they fell within section 35(1)(b). Thus, if, pursuant to a price-fixing agreement, the parties enforced a provision which was a "restriction" within the 1976 Act, that could not, simply because it is unlawful under section 35(1)(b), have constituted a crime. However, if, in enforcing such a restriction, the parties did something which, independently of section 35(1)(b) would have been unlawful, for instance because

it amounted to a dishonest representation, then that could have been a crime. In such a case, it is the deceit, not the price-fixing, which would constitute the criminal conduct. The price-fixing, and indeed the enforcement of the restriction, would thus be merely the occasion of the dishonesty and criminality.

50. It is also convenient at this point to mention another argument not relied on by Mr Norris but relied on by counsel for some of the appellants in *GG*. This is the contention that the court would have no jurisdiction to try a common law cartel offence, in the light of Council Regulation (EC) No 1/2003 of 16 December 2002, which is concerned with "the implementation of the rules on competition laid down in articles 81 and 82 …". The argument is that, by virtue of article 35.1, a member state must "designate the competition authority or authorities responsible for the application of articles 81 and 82", that, at any rate until the 2002 Act, only the OFT and certain other regulatory bodies (such as OFCOM), but crucially not the courts, have been so designated in this jurisdiction (see section 54(1) of the 1998 Act), and, as only such authorities may impose "fines…penalty payments or any other penalty" by virtue of article 5, the courts cannot impose any sanction for agreeing or operating a cartel.

51. There may well be force in the argument that this Regulation would prevent the courts from enforcing, even through the criminal law, a claim based on an allegation of price fixing. It is not necessary to decide the point, as there is, for the reasons discussed, no such common law offence. However, if the formation or operation of the price-fixing agreement involves additional dishonesty (e.g. lying to potential purchasers about the existence of the agreement), then nothing in the Regulation would prevent the dishonesty founding the basis for a criminal charge. Recital (9) states that the Regulation does not apply where "the national legislation pursues predominantly an objective different from that of protecting competition on the market". As already explained, in a case involving dishonest misstatement in connection with price-fixing, it would be the punishment of the dishonesty not price-fixing which would be the "objective" of the criminal law.

(3) *Legal certainty*

52. The above analysis of the case law, the legislation, and ministerial and other official observations appears to establish, without more, that there has never been a common law offence of price-fixing. In addition, the material also serves to demonstrate that it would be wrong in principle for any court now to hold that there is or was, at the time of the events complained of in count 1, such a common law offence.

53. In *R v Rimmington* [2006] 1 AC 459, para 33 Lord Bingham of Cornhill said that there were two "guiding principles" relevant in that case, namely:

> "no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done".

As he went on to say in the next paragraph, those principles are "entirely consistent with article 7(1) of the European Convention". At para 35, he discussed a number of decisions of the Strasbourg Court on the topic, which established that, while "absolute certainty is unattainable, and might entail excessive rigidity", and "some degree of vagueness is inevitable" particularly in common law systems, "the law-making function of the courts must remain within reasonable limits".

54. In *R v Jones (Margaret)* [2007] 1 AC 136, Lord Bingham took the matter a little further when he identified, at para 29

> "what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the

> bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle."

Lord Hoffmann said much the same at para 60.

55. Even if it had otherwise been open to the Divisional Court to decide that price-fixing could now amount to a common law offence, these principles would have required a contrary conclusion. Considering the matter as at the 1990s, the period covered by count 1, the consistent message which had been conveyed both by Parliament, through legislation enacted between 1948 and 1976, and by the judiciary, through cases decided from 1875 through to 1984, was that price-fixing was not of itself capable of constituting a crime. This message was reinforced by ministerial statements, even into this century, and in textbooks. There was no reported case, indeed, it would appear, no unreported case, no textbook, no article which suggested otherwise. Further, the legislation indicated that cartel operating was a matter for regulation, and the cases indicated that it did not even constitute a civil wrong.

56. In these circumstances, it would appear to involve a contravention of the principles articulated in *Rimmington* to hold that entering into or operating a price fixing agreement constituted, and had during the whole, or at any rate most, of the 20th century, constituted a common law offence. The Divisional Court thought otherwise, on the basis that the essence of the common law offence of price-fixing was conspiracy to defraud, a well-established (if not universally approved) offence. That involved the same error as that identified in paras 17 to 21 above, namely the acceptance of the proposition that making or operating a secret price-fixing agreement could, without more, amount to dishonesty and hence to a criminal offence.

57. The alternative argument against Mr Norris is that, even accepting that operating a price-fixing cartel did not constitute an offence for much of the 20th century, public perceptions had changed by the end of the 1980s so as to justify taking a contrary position. That argument is also unsustainable. It is impossible to find any contemporaneous observations to support the argument, at least in the material made available in this case. There is nothing in any paper or report published at any time during the 20th century to indicate such a change of perception, except the majority view expressed in the report of the Cairns Committee, which was promptly and clearly rejected by the Government. However, even if there had been a discernible shift of perception by, say, 1985, it would have been for the legislature, and not for the courts, to decide whether, and if so to what extent, to criminalise price-fixing. The general statement of principle in *R v Jones* would be enough to justify that conclusion. However in the case of cartels, both the legislative history since 1948 and the observations referred to in para 17(3) above make it clear that this is an area in which the law should be developed by Parliament, not by judges. In any event, criminalising price-fixing because of a change in public perception would be hard to reconcile with the Strasbourg Court's rejection of the notion that the courts could characterise an action as criminal simply because it was "wrong rather than right in the judgment of the majority of contemporary fellow citizens" – see *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para 38.

58. Reliance was placed on the reasoning of the Strasbourg Court in *SW v United Kingdom* (1995) 21 EHRR 363. In that case, it was held that, notwithstanding article 7 of the Convention, it was open to the courts in this country to extend the offence of rape to a case of a husband forcing his cohabiting wife to have sex with him, even though historically the relationship had been held to carry with it the wife's implicit consent. That decision does not assist the case against Mr Norris. There were two reasons why the court held that this change in the law in *SW* did not violate article 7, and neither applies here. The first was that a gradual change in the law on the topic of marital rape could have been perceived in the case law over the years preceding the commission of the alleged offence in *SW*, so that it was known that "a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape". Hence the change in the law in question "had become reasonably … foreseeable" (para 43/41). Secondly, by the time of the alleged offence, the notion of a husband "being immune against prosecution for rape of his wife" had become "unacceptable" in the light of "a civilised concept of marriage … and … the fundamental objectives of the Convention" (para 46/44).

59. The first time it was apparently suggested in any publication that price-fixing might be a common law offence was in an article written in 2005 by Sir Jeremy Lever QC and Mr John Pike, "Cartel Agreements, Criminal Conspiracy and the Statutory 'Cartel Offence'" [2005] ECLR 90. At p 95, the authors made the point, which has already been touched on, that if, in addition to the price-fixing, something positively misleading is said, such as a dishonest "representation … that offers are being made competitively", the criminal law will be engaged. More controversially, the authors then went on to suggest that making and operating secret price-fixing agreements could, of itself, operate dishonestly so as to constitute a crime, at least in circumstances where purchasers are acting in the belief, known to the price-fixers, that there is no price-fixing.

60. This article was not only published after the 2002 Act, but a number of years after the activities complained of in count 1 had ended. So it is not as if even an astute reader of legal articles in this area of law could have informed himself at the relevant time of the possibility of his price-fixing activities attracting criminal sanctions. In any event, although the Divisional Court was impressed with the article, there are problems with the notion that mere secrecy can of itself render the price-fixing agreement criminal. It is not as if secrecy is always necessary for a price-fixing agreement to be effective, or that it is the secrecy which causes a purchaser loss. As already mentioned, in order to establish a criminal offence along the lines suggested by Lever and Pike, it would be necessary to show that it was the secrecy which caused the purchaser's loss, since it must be the alleged dishonesty which causes the loss.

61. Quite apart from this, it would be dangerous and impractical, particularly for the judges, to introduce a general principle that there is some sort of implied representation that the price at which goods are offered has been arrived at on a certain basis. Finally, the very fact that it was not until 2005 that it was first suggested that secret price-fixing could of itself constitute a common law offence underlines the difficulty faced by the argument that it would have been a common law offence in the 1990s, especially when one considers the material which was available on the topic from Parliament and the courts.

62. For all the reasons given in sections (1), (2) and (3) above the committee concludes that mere price-fixing (that is, the making and implementation of a price-fixing agreement without aggravating features) was not, at any time relevant to count 1, a criminal offence in the United Kingdom. Mr Norris' appeal in relation to this count must accordingly be allowed and the judge's order quashed.

(4) *The double criminality issue*

63. As stated, Mr Norris's appeal with regard to count one falls to be allowed on the elementary basis that the conduct of which he is accused—mere undeclared participation in a cartel—was not at the material time, in the absence of aggravating features, a criminal offence in this country either at common law or under statute. It was therefore wrong to have characterised his conduct as being party to a conspiracy to defraud although it would have been otherwise had the allegation been, for example, that he and his co-conspirators, having entered into a price-fixing agreement, agreed in addition to deceive their customers by making false representations to the contrary. That certainly would have been an aggravating feature. But no such conduct is alleged here. It is true that Ms McClain has deposed that the conspirators "[i]n effect . . . defrauded their customers by requiring that they pay higher prices than they might otherwise have paid had there been no conspiracy." But that is no more than to assert an intrinsic unlawfulness and dishonesty merely in taking part in a secret cartel and under English law, until the enactment of section 188 of the Enterprise Act 2002, that was simply not so.

64. The issue raised for the House's decision under section 137 of the Extradition Act 2003 strictly, therefore, does not arise. It was discussed by the Divisional Court [2007] 1 WLR 1730, para 99, under the heading "the double criminality issue" and posed thus: "whether, if price fixing is capable of constituting the English offence of conspiracy to defraud, of which dishonesty is an essential ingredient, the absence of such ingredient in the United States offence of price fixing

prevents the alleged conduct of Mr Norris from being an extradition offence within section 137." But it only arose because the Divisional Court found that the conduct alleged against Mr Norris did indeed constitute an offence under English law before the Enterprise Act. Given, however, the obvious general importance of the issue and that it was fully argued before the House, we think it right to decide it.

65. Before turning, as will be necessary, to a brief history of English extradition law prior to the Extradition Act 2003, particularly with regard to the so-called double criminality rule, it is useful to stand back from the detail and recognise the essential choice that the legislature makes in deciding just what the double criminality principle requires. It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. That is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that there is no mismatch between it and the supposedly corresponding domestic offence. If, however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found.

66. The modern history of extradition starts with the Extradition Act 1870 which, by section 10, provided so far as material:

> "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as . . . would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

"Extradition crime" was defined (by section 26 of the Act) to mean "a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the First Schedule to this Act."

67. The magistrate's task, in short, was simply to examine the evidence produced by the requesting state to decide whether, according to English law, it would justify the accused's committal for trial for a listed offence. As Lord Diplock made plain in successive decisions of this House in *In re Nielsen* [1984] AC 606 and in *Government of the United States of America v McCaffery* [1984] 1 WLR 867, the conduct test was to be applied:

> "[T]he magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state." (*In re Nielsen*, 624 F-G):

> "[T]he test whether a person in respect of whom a warrant for his arrest had been issued in a foreign state for an offence alleged to have been committed in that state was liable to be surrendered as a fugitive criminal, was *not*: whether the offence specified in the foreign warrant of arrest as that for which it had been issued was substantially similar to a crime under English law falling within the list of offences described in Schedule 1 to the Extradition Act 1870, as currently amended (i.e., the so-called 'double criminality' test). The right test, as stated by the Divisional Court in the *Nielsen* case, was: whether the *conduct* of the accused, if it had been

> committed in England would have constituted a crime falling within one or more of the descriptions included in that list." (*McCaffery* p 869 F-G)

68. Extradition to Commonwealth countries, however, was governed from 1967 by the Fugitive Offenders Act 1967 and here the so-called double criminality requirement was provided for in very different terms. To constitute a "relevant offence", the offence, however described in the law of the Commonwealth country, had first to fall within a description set out in Schedule One to the Act and to be punishable under that law for a term of 12 months or more (section 3(1)(a)) and in addition it had to be established that "the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom . . . " (section 3(1)(c)).

69. In *Government of Canada v Aronson* [1990] 1 AC 579, the House by a majority of three to two construed section 3(1)(c) as providing for the offence test of double criminality. Lord Lowry said this:

> "The 'act or omission constituting the offence' cannot in my opinion mean 'the conduct, as proved by evidence, on which the charge is grounded,' because the evidence of such conduct could prove something more than what has been charged. In such a case the conduct proved would not be the act or omission constituting the offence of which the fugitive is accused in the Commonwealth country . . . One may paraphrase the effect of section 3(1)(c) by asking: 'what is the essence of the Commonwealth offence? And would that be an offence against the law of the United Kingdom?' That is quite a different thing from looking at the course of conduct revealed by the evidence and asking whether that conduct (as distinct from the conduct of which the person is accused) would constitute an offence against the law of the United Kingdom." (p 609 C-H).

70. Lord Bridge of Harwich, agreeing with Lord Lowry, considered the consequences of the contrary approach (the conduct test):

> "The issue arises when the Commonwealth offence may be established by particularising and proving ingredients A, B and C, but the nearest corresponding United Kingdom offence requires that the prosecution prove ingredients A, B, C and D. It is submitted for the Government of Canada . . . that if, in a particular case, the evidence relied on to prove the Commonwealth offence would be sufficient, if accepted, to establish ingredient D in addition to ingredients A, B and C, this is sufficient to satisfy the requirements of section 3(1)(c). Whether the extra ingredient necessary to prove the United Kingdom offence, over and above the ingredients which constitute the Commonwealth offence, is a physical or mental element, the wide construction leads to startling results. Two men are accused of the identical Commonwealth offence particularised against them in identical terms. The committing magistrate must decide whether the offence with which each is charged is a 'relevant offence': section 7(5). If the evidence establishes ingredients A, B and C against both men but ingredient D against the first man only, the magistrate must commit the first man, but not the second, to custody to await his return to the designated Commonwealth country. Yet so much of the evidence that is relied on to establish ingredient D . . . will be irrelevant to his trial for the Commonwealth offence after his return." (p 589 E-H).

71. Lord Bridge's illustration neatly raises the situation postulated in this very case. Ingredient D (here dishonesty) is required to prove the English offence but is not an ingredient of the United States offence. Applying the conduct test (as would have applied under the 1870 Act) he, but not a notional co-accused against whom dishonesty was not alleged, would have fallen to be extradited. Is that, however, really so "startling"? He, after all, would have committed an offence under English law whereas his co-accused would not.

72. The next major legislation was the Extradition Act 1989 which consolidated the extradition regimes previously contained in the 1870 Act and the 1967 Act, both of which were repealed. The test for double criminality was set out in section 2(1)(a) which provided that "extradition crime" meant "conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law."

73. The Divisional Court (Rose LJ and Hooper J) in *R v Secretary of State for the Home Department, Ex p Hill* [1999] QB 886 held that the section imposed the conduct test as set out in *Nielsen*, not the narrower approach adopted in *Aronson*. Under the 1989 Act the Court was concerned with the conduct of which the person to be extradited is accused, not the conduct constituting the offence of which he is accused. That plainly was correct.

74. There is one other authority worthy of brief mention in this connection before turning to the Extradition Act 2003 itself: *R v Governor of Belmarsh Prison, Ex p Gilligan* [2001] 1 AC 84. The House there was concerned with section 2(2) of the Backing of Warrants (Republic of Ireland) Act 1965 which provided that the accused person should not be delivered up to the Garda "if it appears to the court that the offence specified in the warrant does not correspond with any offence under the law of the part of the United Kingdom in which the court acts which is an indictable offence or is punishable on summary conviction with imprisonment for six months." The House rejected the contention that the juristic elements of the offences had to be the same. Certainly these were relevant but so too was the accused's conduct. A broad approach was required, the court looking only for some similarity or analogy in the comparison and ensuring that the criminal conduct was of the required degree of seriousness (Lord Steyn at 94A-95G and Lord Clyde at 99F-100B).

75. Part 1 of the Extradition Act 2003 is concerned with extradition to category 1 territories (presently just EU Member States), Part 2 with extradition to category 2 territories which include the USA. For the purposes of Part 2 of the Act the term "extradition offence" is defined by section 137, which so far as material provides:

> "(1) This section applies in relation to conduct of a person if—
>
> (a) he is accused in a category 2 territory of the commission of an offence constituted by the conduct . . .
>
> (2) the conduct constitutes an extradition offence in relation to the category 2 territory if these conditions are satisfied—
>
> (a) the conduct occurs in the category 2 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
>
> (c) the conduct is so punishable under the law of the category 2 territory (however it is described in that law)."

76. It is Mr Norris's central contention that in enacting section 137 Parliament deliberately eschewed the approach adopted in the 1989 Act and instead chose language mirroring the 1967 Act. The 1967 Act spoke of "the act or omission constituting the offence", the 2003 Act of "an offence constituted by the conduct". Both Acts, he submits, focus on that part of the conduct which constitutes the foreign offence, not the other parts which are extraneous to it but which may be alleged in documents supporting the extradition request: the court can have regard only to such

conduct as would prove the essential ingredients of the foreign offence, nothing more. In short, Mr Norris contends for the offence test, not the conduct test.

77. In support of this approach Mr Norris points to a fundamental (and somewhat controversial) feature of the 2003 Act regime, the abolition in relation to designated territories of the requirement to establish even a prima facie case against the accused. If, therefore, the wider conduct test is adopted, a mere allegation of conduct sufficient to constitute ingredient D (taking Lord Bridge's illustration in *Aronson*), the ingredient of dishonesty in the present case, would suffice even though no prima facie case, let alone proof, of it will ever be required in either country—even though, indeed, the prosecution might theoretically choose to advance an allegation, say of fraud or dishonesty, which perhaps a grand jury in the USA have considered and rejected. If, of course, the offence test were adopted, at least that allegation would have to be proved in the foreign state before a conviction could be secured.

78. Plainly these are serious arguments but so too are the arguments the other way. Prominent amongst these is the unlikelihood that Parliament, having legislated across the board in 1989 to adopt the conduct test, as earlier expounded by Lord Diplock, should then in 2003, when plainly intent on making the extradition process simpler rather than more difficult, have chosen instead to adopt the offence test. The 2003 Act, it must be noted, adopts the same formula with regard to double criminality in Part 1 as in Part 2 (save only that in Part 1 the requirement is assumed rather than required to be satisfied in the case of European framework list offences). For non-listed offences, sections 64(1)(a) and 64(3) are in materially identical terms to sections 137(1)(a) and 137(2). Against the legislative background to the Act, it would be surprising if the district judge, in deciding whether the conduct constitutes an extradition offence, has to consider in detail the elements of the foreign offence for which extradition is sought, and, indeed, such authorities as bear upon the question suggest that he does not.

79. *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1 concerned in part the requirement in section 65(2)(a) of the 2003 Act (section 65 rather than section 64 because it was a "conviction" case, not an "accusation" case) that "the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom". Lord Bingham of Cornhill said (at p14):

> "16. I would accept the submission of . . . the prosecutor that 'the conduct' in section 65 means the conduct complained of or relied on in the warrant. Such a reading is consistent with the language and purpose of the Framework Decision, obviates the need for an undesirable inquiry into the niceties of a foreign law and is consistent, so far as that is relevant, with the earlier decision of the House in *In re Nielsen* . . .
>
> 17. . . . It is enough, under subsection (3)(a), if some of the conduct complained of or relied on occurred in the category 1 territory."

80. Lord Hope of Craighead similarly said (para 30 at p18):

> "The judge need not concern himself with the criminal law of the requesting state when he is addressing the question whether the offence specified in the Part 1 warrant is an extradition offence. But he does have to consider where the conduct which is alleged to constitute the offence took place."

Since some of the conduct complained of and relied on in the warrant had occurred in the United Kingdom, the section 65(2)(a) condition was found not to be satisfied (although Mr Norris fell to be extradited under section 65(3)).

81. It was because of the decision in *Cando Armas* that leading counsel for the appellants in *R (Bermingham and others) v Director of the Serious Fraud Office* [2007] QB 727 (the so-called "NatWest Three") abandoned their submission "that there had to be a strict correspondence between the ingredients of the crime alleged in the request and an equivalent crime acknowledged by the law

of England, if the former was to qualify as an extradition offence" (para 81). Mr Norris argues that they were wrong to have done so.

82. Similarly by reference to *Cando Armas*, Auld LJ in the Divisional Court in the present case held (at para 126):

> "In the case of the United States and Part 2 offences, the analogue of the warrant, is the request, whether or not it includes more than is required for prosecution of the offence indicated in the Part 2 territory."

83. A month after the Divisional Court's judgment in the present case the House decided *Dabas v High Court of Justice in Madrid, Spain* [2007] 2 AC 31. This raised an issue under section 64(3)(c) of the Act on the basis that part of the conduct relied on by the respondent state in seeking the appellant's extradition for trial, for conspiracy leading to the Madrid train bombings in March 2004, occurred before the equivalent English conduct of conspiring to support terrorism became an offence in February 2001. Lord Hope of Craighead (with whose opinion on this issue each member of the Committee agreed) said (at p 52):

> "47. It is not obvious from the narrative of the circumstances set out in the arrest warrant . . . that the date when the relevant conspiracy is alleged to have begun was as early as 'before the year 2000'. The essence of the allegation is that the appellant was involved in a conspiracy which led up to the train bombings in Madrid on 11 March 2004. Mention is made of the appellant's activities during an earlier period, but this part of the narrative appears to have been included simply as background.
>
> 48. In the light of this narrative I would have been willing to hold, had it been necessary to do so [it was in fact unnecessary since four members of the Committee concluded that the appellant's conduct also constituted an extradition offence under the framework list provision], that throughout the period of the conduct which is said to constitute the offence in this case the requirement of double criminality was satisfied. A narrative of events prior in date to the conduct relied on will not be objectionable if it is included merely in order to set the scene . . . [I]t is the conduct for which extradition is sought, not any narrative that may be included in the Part 1 warrant simply by way of background, that must satisfy the test of double criminality."

Lord Hope then (at paras 53 and 54) expressly reaffirmed what he had said in *Cando Armas*: that "the judge need not examine the text of the foreign law in order to decide whether the conditions set out in section 64(3) are satisfied."

84. The final judgment requiring mention in this connection is that of Sedley LJ in the Divisional Court in *Edwards v Government of the United States of America* [2007] EWHC 1877 (Admin), [2007] All ER (D) 501 (Jul) which, in reliance principally upon para 48 of Lord Hope's speech in *Dabas*, disagreed with the Divisional Court's judgment in the present case—that "the analogue of the warrant is the request"—and continued:

> "22. Here, as in *Dabas*, the question is what is 'the conduct' which has to amount to an extradition offence? Is it the conduct asserted in the indictment or the conduct recounted as giving rise to it? Consonantly with what Lord Hope said in terms in the last sentence at para 48 of *Dabas*, it seems to me that the policy and objects of the 2003 Act point clearly towards the former meaning. The Act limits the requisite documentation, albeit leaving it open to requesting states to add more. But if the evaluation of the request is not confined to the required materials, there is no apparent limit to what further documentation can be introduced, and a statutory process designed to be lean and schematic will become expansive and porous … .

> 24. I conclude that 'the conduct' referred to in section 137 is confined to the facts alleged in 'the offence specified in the request', the phrase used in sections 70 and 78. In a normal US case such as the present one this will limit the inquiry into dual criminality to, on the one hand, the indictment and any document incorporated by reference into it and, on the other, the criminal law of England and Wales."

85. Mr Norris unsurprisingly seeks to rely on *Edwards*; the respondent submits that it was wrongly decided. As Mr Perry QC for the respondent points out, one of its difficulties is that it would require courts to conduct the very inquiry into foreign law which, in both *Cando Armas* and *Dabas*, the House firmly rejected. In *Cando Armas*, moreover, Lord Bingham in terms approved the approach which was consistent with *Nielsen*—the very embodiment of the conduct test. It seems impossible to escape the conclusion that the Divisional Court in *Edwards* misunderstood para 48 of Lord Hope's speech in *Dabas*: the distinction being drawn there was between mere narrative background and the main conduct for which extradition was sought. Lord Hope was not in that passage addressing or answering the question whether the conduct test or the offence test should apply under the 2003 Act, still less the question where to look for the description of the relevant conduct—whether, in other words, under Part 2 of the Act the analogue of the warrant is the request (as Auld LJ concluded) or "the indictment and any document incorporated by reference into it" (as Sedley LJ held).

86. So much for the existing case law bearing on the double criminality test under the 2003 Act. Taken as a whole it plainly favours the respondent. Is the language of section 137 nevertheless, as Mr Norris submits, consistent only with the construction adopted by the majority in *Aronson* of the broadly similar language used in the 1967 Act? At the very least, Mr Norris submits, there is ambiguity as to the meaning of section 137 and accordingly, as a criminal statute, it should bear the construction more favourable to the liberty of the subject—the approach favoured by each member of the majority in *Aronson* towards the 1967 Act. Against this, however, there is telling authority the other way. La Forest J, sitting in the Supreme Court of Canada, noted in *United States of America v McVey* [1992] 3 SCR 475, 513:

> "Consistent with the general principle that extradition laws should be liberally construed so as to achieve the purposes of the Treaty, a much less technical approach to extradition warrants and to common law warrants has been adopted …"

Similarly, in *In re Ismail* [1999] 1 AC 320, 326-327, Lord Steyn said that "a broad and generous construction" should be given to extradition statutes "intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim."

87. The language of section 137 is in our opinion consistent with either test. Whether the conduct consists solely of those acts or omissions necessary to establish the foreign offence, or the accused's conduct as it may have been more widely described in the request, both the foreign offence and the corresponding English offence would still be "constituted" by it (as required respectively by section 137(1)(a) and 137(2)(b)). Which construction, therefore, should it be given?

88. As noted in para 70 above, really nothing "startling" follows from adopting the wider construction. On the contrary, it accords entirely with the underlying rationale of the double criminality rule: that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state—the position of the notional co-accused contemplated in Lord Bridge's illustration and, indeed, the position of Mr Norris himself, as we would hold.

89. The wider construction furthermore avoids the need always to investigate the legal ingredients of the foreign offence, a problem long since identified as complicating and delaying the extradition process—see, for example, besides the passages cited above from *Cando Armas* and *Dabas*, La Forest J's judgment in *McVey* (at p 528):

> "[T]o require evidence of foreign law beyond the documents now supplied with the requisition could cripple the operation of the extradition proceedings. . . . Flying witnesses in to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure of foreign systems of law."

90. In addition, the wider construction would place the United Kingdom's extradition law on the same footing as the law in most of the rest of the common law world. The broad conduct approach—the examination of all the conduct on which the requesting state relies—is that almost universally followed. To take just two examples: the United Nations' "Model Treaty on Extradition", adopted by the General Assembly in 1991, by article 2 (b) stipulates that it shall not matter whether "under the laws of the Parties, the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account." Similarly, the 1997 Treaty between Australia and the Hong Kong Special Administrative Region provides by article 3(3):

> "For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the requesting Party."

91. The committee has reached the conclusion that the wider construction should prevail. In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Part 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence. Had Mr Norris's appeal failed on the first issue the extradition order on count 1 would have stood.

B. COUNTS 2-4

(1) *The construction and application of section 137(2)(b) of the 2003 Act*

92. Counts 2 to 4 on the indictment allege various forms of obstruction of justice, all relating to the criminal investigation into price fixing in the carbon products industry which was being conducted by the grand jury in the Eastern District of Pennsylvania. On behalf of Mr Norris, Mr Sumption QC contended that, in terms of section 137(2)(b) of the 2003 Act, these are not extradition offences since the conduct would not have constituted an offence under English law if it had occurred in England. In other words, it would not have been an offence under English law for Mr Norris to conspire in England to obstruct the criminal investigation into price fixing being carried out by the grand jury in Pennsylvania.

93. Mr Sumption sought support for that approach in *R v Secretary of State for the Home Department, Ex p Norgren* [2000] QB 817. The case concerned an extradition request for offences of insider dealing on the New York and Pacific Stock Exchanges. One of the contentions for Mr Norgren was that, if that course of conduct had occurred in England, it would not have constituted offences contrary to the Company Securities (Insider Dealing) Act 1985. Although the Divisional Court did not need to decide the point, Lord Bingham CJ said, at p 835A-C:

> "Having heard the competing contentions of the parties, and helpful submissions on behalf of the United States Government, we have inevitably formed tentative views on the likely outcome if the matter were to proceed before the magistrate. Since the Act of 1985 proscribes only insider dealing in listed securities on the London

> Stock Exchange, it would appear doubtful whether the applicant's dealing on the New York and Pacific Stock Exchanges, even if conducted in England and Wales, would constitute a crime punishable under the law of this country. But it may be that for present purposes the Act of 1985 is to be read as having a broader and less domestic application."

94. An exercise in transposition has been an essential part of the law since the enactment of section 10 of the Extradition Act 1870 (quoted at para 66 above). It is the means by which Parliament gives effect to a policy that, before there can be extradition, there should have been criminality according to both the law of the requesting state and English law. As Mr Perry emphasised, the proper interpretation of the current provision in section 137(2)(b) of the 2003 Act is essential to the smooth functioning of the system of extradition under Part 2.

95. The most recent and authoritative guidance on the way that section 10 of the 1870 Act was to be applied is to be found in the opinion of Lord Millett in *R (Al Fawwaz) v Governor of Brixton Prison* [2002] 1 AC 556. The United States sought the extradition of Al Fawwaz on charges of conspiring to murder American citizens, officials, diplomats and others, both in the United States and elsewhere. He had never been in the United States. Lord Millett explained, at p 596, paras 109-110:

> "Given that the court is concerned with an extradition case, the crime will not have been committed in England but (normally) in the requesting state. So the test is applied by substituting England for the requesting state wherever the name of the requesting state appears in the indictment. But no more should be changed than is necessary to give effect to the fact that the court is dealing with an extradition case and not a domestic one. The word 'mutandis' is an essential element in the concept; the court should not hypothesise more than necessary.
>
> 110. The one point to which I would draw attention is that it is not sufficient to substitute England for the territory of the requesting state wherever that is mentioned in the indictment. It is necessary to effect an appropriate substitution for every circumstance connected with the requesting state on which the jurisdiction is founded. In the present case the applicants are accused, not merely of conspiring to murder persons abroad (who happen to be Americans), but of conspiring to murder persons unknown because they were Americans. In political terms, what is alleged is a conspiracy entered into abroad to wage war on the United States by killing its citizens, including its diplomats and other internationally protected persons, at home and abroad. Translating this into legal terms and transposing it for the purpose of seeing whether such conduct would constitute a crime 'in England or within English jurisdiction', the charges must be considered as if they alleged a conspiracy entered into abroad to kill British subjects, including internationally protected persons, at home or abroad."

Changing all those elements which required to be changed, Lord Millett translated the American charge of conspiracy abroad to kill United States citizens, including internationally protected persons, at home or abroad, into a charge of conspiracy abroad to kill British citizens, including internationally protected persons, at home or abroad.

96. Support for that approach is to be found, over a century ago, in the decision of Duff J in the Canadian case, *Re Collins (No 3)* (1905) 10 CCC 80. The United States sought the extradition of Collins on a charge of perjury which was alleged to have taken place when he made an affidavit containing a wilfully false statement of fact in the course of an action of alimony in California. A whole host of technical points against the proposed extradition were raised and rejected. The key argument was to this effect. Under section 2(b) of the Canadian Extradition Act, the extradition crime might mean any crime, "which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the first schedule" to the Act. The judge was satisfied that perjury was indeed a crime described in that schedule. According to the Californian Penal Code, the

offence of perjury was committed by someone who lied after having taken an oath "that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person ..." There was nothing, however, in the law of Canada, which made it perjury to make a false deposition before any competent *Californian* tribunal or officer. Therefore, it was said, the crime for which Collins' extradition was sought was not a crime which, if committed in Canada, would be one of the crimes described in the first schedule to the Extradition Act. It followed that it was not an "extradition crime" within the meaning of section 2(b) of that Act.

97. Duff J rejected that argument. On the basis that the approach to be applied was to conceive the accused, and the acts of the accused, transported to Canada, he said, at pp 100-101:

> "It is contended by the applicant that on these authorities to which I have referred, you have to go through the conduct upon which the criminal charge is based, and you have to come to the conclusion that his identical acts, if done in this country, would have constituted a crime in accordance with the law of Canada. Taken with due qualifications, we need not quarrel with that; but it is obvious from the outset that there must be some qualification. In the first place, the treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of 'criminality,' and it seems to me that the fair and natural way to apply that is this – you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with. To illustrate, I apprehend that in the case of perjury, the accused cannot be heard to say, 'the oath on which the charge is based was administered by A.B., an officer who had no authority to administer oaths in Canada (although duly authorized in the place where the oath was taken); and, consequently, if I had done here the identical thing I did there (viz.: the taking of an oath before A.B.), perjury could not have been successfully charged against me.' The substance of the criminality charged against the accused is not that he took a false oath before A.B, but that he took a false oath before an officer who was authorized to administer the oath. Any other view would, I conceive, simply make nonsense of the treaty."

Another passage from Duff J's judgment is also helpful. Proceeding again on the same basis, he said, at p 103:

> "... if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged."

While Duff J referred specifically to the terms of the particular extradition treaty between the United States and Canada, his reasoning has been adopted in subsequent cases in relation to the Canadian extradition legislation – for instance, by Sharpe JA giving the opinion of the Court of Appeal of Ontario in *Germany v Schreiber* (2006) 206 CCC (3rd) 339, 361, at para 42.

98. In Australia the same general approach can be seen in the judgment of Gibbs CJ, and Wilson and Dawson JJ in *Riley v Commonwealth of Australia* (1985) 159 CLR 1. The definition of "extradition offence" in the relevant Australian extradition statute required inter alia that "any equivalent act or omission, would, if it took place in" the relevant part of Australia, "constitute an offence against the law in force in that part of Australia...." Their Honours said, at p 8:

> "The reference in the sub-section to an 'equivalent act or omission' is to an act or omission which would be the same as the act or omission which is an element of the offence against the law of the foreign state were it not for the fact that the law of the foreign state requires (whether or not for reasons of jurisdiction) that the act or omission should have occurred *in or in relation to some place or thing in or connected with the foreign state.* For example, the act of importing narcotics into Australia is an 'equivalent act' to the act of importing narcotics into the United States" (emphasis added).

99. Despite the very tentative indication of view by the Divisional Court in *R v Secretary of State for the Home Department, Ex p Norgren* [2000] QB 817, we consider that, for the reasons which Duff J gave in *Re Collins*, section 137(2)(b) of the 2003 Act must be interpreted and applied in the way that he indicated. If, then, we ignore the adventitious circumstances connected with the conduct alleged against Mr Norris in counts 2 to 4 of the indictment and concentrate instead on the essence of his alleged acts, the substance of the criminality charged against him is not that he obstructed the criminal investigation into price fixing in the carbon products industry being carried out by the Pennsylvania grand jury, but that he obstructed the criminal investigation into that matter being carried out by the duly appointed body. Making the necessary changes, we would have to translate counts 2 to 4 into counts of obstructing in England a criminal investigation into price-fixing in the carbon products industry being conducted by the appropriate investigatory body in this country.

100. But Mr Sumption's point goes deeper. We have held that price fixing in itself is not an offence under English law. He submitted that, since there could, accordingly, never have been a criminal investigation into price fixing in this country, Mr Norris could not have been guilty of an offence of obstructing justice by interfering with such an investigation. We reject that submission. While price fixing in itself is not an offence under English law, Mr Norris accepts that, when combined with other elements such as deliberate misrepresentation, it can lead to various offences such as fraud or conspiracy to defraud. What the exact outcome of any investigation will be cannot be determined when it is in progress. Destroying documents to prevent them falling into the hands of the investigators may well affect the outcome of that investigation and is, indeed, intended to do so. So the mere fact that the result of the investigation in Mr Norris' case was a charge of simple price fixing, which does not constitute an offence under English law, is no reason to hold that it would not have been an offence under English law to obstruct the progress of an equivalent investigation by the appropriate body in this country.

101. Approaching the matter in that way, we are satisfied that, if Mr Norris had done in England what he is alleged to have done in counts 2 to 4, with the intention of obstructing an investigation being carried out into possible criminal conduct, in regard to fixing prices in the carbon products industry, by the duly appointed body in the United Kingdom, he would indeed have been guilty of offences of conspiring to obstruct justice or of obstructing justice, which could have attracted a sentence of twelve months' imprisonment. It follows that offences 2 to 4 on the indictment are "extradition offences" in terms of section 137(2)(b) of the 2003 Act.

(2) *The application of section 82 of the 2003 Act*

102. Counts 2 to 4 relate to alleged events between April 1999 and August 2001. On 31 December 2004 the warrant for Mr Norris' arrest was issued in England at the request of the United States Government and the contested hearing before the district judge took place in May 2005.

103. Section 82 of the 2003 Act (at the relevant time, although since amended) provided:

> "A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be)."

104. It is common ground that "unjust" in section 82 is directed primarily at the risk of prejudice to the accused in the conduct of any trial by reason of the passage of time: *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779, 782H, per Lord Diplock; *R v Governor of Pentonville Prison, Ex p Narang* [1978] AC 247, 272D, per Viscount Dilhorne.

105. The submission for Mr Norris was that, due to the time that had elapsed since the events alleged in counts 2 to 4, there was a risk that Mr Norris would be prejudiced in the conduct of any trial of those counts. It was not possible to quantify the risk unless the United States authorities provided details of the evidence on which they intended to rely in support of these counts. The district judge should accordingly have asked them to provide that information.

106. The period between the alleged conduct in counts 2 to 4 and the arrest of Mr Norris is not strikingly long. Indeed, in our view, it is not such as to make it prima facie likely that significant relevant witnesses or documents might no longer be available.

107. The system of extradition under Part 2 of the 2003 Act does not require the requesting state to provide details of the evidence (witnesses, documents etc) on which the prosecution would rely at trial. Nor does the district judge have any occasion to inquire into it. It is also well settled that, consistently with that approach, in extradition proceedings the accused has no right to disclosure of the kind that would be available in domestic proceedings: *Wellington v Governor of Belmarsh Prison* [2004] EWHC 418 (Admin) and *Jenkins v Government of United States of America; Benbow v Government of United States of America* [2005] EWHC 1051 (Admin). While the district judge has power to request further information from the requesting state, the same underlying considerations mean that such requests will be exceptional. In *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin); [2007] 1 WLR 1157, the Divisional Court indicated that such a request might be appropriate where the judge considered that an abuse of process might have occurred. But, again, such cases are likely to be exceptional. Moreover, Mr Norris does not suggest that there has been any abuse of process in the present proceedings.

108. Mr Norris does contend, however, that the present case should be treated as being analogous to a case of abuse of process. So, in order to assess whether it would be unjust to extradite him by reason of the lapse of time, the judge should request the United States to provide further information about the evidence on which the prosecution would rely in any trial of counts 2 to 4. The district judge rejected the submission. The Divisional Court upheld that decision. We agree.

109. Assume that it might be appropriate for a district judge to request further information in a case where he considered that, due to the lapse of time, there was reason to think that the accused might not be able to have a fair trial. Nevertheless, as we have said, by itself, the relevant period of time in this case does not justify an inference that Mr Norris would not be able to have a fair trial. He has provided no specification of the supposed risk – on the basis that he cannot do so without the information. But the counts in the indictment contain an indication of the type of conduct alleged against him, and of the places where, and the dates when, it is said to have taken place. Armed with that information, he must know who were his colleagues and opposite numbers at the relevant time and is in a position to instruct his lawyers and others to look into the matter. Even such a preliminary investigation might be expected to reveal any grounds for considering that the lapse of time might have caused substantial prejudice to his right to a fair trial. But he has put forward none and really relies on speculation. In that situation, there is no basis whatever for the judge to make a request to the United States authorities for further information. Doubtless, if it turned out on further investigation that there was reason to believe that, due to the loss of some significant evidence, Mr Norris could not have a fair trial, he would be able to raise that matter in any proceedings in Pennsylvania.

(3) *Disposal*

110. Section 87(1) of the 2003 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. In the present case the district judge considered that question and resolved it adversely to Mr Norris. But he exercised his judgment on a basis different from that which now pertains, namely that Mr Norris was to be extradited on the main price-fixing count, and not merely the subsidiary counts. It was suggested that the House should itself consider this question, and the question was raised whether it had power to remit the matter for re-consideration by the district judge. But resolution of this question might well call for the evidence of witnesses, which the House is unaccustomed to receive; adoption of this procedure would deprive Mr Norris of the possibility of effective appeal; and we have no doubt that the House has an inherent power to remit determination of an issue to an inferior tribunal where the interests of justice so require, and that is a power which nothing in the 2003 Act purports to abrogate.

111. In relation to counts 2-4 the House will remit the matter to a district judge to decide the question raised by section 87(1) of the Act. Depending on his answer, he will act in accordance with either subsection (2) or subsection (3) of that section.

112. The parties are invited to make written submissions on costs within 14 days.