The extradition of Mike Lynch: should the forum bar be amended?

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The Extradition of Mike Lynch – Should the Forum Bar be Amended?

Mike Lynch has been denied permission to appeal against his extradition in the High Court.[1] He has no further right to appeal within the UK. The United States request to try him on 17 charges including wire and securities fraud remains live. The charges relate to the $11 billion sale of the software company, Autonomy, to the US company Hewlett-Packard. If convicted, Lynch faces a maximum prison term of 20 years. Lynch's case first came before Westminster Magistrates' Court in February 2021. His lawyers *inter alia* argued that his extradition should be barred on the ground of forum. Particularly, it was argued that Lynch "… is a British citizen with lifelong links to the UK; the alleged conduct concerns the takeover of a UK company which applied UK accounting standards and was audited by a UK auditor; *'this is a factual matrix, par excellence, which should engage the protection of the forum bar'".*[2] The extradition judge at first instance and two High Court judges considering permission to appeal all disagreed. Whether the forum bar should be amended is moot.

The Forum Bar

Following political concern and media campaigns over the extradition of accused white-collar criminals the forum bar was inserted into the Extradition Act 2003 in 2013.[3] It was enacted to address the perception that UK nationals who had committed acts within the country were too readily extradited. The bar applies to requests for surrender to the now EU-27 under s 19B, and to extraditions to all other states with which the UK has entered an extradition agreement under s 83A. It is limited to accusation cases. The forum bar provides that an extradition is to be blocked where it is not in the interests of justice. This firstly turns on a judge deciding that a substantial measure of the requested person's relevant activity was performed within the UK. If that is found to be the case the judge is then required to decide whether extradition should not take place having regard to seven specified factors. They are a) the place where most of the harm occurred or was intended to occur, b) the interests of victims, c) any belief of a prosecutor that the UK is not the most appropriate jurisdiction, d) the availability of evidence, e) any delay that might arise, f) the desirability and practicability of all prosecutions taking place in one jurisdiction and g) the connections between the requested person and the UK. The judge has to have regard to all of these matters and no others. There is no ranking of their importance, and the court will make a "value judgement overall on whether the extradition of the requested person would not be in the interests of justice".[4]

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[1] *Lynch v Government of the Unites States of America* [2023] EWHC 876 (Admin)
[2] *USA v Lynch, Westminster Magistrates' Court* 22 July 2021 at [7], emphasis in original.
[3] See Paul Arnell and Gemma Davies, "The Forum Bar to Extradition – An Unnecessary Failure" (2020) 84(2) Journal of Criminal Law 142-162.
[4] *Atraskevic v Lithuania* [2015] EWHC 131 (Admin) at [14].

The Decision of Westminster Magistrates' Court

The facts surrounding Lynch's case *prima facie* align with the reasons for which the forum bar was enacted. Simply, he is a British national living in the UK and running a UK-based company. His connections to the UK are by far greater than those he has with any other country. He arguably appears to be subject to an 'exorbitant' claim to jurisdiction by the US.[5] However in July 2021 DJ Snow rejected his arguments and sent the case to the Secretary of State to consider his extradition, the last stage of the process in non-EU cases. The District Judge held that even though Lynch is a British citizen who ran a British company in Britain subject to British laws and rules the UK is not where the matter should be resolved. DJ Snow confirmed the position set out in previous judgments that location of harm, although not definitive, is a very weighty factor. The loss or harm, it was held, "was always intended to fall on a US-based entity".[6] That harm was both financial and reputational. As to the specified matter of the interests of any victims, it was held that most of the loss fell on HP and its US-based shareholders who had an interest in securing justice "according to their own local laws and procedures".[7] A belief of a UK prosecutor was given, with the Serious Fraud Office issuing a 'detailed and reasoned statement' that the UK was not the most appropriate forum for Lynch's prosecution. The District Judge found that belief considered and reasonable.

The specified matters relating to the availability of evidence, any delay that might result from proceeding in one jurisdiction rather than another and the desirability and practicability of all prosecutions taking place in one jurisdiction were held to strongly favour extradition or be a weighty factor in its favour. The only factor which was weighted in Lynch's favour were his connections with the UK. A UK national, with a wife and children in the UK, he holds or held a number of notable roles including fellowships of the Royal Society and Royal Academy of Engineering. Lynch was also receiving treatment in the UK for his health issues. The District Judge found Lynch's ties to the UK "strong and long standing".[8] Evaluating the specified matters, the District Judge found that all bar his connections to the UK strongly favour trial in the US, such that their preponderance and collective weight satisfied him that Lynch's extradition was in the interests of justice.

The High Court Judgment

A requirement of permission to appeal decisions of a district judge in extradition cases was introduced in 2014. In considering leave the High Court in Lynch's case

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[5] The High Court in *Love v United States* [2018] EWHC 172 (Admin) rejected the suggestion of the NGO Liberty that the US was seeking to exercise 'exorbitant' jurisdiction in Love's hacking case, at [7].

[6] Supra note 1 at [119].

[7] Ibid at [129].

[8] Ibid at [168].

examined the judgment at first instance. Under section 104(3) the High Court can allow an appeal only if the district judge ought to have decided a question before him differently and if, he had decided it as he ought to have done, he would have had to discharge the appellant. This has been interpreted to mean that an extradition appeal considers the single question of whether or not the district judge made the wrong decision.[9] Findings of fact must ordinarily be respected. This interpretation has been adopted in the context of forum bar appeals. It has been held in that context that the appellate court is "entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed".[10] The High Court cited the cases of *Love* and *Scott* favourably and concluded their "principal task is to determine whether the district judge erred in his assessment of the statutory factors and, if so, whether that leads us to conclude that his rejection of the forum bar was wrong".[11] Applying this approach Lord Justice Lewis and Mr Justice Julian Knowles refused leave to appeal, finding that the district judge had been correct in all of his conclusions confirming that all factors save Lynch's ties to the UK strongly favoured trial in the US.

The High Court's decision is in line with the now well-established position that only in exceptional circumstances will a requested person's connections with the UK trump the specified matters of the place of harm and the interests of victims. This is rare, with the bar being upheld only five times since 2013. Those cases were materially different from Lynch's on their facts. In all bar one of them all of the acts of the requested persons giving rise to the charges had occurred in the UK. Whilst the preponderance of Lynch's allegedly fraudulent acts occurred in the UK, certain acts also took place in the US. These include a meeting with the CEO of Hewlett-Packard on 12 April 2011. In both Lynch's case and where the bar has been upheld the harm caused and victims were in the US. Unlike in Lynch's case, however, those 'weighty factors' were outweighed by particular aspects of the requested person's connection to the UK. Those aspects went further than citizenship, family, and professional links. They were affected by the significant physical or mental health issues of the requested person such that his ties to his relatives, and thus his connection to the country, were strengthened. This feature was found in the cases of Love[12], Scott[13], McDaid[14] and Taylor.[15] In only one of the cases where the bar has been upheld were there not such circumstances. In

[9] *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin) at [24].
[10] *Love v United States* supra note 5 at [26].
[11] *Lynch v USA* supra note 1 [85].
[12] Ibid.
[13] *Scott v United States* [2018] EWHC 2021 (Admin).
[14] *United States v McDaid* [2020] EWHC 1527 (Admin).
[15] *United States v Taylor*, 7 Dec. 2020, Westminster Magistrates' Court, cited at *https://www.judiciary.uk/wp-content/uploads/2020/12/usa-v-taylor-judgment-071220.pdf*.

that case, the court's decision rested primarily on an unjustifiable delay between the offence and extradition request and the fact the requested person had admitted the offences in interview believing this would result in prosecution in the UK.[16]

Evidencing the district judge's view of the connections between Lynch and the UK is the fact his discussion of them entailed only two of the 211 paragraphs in his judgment. The evidence of those connections were contained within Lynch's written statement, which went untested as he did not give evidence on oath. The district judge accepted, with some hesitation, twelve facts substantiating the connection, alluded to above. No exceptional physical or mental health factors were listed of the type found in four of the five cases where the bar was upheld. Further reference to Lynch's health is found later in the judgment when his article 8 arguments against extradition are considered. Nowhere in the judgment, however, are factors which could support his particular reliance on familial support within the country, or indeed medical treatment that could not be secured within the US prison system. Strong and longstanding ties to the UK in the absence of especial factors are not in themselves sufficient to bar extradition if all other factors weigh in its favour.

Should the Forum Bar be Amended?

As enacted the forum bar largely fails to address the mischief it was designed to counter. Instituted after public outcry resulting from the extradition to the US of the Natwest Three[17] (wanted for offences as part of the Enron scandal) and Ian Norris[18] (one-time Chief Executive Officer of Morgan Crucible) the bar would very likely not have been upheld in those cases. It was thought it would prevent extradition following exorbitant claims to jurisdiction and thus provide protection to requested persons. Exorbitant claims entail attempts to prosecute persons where their circumstances and acts are more closely connected to a third jurisdiction. As seen, as extradition law and prosecutorial practice stand Lynch's efforts at winning his appeal were doomed to failure. Lynch stated that his extradition "is surely an affront to the sovereignty of British courts and the British justice system. Is it not time, to borrow a phrase, that we 'took back control'?"[19] That is one way to look at it. On the other hand, the impact of much activity (lawful and criminal) within one country may well be felt in another. If Lynch is alleged to have committed a criminal act which has resulted in billions of dollars of loss in the US, is it not the right forum for the subsequent criminal trial? Importantly, it

[16] *USA v Osbourne* [2022] EWHC 35 (Admin).

[17] In *R. (on the application of Bermingham) v Director of the Serious Fraud Office* [2007] QB 727 an attempt to require an SFO investigation into the case against three requested persons failed.

[18] In *Norris v United States* [2010] UKSC 9 the requested person's appeal against extradition based on his right to respect for his private and family life was refused.

[19] As quoted in *The Scottish Mail* on Sunday, 8 January 2023.

was always open to the SFO to prosecute Lynch had they wished to do so. It is therefore difficult to see why his extradition is an affront to the sovereignty of British courts. This was not a universal view, however. Siding with Lynch were some of the UK's most prominent business figures, who called on the prime minister to block Lynch's extradition in an open letter reported in *The Times*.[20] The former Brexit Secretary David Davis MP also argued publicly against Lynch's extradition.[21] Clearly it is thought in some circles that the bar as enacted fails to address the concerns that gave rise to it. The question then arises of whether it should be amended such that it does.

One way the forum bar could be amended is to include consideration of where the relevant activity giving rise to the offence occurred. Whilst a prerequisite to the application of the forum bar it is not one of the specified factors determining what is in the interests of justice. Indeed, at present only the place where most of the harm occurred or was intended to occur is included as a relevant factor. Were this amendment made it would allow the court to acknowledge, in the parlance of international law, the importance of subjective territoriality (where the individual acted), objective territoriality (where the harm or loss took place) and the 'effects principle' (where the consequences of the act were realised). As to the first, there are cogent arguments in favour of the assumption of jurisdiction on a subjective territorial basis, such as enhanced deterrence on account of the geographic criminal immediacy of the transnational acts.[22] Where that happens the court would recognise that the requesting state has felt the harm or loss of the alleged crime, but also that all, or a substantial part, of the conduct was conducted in the UK. The additional factor could either be added to the list and weighed in the consideration of whether the extradition was in the interests of justice or there could be a presumption against extradition in such cases which was capable of rebuttal when weighed against the other forum factors. Such amendment would make space for the express argument that as a British citizen carrying out a British business Lynch had an expectation that he would be subject to British law were an accusation be made against him.

A second, more radical, option would be to give greater weight to the connection of the requested person to the UK. Whilst this would assist anyone with a connection to the UK it would primarily benefit permanent residents and British citizens. It would therefore operate akin to a nationality bar. Historically the UK has never felt it appropriate to include such a bar in its extradition relations, although the relevance of nationality for the UK has increased post-Brexit. The

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[20] Tom Howard, "Stop Mike Lynch extradition, say leading City figures" 28 February 2023, *The Times*)

[21] "David Davis MP speaks out against the extradition of Dr Mike Lynch" available at *https://www.daviddavismp.com/david-davis-mp-speaks-out-against-the-extradition-of-dr-mike-lynch/*.

[22] See Paul Arnell and Bukola Faturoti, "The Prosecution of Cybercrime – Why Extraterritorial and Transnational Jurisdiction should be Resisted" (2023) 37(1) International Review of Law, Computers and Technology 29.

Trade and Cooperation Agreement 2020 allowed EU states to apply a nationality bar. An option which has been taken up either fully or partially by 13 Member States.

Both amendments are problematic. Firstly, they would likely result in a significant increase in the number of cases where the bar is upheld. This would benefit all requested persons, not just those accused of white-collar crimes. Whilst there is history of British nationals accused of white-collar crime attracting political, media and public backing, that is unlikely to exist where the requested person is accused of violent or sexual crimes.[23] Secondly there would also be significant cost implications. Any change to extradition law in favour of protection of requested persons would have to be made alongside a firm commitment to prosecute and, if convicted, punish requested persons. To fail to do this would likely lead to breaches of the UK's international obligation to 'extradite or prosecute' as found in a number of criminally related treaties or parts of treaties, including the Trade and Cooperation Agreement 2020.

Changes to prosecutorial practice?

Meaningful amendments to the forum bar must be accompanied by changes to prosecutorial practice. The principle of non bis in idem or double jeopardy provides that extradition is not tenable where an individual has been prosecuted for the same acts forming the basis of a request. A different approach to prosecutorial practice in cases of concurrent jurisdiction could therefore ameliorate some of the present concerns. Domestic prosecutions of transnational cases, however, come at a significant cost for already stretched prosecuting authorities. It also requires enhanced cooperation to ensure witnesses are available and evidence is admissible and disclosed in accordance with the law. In complex fraud trials the documentation can run into the millions of pages. There have been high profile cross-border trials which have resulted in collapse or the quashing of convictions due to non-disclosure issues.[24] In July 2022 the former Director of Public Prosecutions, Sir David Calvert-Smith conducted an independent review of the SFO severely criticising the organisation including its disclosure mechanisms.[25] There are also broader issues around cooperation in criminal matters which makes these cases difficult. For example, it is not always easy to establish whether an interview will be admissible in another jurisdiction and the UK does not currently have a mechanism whereby it can assume transfers of prosecutions from other countries.

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[23] Notably the forum bar to-date has largely assisted those accused of such crimes, see for *Taylor*, supra note 14 and *Osbourne*, supra note 15.
[24] For example, *Ziad Akle and Paul Bond v The Crown* [2021] EWCA 1879.
[25] Sir David Calvert-Smith "Independent Review into the Serious Fraud's Office's handling of the Unaoil Case – R v Akle & Anor", July 2022, at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092872/DCS_report_-__FINAL_-_21_July_08.31_.pdf*.

The systems of mutual legal assistance also militate against changes to prosecutorial practice. Requests can often take months or longer to be responded to. The SFO reported that the 2023 successful prosecutions of Balli Steel executives relied on mutual legal assistance requests from 36 different jurisdictions.[26] Evidence obtained by the UK pursuant to a mutual legal assistance request can only be used for the purpose specified in the request unless there is consent of the foreign authority. In the Lynch case the court noted the "novel and untried procedures" available to secure immunity for the witnesses from prosecution in the US if they gave evidence in the UK, difficulties with compelling witnesses to give evidence in the UK through mutual legal assistance and the undoubted delay which using such mechanisms would create.[27] Those who argue Lynch should be tried in the UK should also consider how the UK's criminal justice systems can be adequately resourced to ensure justice in transnational cases where much of the evidence will be in the state where the harm occurred. It is understandable that over-stretched and under-funded authorities would rather hand over jurisdiction to another state than risk a costly and possibly unsuccessful UK prosecution.

Conclusions

As states expand their extraterritorial reach cases of concurrent jurisdiction will increasingly present themselves. Complex fraud cases will almost always have a significant cross-border aspect to them. There are no international rules which prioritise one state's claim to jurisdiction over another. It is open to individual states to decide how the law will operate in relation to claims for extradition when there is concurrent jurisdiction. UK and US prosecutors have agreed a set of principles which are to be considered before any requests for extradition are brought. These rules currently favour prosecution in the state where most of the harm was felt. If a wanted person is in the UK, then the UK has enforcement jurisdiction. The US can only assert its jurisdictional right to charge a crime if the UK agrees to hand over custody of the individual through extradition. If UK prosecutors choose to charge the individual with a crime first, then the extradition will be stayed and may be barred on double jeopardy grounds if the prosecution covers substantially the same facts as those in the extradition request. The UK therefore has the upper hand. If there is an issue with US claims of exorbitant jurisdiction it is best addressed at the stage of investigation when prosecutors can consider a wide range of factors when deciding whether to bring charges in the UK. The courts only role is to reconsider the question of forum to the limited extent Parliament provided for. At present the courts have only intervened to prevent extradition on the grounds of forum when 'exceptional' circumstances present themselves. The fact that Mike Lynch is a British citizen running a British company

[26] "Serious Fraud Office secures three convictions in $500 million trade finance fraud", 2 February 2023, at *https://www.sfo.gov.uk/2023/02/02/serious-fraud-office-secures-three-convictions-in-500-million-trade-finance-fraud/*.
[27] Supra note 1 at [145] citing Lynch supra note 2 at [145-147].

does not prevent him being prosecuted for frauds in another country, particularly when all of the harm occurred in that state. If Lynch is convicted a sentence transfer may offer him some succour, with the UK and the US both being party to the Council of Europe's Convention on the Transfer of Sentenced Persons 1983. However, the forum bar was never going to be able to prevent extradition in his case.

A knee-jerk attempt to reform extradition law by strengthening the forum bar would be misguided. Reform could negatively impact prosecutorial independence and would come with significant cost implications. The UK has always approached extradition as serving a strong public interest which ensures individuals are prosecuted for crimes and with the country adhering to its international obligations. If the law was changed so it was easier to claim the protection of the forum bar the likely outcome would be greater impunity. If there is a problem with US extraterritorial reach the best place for this to be addressed is at the stage of investigation and prosecution, not by the courts at an extradition hearing. Complex cross-jurisdictional crimes present significant difficulties for prosecutors. Rather than reform extradition law the focus should instead be on the effectiveness of the UK's international legal framework through investing time and resources in modernising the rules that govern cross-border cooperation and the prosecutorial guidance that applies in such cases. It may be time to reconsider the weight given to prosecution in the state with subjective territorial jurisdiction rather than seemingly ceding jurisdiction by default in the face of an extradition request to the state with objective territorial jurisdiction for reasons of cost and resources.