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Extradition, the Forum Bar and Transnational Drug Trafficking

Dr Paul Arnell writing on the interests of justice and appropriate jurisdiction

Concerns have been expressed over what are perceived as insufficient safeguards in UK law to protect persons amenable to concurrent criminal jurisdiction. These were particularly forceful where an accused person had material links to the UK. The Crime and Courts Act 2013 inserted a forum bar into the Extradition Act 2003 in an attempt to address the concerns. The bar, defined in ss.19B and 83A of 2003 Act, entered into force October 14, 2013. The first appellate judgement relating to it has been published, *Dibden v. France* [2014] EWHC 3074 (Admin). It provides an indication of how the bar will operate in practice.

Like existing bars the forum bar prevents extradition if met. It exists along-side those such as double jeopardy, time and age. It applies to both surrenders under the European Arrest Warrant and to extraditions to the UK's other extradition partners. The forum bar applies only to where the individual is accused of a crime abroad, not where he has been convicted.

Extradition is to be barred by reason of forum if it would not be in the interests of justice. An extradition is not in the interests of justice if a Judge decides that a substantial measure of the activity material to the commission of the offence was performed within the UK and that, having regard to other matters, the extradition should not take place.

The forum bar provides that certain matters relating to the interests of justice and no others must be taken into account by the Judge. There are seven of these "specified matters". They are the place where most of the harm occurred or was intended to occur, the interests of victims, any belief of a prosecutor that the UK is not the most appropriate jurisdiction, the availability of evidence, any delay that might arise, the desirability and practicability of all prosecutions taking place in one jurisdiction and the connections between the requested person and the UK.

Prosecutor's certificates are a particular feature of the forum bar. These certify that a prosecutor has considered the offences for which the requested person could be prosecuted and that he has decided not to proceed. The



discretionary issuance of a certificate has the effect of requiring a Judge to decide that the extradition is not barred by reason of forum. Notably, though, a decision to issue a certificate may be questioned on appeal under the 2003 Act by the requested person. If allowed, the certificate is quashed and the High Court itself must consider the issue of forum.

Dibden originated in a European Arrest Warrant (EAW) issued by France on November 14, 2013 seeking the surrender of a British national, Daniel Dibden, to

stand trial for drug trafficking offences. District Judge Snow had found that the allegations arose from criminality in the Netherlands, France and the UK. A prosecutor's certificate was not issued in the case (although one had been passed to the defence in error). It was also found that the qualifying condition within the forum bar was met – namely that a substantial measure of the appellant's relevant activity was performed within the UK.

Judge Snow went on to consider the interests of justice factors. He found that most of the harm occurred in the UK and that there were no actual victims (the drugs had been intercepted by the French authorities). The Judge agreed with the prosecutor's view that the most appropriate jurisdiction to try Dibden was France. He concluded that evidence was available in both England and France, but that proceedings in the latter were well-advanced and so a trial there would be the most expeditious. The desirability and practicability of all prosecutions taking place in one jurisdiction militated in favour of a French trial, he held. Finally, the District Judge acknowledged that Dibden had substantial connections with the UK. Dibden was British, and resided in England with a wife and young baby. It appears that Dibden's involvement in the drug trafficking took the form of a co-ordination role, where he acted from England. In spite of this he concluded that it was in the interests of justice that Dibden be extradited. His forum bar argument was rejected.

The High Court upheld the decision of the District Court, agreeing with the specific decisions made on the issue of forum. Justice Simon held that the commencement of proceedings in France carried substantial weight, and particularly so in light of the view of the prosecutor that England was not the most appropriate place to prosecute. He concluded that these factors substantially outweighed the other counter-veiling factors identified by the District Judge including the facts that a substantial measure of Dibden's relevant activity took place in England, a place where he had substantial connections.

Comment

Jeremy Browne MP, former Liberal Democrat Home Office Minister, stated that the forum bar would, "... make our extradition arrangements more open and transparent and will ensure that, in cases of concurrent jurisdiction, due consideration is given to any decision about whether or not a person could be prosecuted in the UK". It is clear that there was concurrent jurisdiction in the present case. Its facts appear to lend themselves to a successful argument based upon forum. The locus of Dibden's activities, his residence, the ultimate destination of the drugs and his family life all weighed in favour of its successful invocation. It was not to be.

Three conclusions can be drawn from the case. First, contrary to Browne's view the forum bar does not necessarily involve consideration of whether an individual could be prosecuted in the UK.

Secondly, it gives rise to a new type of judicial scrutiny of prosecutorial decision making.

Thirdly, the bar has not created within the extradition process the degree of judicial discretion desired by some

commentators.

The forum bar entails a process whereby a Judge decides that a requested person should not be tried abroad. Sections 19B(1) and 83A(1) provide that extradition is barred by reason of forum if the extradition would not be in the interests of justice. The presumption, therefore, is that the extradition is to proceed whether or not there is concurrent jurisdiction. This is far removed from what Burrowes MP argued for when he stated in a Committee debate on the then clause, "My primary concern is that the new clause meets the premise that if a case could be tried in the UK, there is a presumption that it ought to be tried in the UK". This is clearly not the case.


The second conclusion is that the forum bar brings with it a novel type of judicial scrutiny of prosecutorial action. Indeed, there are two points where judicial scrutiny can occur, within the interests of justice test and where a prosecutor's certificate has been issued and challenged. In regard to the former, the interests of justice test includes as a specified matter any belief of a prosecutor that the UK is not the appropriate jurisdiction to prosecute. This is one of the seven matters a Judge is to consider in coming to a view on whether the extradition should not take place. It is but one – Justice Simon noted that there is no hierarchy of these matters (at para.25). The latter avenue arises where a prosecutor's certificate is issued and the extradition is appealed under the 2003 Act. Here the certificate is tested as against judicial review principles. Of course this did not arise in the present case because the discretion to issue a certificate was not exercised.

Finally, it appears clear that the level of judicial discretion within the extradition process desired by some has not materialized. The non-governmental organisation Liberty, for one, has stated that the "fundamental problem" with extradition is the absence of judicial discretion. Meaningful discretion was desired so as to allow a Judge to decide what the interests of justice were with reference to any and all appropriate circumstances. This, clearly, is not the case. The forum bar lists the specified matters to be considered, and excludes all others.

Conclusion

Cases of transnational crime and concurrent jurisdiction are rife and look set to only increase. A transparent and rational system of jurisdiction allocation, accused transfer and, perhaps most importantly, prosecutorial co-ordination is ideally needed.

The forum bar is a relatively small and imperfect step in that direction. It supplements the Eurojust Guidelines 2003 – *Making the Decision – "Which Jurisdiction Should Prosecute?"*. It also leads to a degree of greater transparency. The forum bar does not, however, empower courts to order a UK prosecution.

Ultimately, prosecutors, and indeed countries, are unwilling to cede the discretion they have to decide when, and how, the criminal law will be applied. 

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