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The law and practice of extradition is never far from the front pages. In Scotland ongoing and recent high-profile examples include those of Clara Ponsati and Zain Dean. Elsewhere, the cases of Julian Assange and Wanzhou Meng have been making headlines in England, Canada and indeed around the world. What these cases generally have in common are questions arising from the intricacies of extradition law, such as double criminality and human rights. Craig (James) v HM Advocate [2020] HCJAC 22 in this regard stands apart. The effect of a constitutional illegality gave rise to it, not a question of extradition law *per se*.

The legal origins of *Craig (James) v HM Advocate* are found in the forum bar to extradition. Introduced into law in the United Kingdom following the enactment of the Crimes and Courts Act 2013 the forum bar was a response to what were perceived as egregious claims to jurisdiction by the United States where an individual or his crime had arguably greater connections to a jurisdiction within the United Kingdom. Accordingly, the bar was enacted to prevent an extradition where it is not in the interests of justice to send the requested person abroad to stand trial. The law provides that such a decision turns on seven specified matters listed in section 83A of the Extradition Act 2003. These include the place where the harm occurred, the interests of victims, evidential considerations and the requested person's connections to the UK. The bar entered force in England and Wales and Northern Ireland in October 2013. It has never been brought into force in Scotland. This intra-UK disparity in extradition law, a reserved matter under the Scotland Act 1998, was challenged by Craig by way of judicial review in 2018 following the initial stages of his extradition hearing. Significantly Lord Malcolm, in Craig v Advocate General for Scotland 2019 SC 230, declared that the UK government was acting unlawfully by its continuing failure to bring the forum bar into force in Scotland.

In June 2019 Craig reappeared at Edinburgh Sheriff Court for his extradition hearing. He was subject to a US extradition request accusing him of an offence relating to securities fraud. Sheriff McFadyen considered that the key question before him was the consequence of the Court of Session judicial review decision (United States v Craig [2019] SC EDIN, Case E60/17, unreported at para 5). At his hearing Craig argued he would have a real prospect of meeting the test within the forum bar had it applied in Scotland. He averred that the fact the bar did not apply pointed to a breach of his Convention Rights and an abuse of process on the part of the Lord Advocate. As to his human rights it was argued that article 8, protecting his right to respect for private and family life, would be unlawfully interfered with because that interference was not in accordance with the law. Which failing, Craig suggested the circumstances of his case were sufficiently exceptional to result in article 8 being unlawfully interfered with *per se*. Further,

he averred that it would be oppressive to extradite him on account of the Lord Advocate instituting proceedings after he had "manipulated the UK government into illegally" not extending the forum bar to Scotland (at para 28).

Sheriff McFadyen approached the issue of the applicability of the forum bar by considering the specified matters iterated within it as part of his assessment of the case under section 87 of the 2003 Act. He was, he stated, left "… to attempt to steer a way through the remaining legislation that is, so far as possible, compatible with the statutory forum bar provisions. But I am satisfied that that is the only reasonable course which the court can take" (at para 44). Section 87 provides that a judge at an extradition hearing must consider whether the requested person's extradition would be compatible with his Convention Rights. If the test under the forum bar was not met then it could be discounted Sheriff McFadyen held, if it was met then consideration of how that fit with the approaches under section 87 and that taken in Calder v HM Advocate 2006 SCCR 609 would follow. In *Calder v HM Advocate*, it may be recalled, the High Court considered arguments put forward by an Aberdonian drug dealer that it was more appropriate to try him in Scotland than the US (see Arnell, P., *The Long Arm of United States Law* 2007 37 SLT 267). In any event, Sheriff McFadyen held that had the forum bar been applicable he would have decided that Craig's extradition was not barred on that basis. The conclusion on the forum bar, in effect, also applied to the position on the compatibility of Craig's extradition on human rights grounds *per se* he held (at para 51). The factors considered under the forum bar effectively mirrored those a judge was bound to consider when assessing article 8 under the approach set out in Polish Judicial Authority v Celinski [2015] EWHC 1274 (Admin). Sheriff McFadyen also refused the arguments based on legality and oppression, and sent the case to the Scottish Ministers for their decision on Craig's extradition. Craig then sought leave to appeal from the High Court under section 103 of the 2003 Act, giving rise to the present case.

The High Court decision in *Craig (James) v HM Advocate* was published 3 June. On the bench were the Lord Justice Clerk, Lord Brodie and Lord Turnbull. The leading opinion was given by the Lord Justice Clerk. She began by describing the applicable law and the two cases leading up to the appeal, the judicial review and the extradition hearing. She then set out the five grounds of appeal that had been put forward. These were that the sheriff's approach to the forum bar assessment was *ultra vires*, that if it was *intra vires* his conclusion was wrong, that Craig's extradition would be incompatible with Convention rights, that it would be oppressive to allow the Lord Advocate to benefit from the unlawful non-extension of the forum bar and finally that the failure to inform Craig that a decision was being taken to extend the period in which the Scottish Ministers had to act following the extradition hearing was a violation of his right to a fair trial.

Lady Dorrian addressed the first and third grounds together, terming them the 'legality arguments'. She held that it does not follow from the illegality of the

failure to commence the forum bar that the "entire mechanism of extradition" is unlawful (at para 26). It was the effect the failure had upon the requested person that was critical, she held. In that regard under the 2003 Act there remained arguments which could be advanced by Craig that were in essence akin to the issues put forward in an attempt to substantiate the forum bar. She noted "the arguments forming the underlying rationale for the forum bar provisions are available to him, in terms of section 87…" (at para 28). Whilst this was not the same as direct reliance on the legislative forum bar provisions, she held, the sheriff had weighed the merits of forum-related arguments under section 87. As to the second ground, Lady Dorrian disagreed with the contention that the sheriff had erred in his conclusion upon the forum bar. Upon analysing the sheriff's consideration of the specified matters under the bar the Lord Justice Clerk concluded that that he was not wrong in answering the hypothetical question of what the result would have been had section 83A applied in Scotland. The fifth ground was brushed aside with Lady Dorrian rejecting the contention that extradition is a remedy for the benefit of the Lord Advocate. Finally, in the absence of statutory requirements, she held that the procedure for granting an extension of time for the Scottish Ministers to make a decision was for the sheriff to determine. She refused the appeal. Lord Brodie and Lord Turnbull agreed with the Lord Justice Clerk, with Lord Brodie making several interesting statutory and procedural observations about Craig's submissions. These included highlighting that an *ultra vires* argument is not accommodated under the section governing appeals from a sheriff court decision and that there is some doubt whether oppression or abuse of process exists as a remedy in Scots extradition cases.

Analysis

Three points can be taken from the High Court judgment, and indeed the Craig litigation generally. These are firstly that there is a considerable overlap between the human rights bar to extradition and the forum bar. That is clear. The article 8 jurisprudence coming from the European Court of Human Rights and courts in Scotland and England and Wales has developed to an extent and in a way that makes the forum bar largely redundant. In fact, it can be seen as the product of political and media posturing and sensationalism not reasoned legal analysis and a need to fill a lacuna in the law. This point has been put forward by Davies and the present author in Arnell, P., and Davies, G., *The Forum Bar to Extradition – an Unnecessary Failure* [2020] 84 Journal of Criminal Law 142. Secondly, Craig's case is yet another reminder of the relative ease in which acts carried out in Scotland can give rise to alleged crimes in the US. For Craig, from Dunragit in Dumfries and Galloway, that entailed allegedly using Twitter in order to manipulate the share prices of certain companies listed on the Nasdaq stock exchange. Finally, the Craig litigation is notable by contributing to the seemingly burgeoning body of constitutional jurisprudence that, in one sense or other, concerns the relationship between the UK Parliament, government and the judiciary. Indeed, the Lord Advocate is now explicitly included within that mix. It

is perhaps surprising that the esoteric and niche area of law that is extradition is not immune from this trend. That point aside, Craig remains subject to possible US extradition. The forum bar hypothetically applied, the human rights bar and the putative oppression remedy all failed to come to his aid. Whether this will be the case following his attempt to appeal to the Supreme Court is of course moot. What is not debatable is that the cooperative facet of UK extradition law has again prevailed over its protective purpose, as it does in all save exceptional circumstances. The message is clear for would-be hackers, fraudsters and others; target the US at your peril.