SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2022] SC EDIN 15

E2/21

NOTE BY SHERIFF N MCFADYEN

in the cause

HER MAJESTY'S ADVOCATE,
representing
THE UNITED STATES OF AMERICA

Pursuer

against

ROBERT LEWIS BARR
(born 9 May 1997)
(Requested Person)

Defender

Pursuer: C Edward, Advocate, Crown Office, Edinburgh
Defender: Mackintosh QC, Bridge Legal, Solicitors, Glasgow

Edinburgh, 25 April 2022

[1] Were the actions of Scottish Ministers in certifying an extradition request pursuant to section 70(1) of the Extradition Act 2003 *ultra vires* at a time when the United Kingdom Government had failed properly to commence forum bar provisions introduced by the Crime and Courts Act 2013 (the 2013 Act)?

[2] The requested person is resident in Scotland and is wanted for extradition to the United States for trial in a federal court (in the Northern District of Georgia) on eight counts respectively of wire fraud conspiracy (Counts One and Three), wire fraud (Counts Three and Four), money laundering conspiracy (Counts Five and Six) and aggravated identity

theft and aiding and abetting (Counts 7 and 8), all in violation of specific provisions of the United States Code.

[3] On 4 February 2021 the United States Government requested the provisional arrest of the requested person, in the conventional way, by diplomatic note summarising the facts as alleged by the relevant authorities. On 8 February 2021 the sheriff granted a provisional arrest warrant under section 73(3) of the Extradition Act 2003 (the 2003 Act) and the requested person appeared before me on that warrant on 10 February 2021, when the appropriate procedure under section 74 (2) (3) (7) and (8) was followed and he was remanded in custody until due course of law under section 74(7).

[4] In terms of section 74(10) the sheriff must order the person's discharge if the documents referred to in section 70(9) are not received by the sheriff within the required period, which is 65 days starting with the day of arrest (section 74(11) as modified as regards the United States by the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (SI 2003/3334), article 4).

[5] On 9 April 2021 the Cabinet Secretary for Justice, a Scottish Minister certified a full extradition request by the United States dated 7 April 2021 in accordance with section 70 and the relevant papers, including the certificate, were received by the sheriff the same day, when he ordered that the extradition hearing was to begin in terms of section 76(2) on 15 April 2021. The requested person appeared by video link on that date and was represented by a solicitor. The hearing was adjourned until 13 May 2021 to enable the Crown to make inquiries with regard to an outstanding domestic case, and bail was refused. On 13 May 2021 the requested person again appeared by video link and was represented by a solicitor and the court continued the matter to a notional hearing on 14 October 2021 to await the outcome of other domestic matters and bail was granted. In terms of section 88 of

the 2003 Act the sheriff must adjourn the extradition hearing if the requested person is charged with an offence in the United Kingdom until the charge is disposed of or withdrawn, the proceedings are discontinued or the diet is deserted *pro loco et tempore*. The requested person has remained on bail since 13 May 2021.

[6] On 6 September 2021 the Secretary of State made the Crime and Courts Act 2013 (Commencement No 19) Order 2021 (SI 2021/1018) which brought section 50 of and Schedule 20 to the 2013 Act, known as the forum bar provisions, into force in Scotland on 17 September 2021. These amendments apply to an extradition if, at that time, the judge (in Scotland, the sheriff) has not yet decided all of the existing extradition bar questions, ie the questions in section 79(1) of the 2003 Act as those questions stand before their amendment: *Craig* v *Her Majesty's Advocate (for the Government of the United States of America)* [2022] UKSC 6 , 2022 SLT 233, per Lord Reed at [34]. Section 79 sets out potential bars to extradition which the sheriff must consider at the extradition hearing once satisfied on a number of initial matters set out in section 78 and the amendment referred to was the inclusion of forum as a bar to extradition (section 79(1)(e)).

[7] In the present case, as at 17 September 2021 the sheriff had not started to consider any of the questions in sections 78 and 79 – and if there were pending domestic proceedings, as seemed to be understood, he could not have done so. On the face of it, subject to such further adjournment of the extradition hearing as may be required by section 88, the forum bar provisions have been fully available for consideration by the court and to be advanced by the requested person since 17 September 2021.

[8] On 14 October 2021 the sheriff adjourned the case further to a notional hearing on 20 January 2022 with a case and argument to be lodged by 13 January 2022. No such document appears to have been lodged, but on 20 January 2022 the case was adjourned to a further

notional hearing on 17 March 2022 to await the outcome of domestic matters and for sanction to be granted in respect of Senior Counsel "and for further enquiries". On that date Mr Mackintosh appeared and moved the sheriff to discharge the arrest warrant. The motion was oral, but supported by a full speaking note and the case was continued to a further notional extradition hearing on 21 April 2022 for the Crown to consider that motion. It was against that background that the matter called before me on 21 April.

Submissions

[9] Mr Mackintosh sought the discharge of the requested person under section 74(10), which provides that

> "(4) The judge must order the person's discharge if the documents referred to in section 70(9) are not received by the judge within the required period as defined by section 74(11)"

(ie 65 days starting with the day of arrest as already explained). The relevant documents were received at the latest within 58 days starting with the day of arrest, as opposed to the 65 days permitted.

[10] It was, however, suggested by Mr Mackintosh that discharge was necessary to give effect to the judgment of the Supreme Court in *Craig*. This was a case where the forum bar could be raised; the United States indictment alleged that the requested person was resident in the United Kingdom and it was in any event accepted by the Lord Advocate (in an email sent to instructing solicitors on 10 February 2022) that the requested person was located in the United Kingdom while allegedly carrying out the extradition offences. The gateway to forum bar in section 83A(2)(a) of the 2003 Act which requires that "a substantial measure of [the requested person's] relevant activity was performed in the United Kingdom" was therefore open.

[11] It was submitted that the effect of *Craig* was that the making and sending of the certificate by the Cabinet Secretary for Justice was *ultra vires*, invalid and void because the procedure followed was not in compliance with section 61 of the 2013 Act, which provided as to commencement of the forum bar provisions (in respect that the commencement order which was made did not extend to Scotland): *Craig* at [52]. I was also directed to para [53] where Lord Reed stated

> "The consequence is that the acts of the Lord Advocate in conducting the extradition proceedings, and the act of the Scottish Ministers in making the extradition order, were incompatible with the appellant's Convention rights, and were therefore ultra vires by virtue of section 57(2) of the Scotland Act."

[12] It was submitted that the effect of the Supreme Court's finding as to *vires* is that all acts of both the Lord Advocate and the Scottish Ministers relative to the respondent's extradition in this case are also void; those acts included the initial act of Scottish Ministers in certifying the extradition request under section 70 of the 2003 Act and sending the request for extradition and the certificate to the sheriff. The certificate was *ultra vires* in terms of section 57(2) of the Scotland Act 1998 and was thus of no effect. It was accepted that the intention of the decision of the Supreme Court to "catch" all acts of the Lord Advocate and the Scottish Ministers was not made explicit in para [52], but it was submitted that it was suggested by the general reference in para [37] that the question for the court was

> "whether the Lord Advocate and the Scottish Ministers were acting ultra vires in performing their functions in relation to the appellant's extradition".

[13] It was submitted that if the section 70 certificate was *ultra vires* and thus void and of no effect the requirement that the certificate be served within 65 days under section 74(11) of the 2003 Act had not been complied with and section 74(10) required that the requested person be discharged. It did not matter that the forum bar provisions had since been commenced and would be available to the requested person at the full hearing in due

course. He accepted, however, that it was open to Scottish Ministers to issue a fresh section 70 certificate and commence fresh proceedings.

[14] He was not raising a devolution issue and it was unnecessary to do so if the issue of the section 70 certificate was *ultra vires*, given that the issue had essentially been determined in *Craig*. There was no valid certificate and there is no time limit set as to when the matter can be raised and he was therefore entitled to raise it now. I was referred to the position with regard to another co-defendant who counsel had discovered was resident in England and had secured his discharge in part because of the forum bar and it was said that the failure to disclose information about that indicated a lack of candour on the part of the United States authorities.

[15] He accepted that the issue of a certificate would not be *ultra vires* if no potential issue of forum bar arose – for example if it were alleged that the whole criminal acts were committed in the territory of the requesting state, but in this case there were always indications that some at least of the alleged conduct had been in the United Kingdom.

[16] Mr Edward submitted on behalf of the Lord Advocate that what was being raised was properly a devolution issue. It was clear that the requested person was founding on section 57(2) of the Scotland Act 1998 and the means to raise that was by way of a devolution minute: Rule 40 of the Criminal Procedure Rules. That would have ensured intimation on the Advocate General and would have required the requested person to state expressly why the acts impugned involved a breach of Convention rights.

[17] *Craig* was concerned with the unlawfulness of the extradition proceedings in the absence of commencement of the forum bar provisions. It was the position at the time of the extradition hearing which was critical (paras [52] and [53]). It was not a fair reading of *Craig*

to say that the Supreme Court was referring to the whole procedure rather than the procedure as at the date of the hearing.

[18] In brief further submissions Mr Mackintosh referred to *Shahid* v *Brown* [2010] HCJAC 100, 2011 JC 119, where it was held that the requirement of a signature on a criminal complaint was mandatory and an unsigned complaint was a nullity and there were never any proceedings in the case. In this case, the certificate was void when it was received by the sheriff and there were no valid proceedings. It should have been clear that forum bar could be engaged. In para 2 of the indictment the requested person was described as a resident of Scotland and it was not alleged that he travelled outside Scotland.

Discussion

[19] I do not think there is anything in the Lord Advocate's point about the matter requiring to be raised as a devolution issue. If the effect of *Craig* is that procedure in a case such as this was *ultra vires* I do not see why that point of competency cannot be taken without recourse to the Scotland Act 1998. Indeed, as has repeatedly been stated by higher courts, devolution or compatibility minutes do not give rise to free-standing remedies, but require to be brought within the scope of the remedies or objections etc which can properly be brought in respect of the particular proceedings (see, eg, *Sabiu* v *Wyllie* [2013] HCJAC 160, 2014 SCCR 59 at [24]). Nonetheless, given the history that I have recited the court might have been forgiven for believing that the time for seeking discharge on the basis sought here had long since expired (again, see *Sabiu* v *Wyllie* at [24]).

[20] In any event, the proposition that the initial act of Scottish Ministers in certifying the extradition request under section 70 of the 2003 Act was struck at by the decision in *Craig* is one which I imagine the Supreme Court would have found surprising, given what I have

already noted was stated at para [34] about the forum bar provisions being available provided that the sheriff has not yet decided all of the existing extradition bar questions and, indeed, given the Supreme Court's view that even in Mr Craig's case it would have been open to the High Court to provide for a new extradition hearing to be held before a different sheriff with the forum bar provisions in place (para [54}). It is nothing to the point that the High Court chose to discharge Mr Craig, particularly when that decision appears to have turned on the statutory limitation on their powers in relation to extradition appeals (*Craig* v *Lord Advocate* [2022] HCJAC 17). It seems to me very clear, reading the judgment of the Supreme Court as a whole, that it was proceeding with the extradition hearing itself –or possibly even concluding that hearing - and the subsequent decision of Scottish Ministers to extradite the requested person that were incompatible with the requested person's Convention rights and not the procedure prior to the hearing.

[21] In this case the requested person has not been prejudiced in any way by the late commencement of the 2013 Act provisions as to forum bar, and indeed even as late as 20 January 2022 (and possibly later than that) the result of domestic proceedings was apparently awaited, and that would itself have required adjournment of the extradition hearing.

[22] In any event, I rather doubt that the question of forum bar could properly be focused on or identified at the time of issue of a Minister's certificate unless perhaps it was quite clear in the material submitted by the requesting state that a substantial measure of conduct (the bulk at least of which in this case appears to have been conducted on-line) had in fact taken place in the United Kingdom. References to the subject's residence and home address in Scotland and what may have been a United Kingdom mobile telephone number do not seem to me to provide any obvious basis for considering that a substantial measure of

conduct had taken place in the United Kingdom - and what was essentially said to be confirmation that that was the position in an email in February 2022 came long after the forum bar provisions were commenced. If, as Mr Mackintosh conceded, no issue of *vires* would arise in a case with no link to the United Kingdom, the possibility of conduct – let alone a substantial measure of conduct - having taken place while in the United Kingdom would seem a somewhat shaky peg on which to hang an argument as to the *vires* of the issue of the initial certificate. That perhaps underlines the logic of the extradition hearing itself being the time when the forum bar provisions had to be available: the time when the questions under section 79(1) fell to be addressed.

[23] The argument for the requested person in this case was highly technical, given the simple remedy, were it successful, of recommencing the whole process, but, although it was elegantly and eloquently framed, it seemed to me that ultimately it was an argument without merit. I shall refuse the motion.