UK Courts Raise the Bar to US Extradition

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On 31 July 2018, the Administrative Division of the High Court of England and Wales blocked the extradition of Stuart Scott to the United States.[1] As the second case this year in which the High Court has blocked extradition to the US, this judgment may be viewed as part of a broader shifting of the sands.

The Government of the United States had sought an order for Scott's extradition to face charges of wire fraud and conspiracy to commit wire fraud in connection with an allegation of fraudulent foreign exchange trading in 2011, when Scott was employed by HSBC.

The Allegations

The substance of the allegations is that Scott participated in a scheme to defraud Cairn Energy Plc ("Cairn"), a Scottish oil and gas exploration company, in connection with a foreign exchange transaction to convert approximately US$3.5 billion into sterling ("the Transaction").

In October 2011, Cairn had invited HSBC to bid for the right to execute the Transaction. HSBC succeeded in winning this instruction and in doing so, according to the US Government, entered into a fiduciary relationship with Cairn by which HSBC was required to act in Cairn's best interests.

It is the US Government's case that Scott, together with fellow trader Mark Johnson, used insider knowledge, to raise the price of Sterling/Dollar trades artificially, in advance of the Transaction, thereby maximising the profits generated for HSBC through the Transaction, to the detriment of Cairn and in breach of its fiduciary duty to Cairn.

The US Government alleges further that Scott and Johnson provided false information to Cairn, advising as to the best time to execute the trade. It is alleged that the advice given by Scott and Johnson in fact served their purposes in ensuring the trade was executed at a time when the markets were easier to manipulate.

Scott denies the allegations.

Grounds for Resisting Extradition

On 6 December 2017, the Secretary of State ordered Scott's extradition following the 26 October

2017 judgment of District Judge Snow at the Central London Magistrates' Court.

On appeal to the High Court, Scott raised four arguments:

1. The conduct specified in the extradition request did not satisfy the definition of dual criminality under section 137(3)(b) of the Extradition Act 2003 ("the Act");
2. The conduct specified in the request did not occur in the United States, as required by section 137(3)(a) of the Act;
3. Scott's extradition should be 'barred by forum' under section 83A of the Act, in that his extradition would not be in the interests of justice; and
4. Extradition would be contrary to Scott's right to respect for his private and family life under Article 8 of the European Convention on Human Rights.

The principal issue before the High Court was whether the district judge had been wrong to reject Scott's argument under the forum bar.

Forum Bar Decision

The forum bar operates to prevent a defendant's extradition where a substantial measure of the defendant's relevant activity took place in the UK and extradition would not be in the interests of justice.[2]

In deciding whether extradition is in the interests of justice, the judge must have regard to an exhaustive list of seven matters in section 83A(3) of the Act.

The matters most significant to the judgment in *Scott* were:

> (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur; and
>
> (g) the defendant's connections with the United Kingdom.

Location of Harm

The judgment in *Scott* referred to the recent judgment in *Love v USA* [2018] EWHC 172 (Admin) as the leading case on the application of the forum bar.[3] The judgment in *Love* described location of harm as a "*very weighty factor*" in determining forum.[4] In *Scott*, the district judge did not expressly consider this factor, noting only that significant harm took place in the UK and US, thus appearing to treat it as a neutral factor.

The High Court disagreed. The only quantified harm was to Cairn, a UK company. Accordingly, at least the majority of harm in *Scott* occurred in the UK and this should have been treated as a factor weighing strongly against extradition.

The Defendant's Connection to the United Kingdom

The district judge noted that Scott is a UK national with "very strong connections to the UK". The High Court advanced this point, noting that Scott is a British citizen, resident and domiciled there and had lived there his whole life. Scott was previously the sole carer for his children (also UK

citizens) before he met his wife who was widowed with two children of her own, to whom he became stepfather. In addition, Scott and his wife face substantial pressure because of family illnesses not detailed in the judgment. Finally, Scott had no material links to the US. Accordingly, the High Court viewed Scott's connection to the UK as an important factor weighing against extradition.

In *Love*, the court indicated that the fact that Love was a British national, long resident in the UK, studying in the UK and with a girlfriend in the UK would not have persuaded the High Court to attach significant weight to this factor.[5] In that case, the court was only persuaded by the fact that breaking Love's connection to his parents and the medical care provided by them would cause "serious deterioration in health" or a "risk of suicide"; Love's "entire well-being [was] bound up with the presence of his parents", which was "only enhanced by the support of his girlfriend".[6] Even then, and in combination with other factors, the High Court did not accept a submission that Love's connections to the UK made an "overwhelming" case.

Love appeared to set a high bar to be cleared before significant weight would be attached to the defendant's connection to the UK. On the surface, Scott's circumstances are not unusual. Without a detailed knowledge of the family illnesses in Scott's case, his connection to the UK appears considerably weaker than Love's and not one significantly stronger than most UK citizens. Accordingly, the weight afforded to this factor in *Scott* indicates a softening of the approach and a lowering of the hurdle faced in demonstrating connection to the UK under section 83A(3)(g) of the Act.

No Prospect of UK Prosecution

Although the location of harm and connection to the UK were the most important factors in the High Court's decision, one of the more interesting features of *Scott* is the impact of the fact that there was no real prospect of a prosecution in the UK on the same facts.

In March 2016, the Serious Fraud Office ("SFO") published a statement on its website that its investigation into general allegations of fraudulent conduct in the foreign exchange market had closed as it had insufficient evidence for a realistic prospect of conviction.[7] The SFO later confirmed by letter that Scott had not been a suspect in that investigation and would not be the subject of a future SFO investigation ("the SFO letter").

The district judge viewed the SFO letter as relevant to section 83A(3)(c) of the Act, which adds to the list of matters affecting the interests of justice as follows:

> (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute [the defendant] in respect of the conduct constituting the extradition offence

The High Court held that the SFO letter did not in fact have any bearing on the prosecutor's belief as to the most appropriate jurisdiction for prosecution. Rather, the SFO letter should be viewed as a statement of fact.

The High Court went on to outline the wider effect of the fact that "the practical reality appears to be

that no investigation or prosecution is likely in this jurisdiction". This impacts several factors under section 83A(3) of the Act, which require an assessment of the relative merits of a trial occurring the UK or in the requesting state. Where one of these two alternatives is not a practical reality, the weight attached to factors balancing these alternatives should be reduced.

- First, the assessment of the interests of any victims of the extradition offence under section 83A(3)(b) of the Act, which includes assessing the relative convenience for witnesses between attending a trial in the UK or in the requesting state.
- Second, whether evidence necessary to prove the offence is or could be made available in the United Kingdom were the defendant to be prosecuted there, under section 83A(3)(d) of the Act.
- Third, any delay that might result from proceeding in one jurisdiction rather than another, under section 83A(3)(e) of the Act.

Each of these factors involves a balancing act between two available alternatives: trial in the UK or trial in the requesting state. Where trial in the UK is not a realistic prospect, one of those alternatives is removed. According to the judgment in *Scott*, the effect of this is not to shift the balance towards trial in the requesting state, rather it is to reduce the weight attached to the assessment of these factors as they present the judge with false dichotomies.

Given the weight attached to the place of harm and Scott's connection to the UK, the High Court's decision may not have been affected by its ruling on the effect of the SFO letter. However, the overall effect is to reduce the impact of certain factors in circumstances where domestic prosecution is not a realistic prospect.

In many cases, this will result in a more confined balancing act between the place where most of the harm occurred and the defendant's connections to the UK. In *Scott*, both factors weighed in the defendant's favour.

Belief of the Prosecutor – Love Corrected

One further noteworthy feature in *Scott* was its approach to the question of the prosecutor's belief in the most appropriate jurisdiction for prosecution under section 83A(3)(c) of the Act in circumstances where the prosecutor does not express a belief either way.

In *Love*, the absence of an explicit statement of belief was held to weigh in the defendant's favour.[8] The judgment in *Scott* reverses this position, acknowledging that the decision in *Love* overlooked key decisions made in earlier cases of concurrent jurisdiction.[9] As a result, the prosecutor's belief should only be considered, for the purposes of section 83A(3)(c) of the Act, when such a belief is actually expressed; silence should not weigh in the defendant's favour.

Shifting Sands?

The cases of *Love* and *Scott* run counter to a long-held belief by many that UK-US extradition cases will tend to be decided in favour of the US.

However, two swallows do not a summer make. The US has indicated its intention to appeal this

decision. The outcome of that appeal will provide a clearer indication of whether there is a genuine shift towards greater protection given by the courts to UK citizens from extradition to the US.

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[1] *Scott v United States of America* [2018] EWHC 2021 (Admin)

[2] Extradition Act 2003, section 83A(2)

[3] See our previous blog post on *Love v USA* (Lauri Love: The Forum Bar Shows Its Mettle)

[4] *Love v United States of America*, para 28

[5] *Love v USA*, para 43

[6] *Ibid*

[7] *SFO closes Forex investigation*, 15 March 2016. Available at: https://www.sfo.gov.uk/2016/03/15/sfo-closes-forex-investigation/

[8] *Love v USA*, para 34

[9] Shaw v *USA* [2014] EWHC 4654 (Admin), para 4; Atraskevic v Prosecutor General's Office, Republic of Lithuania [2015] EWHC 131 (Admin), [2016] 1 WLR 2762, para 39

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