
Lauri Love: The Forum Bar Shows its Mettle

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On 5 February 2017, the UK High Court issued judgment in the case of *Love v USA* [2018] EWHC 172 (Admin) (“the Judgment”). This was an appeal against the decision at Westminster Magistrates’ Court on 16 September 2016. The case is significant as the first reported case in which the forum bar was successfully argued to prevent extradition. Although the Judgment provides welcome confirmation that the forum bar does have teeth, it makes clear that it will only rarely bite.

The Allegations

Love was accused, in three federal indictments, of carrying out cyber-attacks against computer networks of private companies and US Government agencies between October 2012 and October 2013. It is alleged that he accessed websites to steal, and disseminate publicly, confidential and personally identifiable information.

The Forum Bar

The forum bar was introduced by the Crime and Courts Act 2013 as section 83A of the Extradition Act 2003 (“the Act”). The change in legislation followed the refusal by then Home Secretary Theresa May to order the extradition of Gary McKinnon in October 2012.¹ May concluded that the extradition of McKinnon, who suffered from Asperger syndrome and a depressive illness, “*would give rise to such a high risk of him ending his life that a decision to extradite would be incompatible with Mr McKinnon’s human rights*”. Introducing the forum bar in the same speech, May said: “*Where prosecution is possible in both the UK and in another state, the British courts will be able to bar prosecution overseas if they believe it is in the interests of justice to do so*”.

Under section 83A(2) of the Act, extradition of a defendant to certain states, including the USA, is barred if a substantial measure of the defendant’s relevant activity was performed in the UK and the judge concludes, having regard only to certain specified matters, that the interests of justice lie in the extradition not taking place.

These specified matters include the location of loss or harm; the interests of any victims; the views of the prosecutor on the most appropriate jurisdiction for prosecution; the availability of evidence and witnesses; and, crucially in Love’s case, the defendant’s connection to the UK.

Lauri Love

Love suffers from Asperger syndrome, partly stress-related eczema and asthma. He requires a daily course of creams, steroids and other medication. Love also suffers from depression and has experienced suicidal thoughts. Medical evidence before the magistrates' court suggested that Love would attempt suicide before extradition to the US (§11).

Belief of the Prosecutor

One fact that the court is required to consider in determining an appeal made to the forum bar is any belief held by the prosecutor, in this case the CPS, that the UK would not be the most appropriate jurisdiction in which to prosecute the defendant. If the prosecutor advances such a belief, it will weigh against the defendant.

In Love's case, the CPS did not express a belief either way. In the magistrates' court, the District Judge found that the absence of a belief advanced either way by the prosecutor should have a neutral effect on the forum bar decision; the absence of an expressed belief should not affect the decision.

The Judgment is significant in that it determined this reasoning to be wrong. The absence of a belief expressed either way should in fact weigh in favour of the defendant (§34). This places an onus on prosecutors to express a belief if they hold one. This can be done in two ways: (1) Through a formal decision, under section 83B of the Act, that the UK is not the most appropriate jurisdiction in which to prosecute the defendant, or (2) The explicit expression of a belief that the UK is not the most appropriate jurisdiction in which to prosecute the defendant.

The Defendant's Connection to the United Kingdom

The most significant factor weighing Love's favour in this case was his connection to the UK. 'Connection' is not defined in the Act. The Court of Appeal declined to adopt a narrow interpretation offered by the CPS and instead equated it to the notion of 'ties' for the purposes of bail decisions (§40). This covers "*family ties, their nature and strength, employment and studies, property, duration and status of residence, and nationality*" but would not normally cover health conditions unless the nature of the treatment of such conditions connects the defendant to the UK.

The Court of Appeal ruled (§43) that Love's medical conditions and the care and treatment required, combined with the stability and care provided by Love's parents, produce a significant connection to the UK.

The Judgment makes clear that, by itself, this connection would not be sufficient to place the interests of justice in the defendant's favour. The scales only tipped towards Love when that connection was combined with other factors such as the interests of the victims being poorly served in the "*far from speculative*" circumstances where Love was found unfit to plead in the US and the availability of evidence in the UK.

A Note of Caution

Although this case may be a helpful precedent, the circumstances were extreme; the Court accepted medical evidence that extradition would lead to a severe deterioration in Love's physical and mental state, resulting in a very high risk of suicide and rendering him unfit to plead. The Judgment makes clear that only an extraordinary combination of factors resulted in the decision to use the forum bar to prevent Love's extradition. It is not anticipated that this case will open the floodgates to successful challenges to extradition under the forum bar.

Love is now likely to face prosecution in the UK.

¹ <https://hansard.parliament.uk/Commons/2012-10-16/debates/12101642000005/Extradition>

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