

THE FORUM BAR IN UK EXTRADITION LAW – AN UNNECESSARY FAILURE

Paul Arnell and Gemma Davies

Abstract

The introduction of the forum bar into UK extradition law was unnecessary. It is a failure. It was unnecessary because extant law addressed, or could have addressed, the putative mischief giving rise to it. It is a failure because it admits only limited and optional prosecutorial input into forum bar decisions and, more fundamentally, because it is founded upon two misplaced premises. The forum bar is irredeemable and should be repealed.

Key words: Extradition; forum; forum bar; concurrent jurisdiction; forum non conveniens

1. Introduction

A forum bar was introduced into UK extradition law in October 2013 after several high profile cases led to calls for its introduction. Those cases, entailing US requests for UK nationals who had committed acts on British soil, gave rise to a media and political uproar. The response to these cases overcame reasoned argument and resulted in the insertion of the forum bar into the Extradition Act 2003 (the 2003 Act). The forum bar was unnecessary and is a failure. It was unnecessary because the human rights bar to extradition and prosecutorial guidelines and agreements governing concurrent criminal jurisdiction, amongst other things, addressed the mischief it was enacted to counter. It is a failure because it does not act to ascertain whether the UK, or indeed anywhere, is the most appropriate jurisdiction in which a criminal trial should take place. It does not necessarily lead to a criminal prosecution. The two cases where the bar has been upheld since its introduction highlight its inherent failures. The forum bar was based upon the premises that it is generally appropriate for extradition hearings to consider a UK prosecution in the context of concurrent jurisdiction and that where the bar has been upheld a UK prosecution would follow. Both are misplaced. They arose from the erroneous belief that it was tenable to transplant the meaning of forum in private international law to extradition. The repeal of the forum bar is called for. It is not redeemable, at least not without significant and inappropriate changes to fundamental aspects of the UK's criminal justice systems. The

repeal of the bar would reinstate clarity in the area with existing law and practice acting to address forum-related concerns where appropriate. This development would affirm that prosecution decisions in the context of concurrent jurisdiction are rightly taken by the UK's prosecution services independently and alone.

2. The Nature of UK Extradition

The nature of extradition provides context to the forum bar. Extradition is the legal process under which individuals are transferred between territories to stand trial or serve a sentence.¹ Within the UK the centrepiece of the process is the extradition hearing. It is neither a criminal trial nor a civil hearing. Whilst criminally-related extradition "... operates within the context of other legal, political and international considerations".² Indeed, extradition hearings are best considered "... sui generis, quasi-criminal proceedings affected by international considerations".³ These international considerations include a co-operative element. Extradition is a bilateral process.⁴ Outgoing extradition proceedings follow a third party request to the UK, and considerations of forum may, or may not, come to play in light of that fact. Whilst the specific purpose of extradition is the facilitation of a trial or the imposition of a sentence abroad, in general terms it acts to serve the interests of international criminal justice. The explanatory notes to the 2003 Act state:

"Crime, particularly serious crime, is becoming increasingly international in nature and criminals can flee justice by crossing border with increasing ease. Improved judicial co-operation between nations is needed to tackle this development. The reform of the

¹ See generally Baker, S., Perry, D., and Doobay, A., *A Review of Extradition*, September 2011 (the Baker Review), cited at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf.

² The House of Lords Select Committee on Extradition Law, Second Report of Session 2014-2015, *Extradition: UK Law and Practice*, 25 February 2015, at para 4, at <https://publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/12602.htm>.

³ Arnell, P., *What An Extradition Hearing Is And Why It Matters*, (2018) 4 *Juridical Review* 250 at 268.

⁴ Accordingly it differs from the unilateral exercise of deportation, where there are distinct public policy considerations. In *Norris v UK* [2010] UKSC 9, Lord Phillips said that whilst it is not unreasonable that deportation and extradition are often not distinguished the "... public interest in extraditing a person to be tried for an alleged crime is of a different order" to that underlying deportation, at para 15.

United Kingdom's extradition law is designed to contribute to that process".⁵

The international and co-operative nature of extradition is readily apparent in the jurisprudence. A leading UK right to respect for private and family life extradition case under article 8 is *Poland v Celinski*, where Lord Thomas stated that there is:

"... a constant and weighty public interest in extradition that those accused of crimes should be brought to trial; that those convicted of crimes should serve their sentences; that the UK should honour its international obligations and the UK should not become a safe haven".⁶

These international obligations generally take the form of the European Arrest Warrant and a network of bilateral extradition treaties. They are given effect in UK law by Parts 1 and 2 of the 2003 Act respectively, with Part 1 governing EU surrenders and Part 2 non-EU extradition from the UK. Notably, both of the above quotes allude to a traditional understanding of extradition where an individual commits a crime within one jurisdiction and then flees to another in an attempt to thwart prosecution or escape punishment. This conception no longer necessarily reflects extradition practice. Modern criminality has brought novel challenges to the law and has, in part, itself led to the forum bar.

3. Modern Criminality

Criminality and international criminal justice have changed dramatically over the past fifty years. Many acts today can be carried out in one country and yet affect persons, circumstances or things in another. Indeed, the former Head of the Specialist Fraud Division at the CPS, Sue Patten, in giving evidence to the Select Committee on Extradition Law has said "... my colleagues specialising in organised crime... estimate that about 70% of their case load involves conduct in multiple jurisdictions".⁷ The internet, of course, is particularly relevant here as in many cybercrime cases the acts of an accused may occur in one country with the harm taking place in another.⁸ This is not to suggest that difficulties engendered by transnational and extraterritorial criminality are novel. They have long beset the law.

⁵ Paragraph 6, cited at <http://www.legislation.gov.uk/ukpga/2003/41/notes>.

⁶ [2015] EWHC 1274 (Admin) at para 6.

⁷ Supra note 2 at para 132.

⁸ There have been calls for a multilateral convention on the extradition of computer criminals, see Svantesson, D., Sovereignty in International Law – How the internet (Maybe) Changed Everything, but Not for Long, (2014) 8(1) Masaryk University Journal of Law and Technology 137.

These include jurisprudential and academic debates on the circumstances required for possible UK criminal liability. The terminatory and initiatory theories of jurisdiction and the distinction between result and conduct crimes are of particular relevance here.⁹ These debates have largely come to an end. This has followed a relaxation of jurisdictional restrictions both judicially and legislatively.¹⁰ Judicially, Lord Griffiths stated in 1990 in the context of jurisdiction and inchoate crimes:

“Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England”.¹¹

A number of statutes have similarly widened UK jurisdiction. Of particular note is the Criminal Justice Act 1993, which substantially altered the jurisdictional rules pertaining to a number of crimes including fraud, theft, blackmail and forgery.¹² A further notable instance is found in the Computer Misuse Act 1990, which may have formed the basis of the prosecutions of Gary McKinnon and Lauri Love.¹³

Transnational and extraterritorial offences are given effect in extradition law through the double criminality principle where the party with which the UK is co-operating also criminalises the act on a similar basis. Amongst the relevant provisions are sections 64(4)-(6) and 137(4)-(6) of the 2003 Act, which include as extradition offences conduct within the UK constituting an extraterritorial offence under UK law for Category 1 and 2 territories

⁹ See Hirst, M., *Jurisdiction and the Ambit of the Criminal Law*, Oxford University Press, Oxford, 2003, Chapter 2, and Arnell, P., *Law Across Borders – the Extraterritorial Application of UK Law*, Routledge, London, 2012, Chapter 3.

¹⁰ This accords with international law, which is generous in its allocation to states of jurisdictional competence. For a relatively early statement of the law see the Harvard Draft Convention Jurisdiction with Respect to Crime, (1935) 29 AJIL (Supp) 435, p 445. See also Arnell, P., *Criminal Jurisdiction in International Law* [2000] Juridical Review 179.

¹¹ *Liangsiriprasert v United States* [1991] 2 AC 225 at p 251.

¹² See Sullivan, G.R., and Warbrick, C., *Territorial Jurisdiction: Criminal Justice Act 1993*, [1994] ICLQ 460.

¹³ Section 5(2) of which *inter alia* provides that there is a significant link with a UK jurisdiction where the accused was in the UK at the time he caused a computer to access computer material. Under s 4(1)(a) unauthorised access is criminal regardless of where the computer is located.

respectively.¹⁴ Prosecutorial practice has also come to accommodate modern criminality. This has manifested itself, in part, in various sets of prosecutorial guidance. In England and Wales, the Director's Guidance on the Handling of Cases where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas 2013 provides that a prosecution should be ordinarily "... brought in the jurisdiction where most of the criminality or most of the loss or harm occurred".¹⁵ Of course, this does not assist when most of the loss occurred in one jurisdiction and most of the criminality occurred in another. Indeed, it is illustrative of the difficulties that the criminal law, extradition and prosecutorial practice have faced and continue to address. Certain of those difficulties can be discerned by examining the meaning of 'forum'.

4. The Meaning of 'Forum'

Adjudging whether the forum bar was necessary and whether it is a failure requires an understanding of what the bar was intended to achieve and how it has operated to-date. These in turn lead to the question of what is 'forum'. Statements about the bar's purpose and the mischief it was intended to address provide part of the answer. So too does the meaning of forum in private international law. Leading to the forum bar were concerns over extradition in cases of concurrent jurisdiction. The forum bar, it was thought, would be a mechanism to regulate and moderate such situations. Explicitly describing this function was the Home Affairs Select Committee, which described forum in the context of extradition as identifying "... the country in which it is most appropriate for a trial to take place".¹⁶ The forum bar was intended to act to prevent extradition where only a tenuous connection existed between the requested person and their acts and the requesting state. Such requests were considered to be egregious claims to jurisdiction. The Home Affairs Select Committee, in arguing in favour of the bar, cited Julian Knowles of Matrix Chambers, who

¹⁴ Whilst the Extradition Act 1989 also contemplated extraterritorial offences, the Extradition Act 1870 did not.

¹⁵ At para 8, cited at <https://www.cps.gov.uk/publication/directors-guidance-handling-cases-where-jurisdiction-prosecute-shared-prosecuting>. Interestingly from a forum perspective paragraph 10 of the Guidance provides that the receipt of an extradition request does not require the CPS to consider or reconsider a prosecution in the UK.

¹⁶ House of Commons, Home Affairs Select Committee – Twentieth Report, The US-UK Extradition Treaty, 27 March 2012, at para 22, cited at <https://publications.parliament.uk/pa/cm201012/cmselect/cmhaff/644/64403.htm>. The Select Committee on Extradition Law, simply states that "Forum is the term used to describe the country in which a prosecution takes place", supra note 2 at para 130.

stated "The problem with the US arises... because of the overzealousness of US prosecutors and their whole approach... It has the power to reach out around the world and—provided there is a very, very tenuous connection with the US—it generally has the power to prosecute".¹⁷ Significantly, however, it was also thought that a UK prosecution would follow where the bar acted to prevent an extradition. In this regard the Baker Review notes that "The thinking which underlies the bar is that where a person has committed an offence largely or partly in the United Kingdom, indeed perhaps without ever having left these shores, the extradition judge should have the power to prevent extradition and that the requested person should be prosecuted in the United Kingdom".¹⁸ Enhanced transparency in decision making in cases of concurrent jurisdiction was also an intention of the bar. Lord Taylor said of the bar:

"I believe that these measures will make our extradition arrangements more open and transparent and will ensure that, in cases of concurrent jurisdiction, due consideration will be given by the prosecutors to any decision about whether or not a person could be prosecuted in the UK".¹⁹

Greater transparency, preventing the success of tenuous and egregious claims to jurisdiction and a trial in the UK where it is the most appropriate jurisdiction, then, were central aims of the forum bar.

Within private international law there are rules that govern whether a particular jurisdiction, or forum, is not appropriate to hear a civil dispute with an international element, rules which govern which jurisdiction should

¹⁷ Ibid, at para 30.

¹⁸ Baker Review, *supra* note 1, at p 208. The statement was made in regard to the first iteration of the forum bar, mentioned below. It has been said that article 4(7)(a) of the Framework Decision constitutes in effect a forum bar to extradition, Joint Committee on Human Rights, The Human Rights Implications of UK Extradition Policy, Fifteenth Report of Session 2010-2012, para 88 cited at <https://publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/156.pdf>. The article provides that extradition can be refused where the alleged offence is regarded by the requested state to have been committed in whole or in part in its territory.

¹⁹ Lord Taylor, House of Lords Hansard, 25 March 2013, at col 888. Cited at [https://hansard.parliament.uk/Lords/2013-03-25/debates/13032511000850/CrimeAndCourtsBill\(HL\)?highlight=forum%20bar#contribution-13032540000046](https://hansard.parliament.uk/Lords/2013-03-25/debates/13032511000850/CrimeAndCourtsBill(HL)?highlight=forum%20bar#contribution-13032540000046), at col 888. As to the openness of decision making a former Head of the Specialist Fraud Division in the CPS said to the House of Lords Select Committee on Extradition that where there were "considerations of concurrent jurisdiction with another country, where this results in an extradition request and an application for the extradition of an individual who has been the subject of such a decision, we provide the defence with a copy of our decision on concurrent jurisdiction", *supra* note 2 at para 137.

normally hear a dispute, and rules which govern which law, the proper law, governs the case at hand. As to the first, it has been said that word 'forum' in the forum bar appears to come from the Latin terms '*forum conveniens*' and '*forum non conveniens*'.²⁰ *Forum non conveniens* is a common law doctrine that gives a court the power to refuse to hear a case where there is a more appropriate jurisdiction.²¹ In English law it gives courts discretion to stay a proceeding where there is "... some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice".²² Of note is that, of course, a decision of *forum non conveniens* provides that that particular jurisdiction is not the most appropriate to hear a case. The intention behind the forum bar, in contrast, appears to be that a court would decide that the UK was, or that the requesting state was not, the most appropriate place for a trial to take place.²³

The rules of private international law governing which jurisdiction should hear a dispute generally provide the plaintiff must bring an action in the domicile of the defendant, *actor sequitur forum rei*.²⁴ The principal justification for this rule is that it "... protects defenders from the risk of being summoned to a distant forum, perhaps unconnected with the facts in dispute and to which witnesses cannot readily be cited".²⁵ Again, the intention behind the forum bar mirrors this reasoning. Tenuous links between the requested person and requesting state, and the concomitant strength of links between the individual and the UK were influential in its enactment. The rules governing the law that properly applies to a dispute also finds a parallel in the forum bar. Whilst they do not concern a

²⁰ The Baker Review, *supra* note 1, refers to forum in civil law in addressing the bar under the 2006 Act, at p 205.

²¹ Its scope has been curtailed by European Court of Justice in *Owusu v Jackson* [2005] Q.B. 801 in light of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, cited at <https://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>. See Arzandeh, A., *Should the Spiliada Test be Revised?*, (2014) 10(1) *Journal of Private International Law* 89 at p 89.

²² *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at p 476, per Lord Goff.

²³ That noted, the bar can act in a manner akin to a *forum non conveniens* decision in that it provides for (optional) prosecutorial input stating that the UK is not the most appropriate jurisdiction.

²⁴ The general rule is found in article 2 of the Brussels Convention 1968, given the force of law in the UK by the Civil Jurisdiction and Judgments Act 1982.

²⁵ Beaumont, P., and McEleavy, P., *Anton's Private International Law*, Third Edition, W. Green, Edinburgh, 2011, at para 1.12.

jurisdictional decision the rules are germane because they entail a process of weighing up relevant factors or matters, akin to that under the forum bar. The proper law is "... the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation before us".²⁶ As will be described below, the forum bar contains seven factors that courts must consider in coming to a decision. Of course in purpose proper law rules are alien to the forum bar because countries will not apply the criminal law of third states.²⁷ That noted, it appears clear that there is not inconsiderable overlap between the intention behind the forum bar and forum in private international law. That intention being to ascertain the most appropriate jurisdiction in which a hearing or trial should take place. That intention, however, was not reflected in the terms of the forum bar itself. This is explained, in part, by the circumstances in which the bar was enacted.

5. The Legislative Origins of the Forum Bar

The forum bar was the result of political machinations following the conclusion of the UK-US Extradition Treaty 2003, the cases of a select number of individuals who were well connected, sympathetic and/or benefitting from high profile media campaigns²⁸, and parliamentary and political party horse-trading and expediency. These origins in no small measure explain the bar's existence and its failings. There have been two iterations of the bar. The first, found in the Police and Justice Act 2006 (2006 Act), never entered into force. The second is presently applicable. The forum bar within the 2006 Act followed the cases of the NatWest

²⁶ Morris, J., The Proper Law of the Tort, (1951) 64 Harvard Law Review 881, at p 888. See also Mann, F.A., The Proper Law in the Conflict of Laws, (1987) 36 ICLQ 437. The common law proper law of the contract has, in the UK, been overtaken by the Rome Convention on the Law Applicable to Contractual Obligations 1980, cited at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41998A0126%2802%29>.

²⁷ It is a well-settled rule that UK courts "... will not entertain a suit brought by a foreign sovereign, directly or indirectly, to enforce the penal or revenue laws of that foreign state", *Att-Gen of New Zealand v Ortiz* [1984] AC 1, at p 20 per Lord Denning.

²⁸ The Baker Review noted that a "... small number of high profile cases have highlighted the issue of forum...", supra note 1 at para 1.16.

Three²⁹, Gary McKinnon³⁰ and Ian Norris.³¹ In all three the US sought UK nationals for crimes based upon acts fully or partially carried out within the UK. The cases gave rise to debates on aspects of the 2003 Act and the UK-US Treaty. An aspect of which suggested that there were insufficient safeguards for UK nationals where an alleged crime was subject to concurrent jurisdiction.³² Reference to the NatWest Three is found in the debate in the House of Commons on the bar in 2006. John Redwood MP, in support, is reported as stating:

“The problem is that although many Conservative Members were tolerant and sympathetic to the Government when the provision [removing the *prima facie* evidence requirement] was presented as something to do with terrorism, in the case of alleged white collar crime—[Hon. Members: “Ah!”] This concerns Labour Members’ constituents as well as ours, and they should listen carefully...”³³

Forum, as well as the *prima facie* evidence requirement, was in political and media consciousness following the conclusion of the UK-US Treaty. A distinct and important feature of the context surrounding the enactment of the first forum bar was the legislative horse-trading leading to the 2006 Act. This entailed the then Labour Government including the bar within the 2003 Act in order to assuage Conservative party opposition to the 2006 Act generally, not on account of specific support for it.³⁴ This deal-making is

²⁹ R (Birmingham) v Director of the Serious Fraud Office [2007] QB 727. Warbrick notes the “unusual public profile” of the NatWest Three case in Warbrick, C., Recent Developments in UK Extradition Law, (2007) 56 ICLQ 199. As for the political support see, for example, ‘Try NatWest Three in UK – Tories’, at http://news.bbc.co.uk/1/hi/uk_politics/5155596.stm.

³⁰ McKinnon’s case spanned the period 2005 – 2010, see McKinnon v US [2007] EWHC 762 (Admin), McKinnon v US, [2008] UKHL 59, R (on the application of McKinnon) v Secretary of State, [2009] EWHC 2021 (Admin), and R (on the application of McKinnon) v Secretary of State [2009] EWHC 2449 (Admin). His hacking activities took place in 2001 and 2002, whilst Theresa May, as Home Secretary, blocked his extradition in October 2012.

³¹ Similar to McKinnon, the litigation of Ian Norris spanned the years from 2005 - 2010. See Norris v US, [2005] 6 WLUK 6, Norris v US, [2007] 1 WLR 1730, Norris v US [2008] 1 AC 920, Norris v US [2009] EWHC 995 (Admin), and in the Supreme Court, Norris v US, supra note 3.

³² Lord Taylor, supra note 19 at col 888.

³³ House of Commons Hansard, 24 October 2006, Vol 450 at Col 1392, cited at <https://hansard.parliament.uk/Commons/2006-10-24/debates/0610245500001/PoliceAndJusticeBill?highlight=forum%20bar#contribution-06102455000301>.

³⁴ Binning, P., and Campbell, D., No Forum for Debate on Extradition, (2008) 1 Law Society Gazette, 10 January, p 27.

seen in the sunrise provision that governed the bar's entry into force³⁵ and the fact that that procedure was never subsequently undertaken.

The antecedents of the forum bar now in force were somewhat similar to those existing in 2006. They included concurrent jurisdiction concerns and political expediency. As to the first, Lord Taylor in the House of Lords debate on the House of Commons amendment introducing the forum bar into the Crime and Courts Act 2013 stated that the bar was a response "... to the widespread concern within Parliament, as well as among the public more generally, that insufficient safeguards are currently built into cases of concurrent jurisdiction".³⁶ As to the political expediency, the Programme for Government of the Coalition Government of the Conservatives and Liberal Democrats included the undertaking to "... review the operation of the Extradition Act – and the US/UK extradition treaty – to make sure it is even-handed".³⁷ Again, it is clear that political considerations affected the enactment of a forum bar.³⁸ Legislatively, the process under which the House of Commons amendments to the 2013 Act containing the bar were made was subject to strident criticism in the House of Lords. Lord Rosser described the process as:

"... an example of how not to legislate... Some of the changes, such as Amendments 24 and 136 on extradition, which we are considering now, were introduced by the Government on the final day of the Committee stage in the other place, despite the Government having announced their intention last October to go down the road of a forum bar. The impact of this late and significant change to the Bill was then compounded by there being no scrutiny of these late changes on Report in the other place because they ran out of time.

³⁵ Paragraph 6 to Schedule 13 to the Act provided that the bar was not to come into force for at least 12 months following its enactment, with a resolution of either House of Parliament being required before the Secretary of State brought it into force. The then Home Secretary John Reid said "The Government are not, of course, obliged to bring forward such a resolution, and have no intention of doing so", HC Deb (2006–7) 6 Nov 2007 col 625, at <https://publications.parliament.uk/pa/cm200506/cmhansrd/vo061106/debtext/61106-0011.htm>.

³⁶ At col 888, supra note 19.

³⁷ Cited at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/83820/coalition_programme_for_government.pdf at p 14.

³⁸ The Liberal Democrat election manifesto included the promise to "stop unfair extradition to the US", at http://www.politicsresources.net/area/uk/ge10/man/parties/libdem_manifesto_2010.pdf

This is no way to make substantial changes to our extradition arrangements".³⁹

In spite of these criticisms the forum bar became law. Had it been subjected to proper scrutiny its defects may well have been lessened. However, as will be argued below, the failings of the forum bar transcend its particular terms.

6. The Terms of the Forum Bar⁴⁰

The forum bar is found in ss 19B-F and 83A-E of the 2003 Act, pertaining to Category 1 and Category 2 territories respectively. It does not extend to Scotland⁴¹ nor apply to requests for convicted persons. The bar is a complex provision.⁴² It acts to prevent extradition where 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 requested person's relevant activity⁴³ was performed within the UK and that, having regard to specified matters, it should not take place. There are seven such matters, set out in sections 19B(3) and 83A(3). 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. The judge has to have regard to all of these matters and no others. There is no ranking of their importance, and the court will make a "value judgement overall on whether the extradition of the requested person would not be in the

³⁹ Supra note 19 at col 891. The intention to proceed with a forum bar was iterated in the Government's response to the Baker Review of Extradition. As noted below, the Baker Review argued against bringing the then bar into force. See the Response to Sir Scott Baker's Review of the United Kingdom's Extradition Arrangements, October 2012, Cmnd 8458, at pp 3-4, cited at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228566/8458.pdf.

⁴⁰ See generally Arnell, P., *The Forum Bar to Extradition*, (2013) 24 SLT 169.

⁴¹ This is discussed below.

⁴² Noting the complexity of the bar was Lord Lloyd, who in the House of Lords debate on the 2013 bar stated, "One of the many reasons why the 2006 forum bar was never brought into force was that it was thought to be too complicated. If the 2006 Act was complicated, how much more complicated is this forum provision...?", supra note 19 at col 895.

⁴³ 'Relevant activity' is that which is material to the commission of the offence, under ss 19B(6) and 83A(6)).

interests of justice".⁴⁴ That value judgment is "... very similar in kind to the exercise undertaken on a 'proportionality' issue when it is established that extradition would interfere with the Article 8 rights of a requested person".⁴⁵ That process was authoritatively set out in *Poland v Celinski*⁴⁶; it entails an analysis of the facts as found for and against extradition followed by reasoned conclusions as to why extradition should be ordered or the defendant discharged. The threshold under the forum bar, then, is met where the factors in favour of extradition are outweighed by the interests of justice as defined by the specified matters listed in the bar. If it is decided that the bar is satisfied the requested person is discharged. Whilst complex, the terms of the bar are relatively clear. The question that arises is whether those terms, in the light of the UK's criminal justice systems, give rise to a mechanism that is correctly designated a forum bar. As seen, one of the specified matters does relate to the concept of an appropriate jurisdiction. The manner in which it plays a role within the bar, however, has a considerable bearing upon how it operates in practice. This is clearly seen in the forum bar jurisprudence to-date.

7. Forum Bar Jurisprudence

There is a small but notable body of forum bar jurisprudence. Eighteen High Court appellate cases have been reported where the bar has been considered. Requests have originated roughly equally from non-EU and EU territories, with six coming from the US.⁴⁷ The bar has been upheld twice. The case law is illuminative in demonstrating why the forum bar was unnecessary and is a failure. It confirms that the private international law meanings of forum were not necessarily actualised in the terms of the bar. The jurisprudence highlights that the forum bar has forced courts to attempt to reconcile the intention behind its enactment with its terms. The leading forum bar case is *Love v US*.⁴⁸ It was the first case where the bar

⁴⁴ *Atraskevic v Lithuania* [2015] EWHC 131 (Admin) at para 14. In *Scott v US*, supra note 29 it was stated that "There is no predetermined hierarchy whereby one or more factors will have greater significance than others", at para 25.

⁴⁵ *Atraskevic v Lithuania*, *ibid* at para 32.

⁴⁶ *Supra* note 6 at paras 15-17.

⁴⁷ The other non-EU case followed a Turkish request. Within the EU there have been three French cases, two German and single instances relating to Italy, Lithuanian, Poland, the Czech Republic and Austria. These are the cases reported on Westlaw as at 28 May 2019.

⁴⁸ [2018] EWHC 172 (Admin), as designated in *Scott v US* [2018] EWHC 2021 (Admin). The High Court in *Love v US* reversed the decision of the Magistrates Court, *United States v Love* [2016] Lloyd's Rep. F.C. 597.

was successfully invoked.⁴⁹ Love, a UK national, had been charged with hacking offences said to have caused considerable damage to US computer systems. His acts took place in England. He invoked three bars in opposition to extradition; forum, oppression and human rights. Love's arguments at Westminster Magistrates' Court were rejected, and the Home Secretary ordered his extradition. Upon appeal the High Court barred his extradition on the grounds of forum and oppression. The human rights bar was not considered. Whilst all the specified matters under the bar were discussed, considerable weight was placed upon Love's connection to the UK. This centred upon his connection to his family and home circumstances on account of his mental health disorder and the care he required. This care was "... not just or even primarily the medical care he receives, but the stability and care which his parents provide... His entire well-being is bound up with the presence of his parents".⁵⁰ The specified matter of a belief of a prosecutor that the UK was not the most appropriate jurisdiction was relevant only in its absence. Notably, the possibility of Love's UK prosecution lent weight to the High Court's decision. It concluded that the factors against extradition outweighed those in favour sufficiently clearly to bar Love's extradition. This decision evidences the conflict between the aim of the forum bar and its terms. On the one hand the High Court noted that the bar was intended to apply to circumstances not covered by any of the other bars, its underlying aim was to prevent an extradition where the offences could be fairly and effectively tried in the UK and it was not in the interests of justice to extradite.⁵¹ On the other, the High Court upheld the bar where the mental health of Love was a central consideration⁵² and it emphasised that the terms of the bar must be followed and that it is not tasked with forming a view as to the more suitable forum.⁵³ The lack of prosecutorial input was held to support the bar. In essence, the High Court was torn between deciding the case on the grounds of where it was most appropriate to try Love and on the basis that it would not be in the interests of justice to extradite. In the end it did both.

The second case where the forum bar has been upheld, *Scott v United States*,⁵⁴ also evidences the conflict between the apparent purpose of the

⁴⁹ See Davies, G., Extradition, forum bar and concurrent jurisdiction: Is the case of Love a precedent for trying hackers in the UK?, (2018) 82(4) *Journal of Criminal Law* 296 and Arnell, P., The Case of Lauri Love, (2018) 182(8) *Criminal Law and Justice Weekly*.

⁵⁰ *Supra* note 48 at para 43.

⁵¹ *Ibid* at para 22.

⁵² The oppression bar to extradition explicitly covers mental and physical health.

⁵³ *Supra* note 48 at para 22.

⁵⁴ *Supra* note 39.

forum bar and its terms. Scott was a UK national working in England for HSBC. The US sought his extradition for fraudulent foreign exchange trading. Before the District Court his arguments against extradition founded upon forum, a lack of double criminality and human rights were rejected. His appeal was allowed on the basis of forum. As with Love, the High Court held that Scott's connection to the UK was a weighty factor against extradition. In contrast with Love, the court noted that on the basis of a SFO statement, which was not a prosecutor's belief, it was most likely Scott would not be tried in the UK. Significantly, this fact was held to be relevant to the extent that it affected certain of the specified matters. The interests of victims, delay and the availability of evidence were matters of hypothetical relevance alone, it held, because no UK trial was likely. The specified matters which were held to be operative, indeed decisive, were the place where the loss or harm occurred and Scott's connections to the UK. Scott was discharged. Again similar to Love's case the operation of the bar is wanting. The High Court noted that the interests of justice test is primarily concerned with the question of whether a prosecution should take place in the UK or the requesting state.⁵⁵ As seen, the terms of the bar do not address that basic forum question. Further, in spite of this understanding the bar was upheld in the face of a UK prosecution being unlikely. In attempting to reconcile the purpose of the forum bar with its terms the High Court first professed then failed to apply the essence of the intention behind the bar. It then focused upon Scott's connection with the UK and upheld it. Both of these cases indicate why the forum bar was unnecessary and has been a failure. Multiple bars were put forward in each and it is not unreasonable to suggest that the either the human rights or oppression bar could have been upheld in both. Indeed the latter was upheld in Love v US. In both cases the forum bar did not lead to the identification of the most appropriate jurisdiction. In Scott v US that consideration was willfully ignored. In both cases the requested person remains untried.⁵⁶

8. The Forum Bar was Unnecessary

8.1 Overlap with other bars to extradition

⁵⁵ Scott v US, supra note 48 at para 34.

⁵⁶ Two further cases of note are US v KB [2019] SC EDIN 45 and US v Craig, case E/60/17, 4 July 2019, unreported. In both Edinburgh Sheriff Court considered forum arguments in spite of the bar not extending to Scotland. In the former extradition was found to have been barred, whilst in the latter arguments against extradition were rejected.

The forum bar was unnecessary. This was because existing law and practice considered similar circumstances and acted, or could have acted, to address the putative mischief that gave rise to it. That existing law was, and is, pre-eminently found in distinct bars under the 2003 Act. Of particular relevance here is the human rights bar and the right to respect for private and family life under article 8 in particular.⁵⁷ Also relevant, but to a lesser extent, are the oppression bar, double criminality principle, *prima facie* evidence requirement and proportionality bar. A first human rights point to make is that the human rights bar covers circumstances both within the requesting territory and the UK. These have been termed foreign and domestic cases respectively.⁵⁸ Considerations arising under the forum bar likewise can exist in both territories. The human rights bar, in ss 21A and 87, provides that an extradition will not be ordered where a judge decides it would not be compatible with Convention rights within the meaning of the Human Rights Act 1998. It is evident from an examination of human rights jurisprudence that there is an overlap between the matters taken into consideration under article 8 and those that come under a forum bar analysis. Of particular relevance here is the specified matter of one's connections to the UK under the forum bar which, as just seen, was found to be important in both *Love v US* and *Scott v US*. Relevant to this overlap, the House of Lords Select Committee on Extradition Law has stated "Arguably, the impact of extradition on a person resident in the UK is more properly addressed by consideration of Article 8 of the ECHR as this can already take into account all aspects of his or her life and relationships in the UK".⁵⁹ In addition to one's connection to the UK per se being considered

⁵⁷ The consideration of forum issues under article 8 has considerable pedigree. In *Bagri v France* [2014] EWHC 4066 (Admin) it was noted that "The question of whether 'forum' can be raised as a factor when a court is considering whether extradition would be a disproportionate interference of the requested person's Article 8 rights was considered by the European Court of Human Rights in *Soering v UK*" which was reported in 1989, at para 41. In *Bagri v France* Lord Justice Atkins considered, and discounted, forum considerations under article 8, at para 50, in spite of it being a conviction case. As noted above, in *Love v US* the High Court described the forum bar as a safeguard "not distinctly found in any of the other bars" including within the wide scope of article 8, supra note 48 at para 22. Clearly judicial practice varies.

⁵⁸ *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at para 9, per Lord Bingham.

⁵⁹ Supra note 2 at para 166. In *Calder v Lord Advocate* the High Court of Justiciary the requested person's association with the UK was considered under article 8, at [2006] HCJAC 71, para 17. Lord McFadyen in *US v Craig*, supra note 56 stated that *Calder* demonstrated the "traditional approach to forum", at para 45. It should be noted, however, that Lord McFadyen notes that human rights will not necessarily bring the same result as the forum bar, at para 43.

under article 8 has been forum itself, albeit exceptionally. Lord Phillips said in *Norris v US*:

“Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition... Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an inquiry as to the possibility of prosecution in this country”.⁶⁰

Whilst limited, the Supreme Court here accepted the possibility of a domestic prosecution coming within an article 8 analysis.

The initially narrow scope for the consideration of a UK prosecution under article 8 has been widened somewhat in *BH (AP) and another v Lord Advocate*.⁶¹ Here, in the unusual circumstances of an extradition request for both parents of young children Lord Hope stated:

“The best interests of the children do however suggest that the High Court of Justiciary was wrong to hold... that it was unnecessary to consider the possibility of a prosecution in this country. It will not be necessary to do this in every case. But I would make an exception here”.⁶²

In coming to its decision the Supreme Court referred to forum-related factors and terminology. It stated “The United States has a substantial interest in trying the appellants in its own courts and there are strong practical reasons for concluding that that country, where most of the witnesses reside and the degree of the criminality involved is best assessed, is the proper place for them to be tried... The proper forum in which the prosecution should be brought is in the United States of America”.⁶³

Exorbitant claims to jurisdiction and tenuous links between the requested person or his crime and the requesting territory are facets of the mischief leading to the forum bar that have been considered under the human rights bar. The Divisional Court in *Hashmi v United States* has stated that “... the concept of exorbitant jurisdiction is one which, so it seems to me, has been largely if not wholly subsumed within human rights considerations. The only

⁶⁰ *Supra* note 3 at para 67.

⁶¹ (2012) UKSC 24. See as to the case generally, Arnell, P., Extradition and the Best Interests of Children (2012) 27 SLT 157.

⁶² *Ibid* at para 60 per Lord Hope.

⁶³ *Ibid* at para 70 per Lord Hope. The forum considerations included the whereabouts of witnesses and the locus of the effect of the alleged crimes, at para 69.

place where it is likely to have any relevance is on an issue of proportionality for the purposes of art. 8".⁶⁴ Bringing together excessive jurisdictional claims and tenuous links was *Boudhiba v Spain* where the High Court stated "... that it is possible that a request might range so widely and have so tenuous a connection with the requesting state as to amount to the exercise of exorbitant jurisdiction. It might then be appropriate for the court to consider the situation under the rubric of s21 [the human rights bar]".⁶⁵ It appears clear, therefore, that there is a considerable overlap between the forum and human rights bars – in both the factors considered under them and the mischief they address. Indeed, Lord Brown, who gave the leading opinion in the House of Lords in *McKinnon v United States*⁶⁶, said in the Grand Committee of the House of Lords that article 8:

"... enables the court to look at a case in the round and decide whether the gravity of the alleged offending and the overall interests of honouring extradition agreements and combating cross-border crime truly justify the huge disruption of life sometimes involved in a person's extradition. Although Parliament has now introduced into our law certain specific provisions about forum and proportionality and so forth, very generally those same considerations will also come into play in determining an Article 8 claim".⁶⁷

Further supporting the case that the forum bar was unnecessary are the oppression bar, double criminality principle, the *prima facie* evidence requirement and the proportionality filter and bar.

The oppression bar prevents an extradition where it is oppressive or unjust on account of the physical and mental health of the requested person. It is found in ss 25 and 91 of the 2003 Act. As noted, this bar was upheld along with forum in *Love v US*⁶⁸ with features of the management of Love's Asperger syndrome substantiating the forum bar and his suicide risk supporting the oppression bar. There is nothing within the oppression bar itself or the jurisprudence under it, however, to prevent it from applying

⁶⁴ [2007] EWHC 564 (Admin) at para 26.

⁶⁵ [2006] EWHC 167 (Admin) at para 44.

⁶⁶ Supra note 32.

⁶⁷ The House of Lords Grand Committee, note of the Report of the Extradition Law Committee on Extradition: UK Law and Practice, 16 Sept. 2016, vol 764, Col 270-271. Cited at [https://hansard.parliament.uk/Lords/2015-09-16/debates/15091644000192/ExtraditionUKLawAndPractice\(ExtraditionLawCommitteeReport\)](https://hansard.parliament.uk/Lords/2015-09-16/debates/15091644000192/ExtraditionUKLawAndPractice(ExtraditionLawCommitteeReport)).

⁶⁸ Supra note 48.

to the circumstances in Love's case that substantiated the forum bar.⁶⁹ Indeed, it would appear sensible if it did. The double criminality principle provides that an individual will not be extradited from the UK for an act that is not criminal within it. As mentioned above, the principle is conditioned by specific jurisdictional rules. In essence, these provide that an individual may be extradited for an extraterritorial crime only if UK law provides similarly. This rule, then, prevents exorbitant requests in the form of those which go beyond the scope of UK law in converse circumstances.⁷⁰ Somewhat similarly, the *prima facie* evidence requirement limits extradition to situations where the requesting state can establish to the requisite standard the case against the requested person.⁷¹ Where the requirement applies, therefore, it acts to ensure that there is a case against the individual in the requesting state. The final features of extradition law to be noted that address kindred concerns as the forum bar are the proportionality filter and bar applying in EAW cases. These apply when the National Crime Agency receives a request and in the course of hearing respectively. At both the question of whether it would be proportionate for the surrender to take place is considered. The procedures are mandated by ss 2(7A) and 21A of the 2003 Act. Taken into account is, *inter alia*, the seriousness of the alleged crime.⁷² If surrender is considered disproportionate the EAW is not executed. Overall, it is clear that existing extradition law took into account a number of the specified matters under the forum bar and acted to address similar mischief. Simply, a number of the arguments in favour of the bar were already addressed by the law. The existence of prosecutorial guidance strengthens the argument that the forum bar was unnecessary.

8.2 National and international prosecutorial guidelines

Several relatively long standing sets of prosecutorial guidelines support the redundancy of the forum bar. They illustrate that decisions to prosecute in cases of concurrent jurisdiction are not taken in a vacuum, but within a context that address certain of the concerns leading to the bar. In fact prosecutors are assisted and conditioned in the decisions they take in such

⁶⁹ See Arnell, P., Extradition and Mental Health in UK Law, (2019) Criminal Law Forum, cited at <https://link.springer.com/article/10.1007/s10609-019-09369-7>.

⁷⁰ The jurisdictional rules are mentioned above at p 4.

⁷¹ This rule is not applicable under the Framework Decision, and may be disapplied as regards other territories on a country-by-country basis.

⁷² See Davidson, R., Lloyd, B., and Payter, A., Recent Developments in Extradition Law – some Practical Implications, (2015) 7 Criminal Law Review 504.

cases in a manner that is akin to the conception of forum in private international law. The guidelines are unilateral, bilateral and multilateral. The CPS guidance on jurisdiction⁷³ and the DPP's Director's Guidance on the handling of cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas 2013⁷⁴ are, of course, unilateral. Bilaterally, of particular relevance is the UK-US Guidance for handling criminal cases with concurrent jurisdiction between the UK and the US 2007.⁷⁵ Multilaterally, of perhaps greatest significance to the UK are the Eurojust Guidelines.⁷⁶ As to the DPP Guidance, it firstly sets out that a prosecution should usually take place in the jurisdiction that most of the harm or most of the criminality occurred.⁷⁷ It then provides that prosecutors should take into account accessibility of evidence, the practicability of all related prosecutions occurring in the same jurisdiction, the location of the witnesses and the accused, the connection of the accused to the UK, location of any co-accused and the availability of extradition. Whilst not as specific the UK-US bilateral guidelines provide a broad framework for prosecutorial responses to cases of concurrent jurisdiction. The Eurojust Guidelines apply in a kindred manner to the DPP Guidance. They contain a list of factors to be considered when decisions on

⁷³ Cited at <https://www.cps.gov.uk/legal-guidance/jurisdiction>.

⁷⁴ Supra note 15. This guidance refers, *inter alia* to the Eurojust Guidelines, mentioned presently.

⁷⁵ Cited at <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>. Their particular relevance follows the relative assertiveness of US extraterritorial prosecution policy. A separate document of the same date (18 January 2007), entitled "Attorney General's domestic guidance for handling criminal cases affecting both England, Wales or Northern Ireland and the United States of America", gives effect on the domestic plane to the guidance agreed at the international level by the Attorneys General and the Lord Advocate. See Brookson-Morris, K., *Conflicts of Criminal Jurisdiction*, (2007) 56(3) ICLQ 659. The International Association of Prosecutors' *Prosecutorial Guidelines for Cases of Concurrent Jurisdiction* *inter alia* contain reference to further bilateral and multilateral guidelines and agreements, at <http://www.mpf.mp.br/atuacao-tematica/sci/pedido-de-cooperacao-1/manuais-de-atuacao-1/guia-de-conflitos-de-competencias-da-iap/guia-de-conflitos-de-competencias-da-iap>.

⁷⁶ Eurojust Guidelines for Deciding 'Which Jurisdiction Should Prosecute?', 2003, updated in 2016, found at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20\(2016\)/2016_Jurisdiction-Guidelines_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20(2016)/2016_Jurisdiction-Guidelines_EN.pdf). As the vast majority of UK extraditions take place under the EAW it is not unreasonable to deem the Eurojust Guidelines of greatest importance. The Eurojust Guidelines refer to the Framework Decision on Conflicts of Jurisdiction 2009/948/JHA, 30 November 2009, [2009] OJ L 328/42, at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ajl0021>. The UK has opted out of this Framework Decision.

⁷⁷ Supra note 15.

which jurisdiction should prosecute are taken. These include territoriality, the location of the accused person or suspect, the connections of that person to a particular Member State, evidential issues and the interests of victims.⁷⁸

Both the DPP Guidance and the Eurojust Guidelines align quite closely to certain of the specified matters a judge is obliged to take into account under the forum bar. More relevantly, though, they correlate to forum in private international law in that ultimately what is considered is the most appropriate jurisdiction, not whether an extradition is in the interests of justice. In this sense the guidelines operate as the forum bar was intended. UK prosecutors, therefore have been, and are, operating under forum-type rules. As the Baker Review noted, prosecutors in an evenly balanced intra-EU case are assisted by the Eurojust Guidelines and in the unlikely event they cannot agree, will meet in The Hague to discuss the matter.⁷⁹ These guidelines are not without criticism. Pre-eminent of which is the fact that they do not entail judicial consideration and scrutiny. They are not justiciable. Indeed, this was an argument put forward in favour of the forum bar. In this regard it is submitted that the nature of extradition – discussed below in the context of the failure of the bar – counters this point. This is, in essence, that the ultimate decision in cases of concurrent jurisdiction is rightly non-justiciable because of its extra-legal and international nature. Overall, the forum bar was an unnecessary addition to the law. It emerged as a result of high profile media coverage and campaigns and was a product of political horse-trading. It was not the result of deep and joined-up thinking that took into account all relevant considerations, particularly the roles of the prosecution in decision making in the extradition context on the one hand and the judiciary and judicial independence on the other. The bar was not only unnecessary it is been a failure.

9. The Failure of the Forum Bar

The forum bar is a failure. Those responsible for its enactment thought it would lead to a determination of the most appropriate jurisdiction in which a criminal trial should be held and a trial in that place. As seen, the bar does not necessarily lead to such a determination. Nor does the successful invocation of the bar lead to a UK trial. The first fact is an immediate consequence of the terms of the bar and in particular the role given the prosecution in the forum bar decision-making process. More fundamentally,

⁷⁸ Supra note 76 at pps 2-4.

⁷⁹ Supra note 1 at para 6.30.

the forum bar is a failure because it is founded upon two misplaced premises.

9.1 The forum bar and the role of the prosecution

Prosecutors are given two specific roles under the bar.⁸⁰ Firstly she can make known to the extradition hearing "... any belief... that the United Kingdom... is not the most appropriate jurisdiction in which to prosecute [the requested person] in respect of the conduct constituting the extradition offence", under ss 19B(3)(c) and 83A(3)(c) of the 2003 Act. Such a belief has been expressed only rarely. This has taken place in *Dibden v France*⁸¹ and *Piotrowicz v Poland*.⁸² The rarity of expression of a belief reflects the fact that it is optional. This latitude is a facet of prosecutorial discretion which, of course, also applies to decisions not to investigate an allegation of a crime.⁸³ The expression of a belief under the bar must be explicit. In *Carpenter v Italy* it was held that a statement by the CPS that it had no current intention of prosecuting was not such an expression.⁸⁴ When a belief is given it is generally immune from review, short of being irrational.⁸⁵ This was approved in *Piotrowicz v Poland* where the court agreed that a prosecutor's view "... is not a developed view. It is not any rational written, presented or any other qualification intended to invite investigation by the court".⁸⁶ Where a belief is given it is merely one of the factors to be balanced and weighed by the judge. It is not determinative, and the absence of the expression of a belief has been held to be neutral. This was confirmed in *Scott v US*,⁸⁷ which disavowed the view in *Love v US*⁸⁸ that the absence of a belief weighed in favour of the bar. A final point to be highlighted about the expression of a belief is that the belief

⁸⁰ A general way in which a prosecutor may influence the outcome of an extradition decision, under ss 19B(5) and 83A(5), is through becoming a party to the proceedings. Under the sections a prosecutor's application to take part must be accepted if it appears she has considered the offence for which the requested person could be prosecuted in the UK. The decision whether to apply is within the discretion of the prosecution.

⁸¹ *Dibden v France* [2014] EWHC 3074 (Admin).

⁸² *Piotrowicz v Poland* [2014] EWHC 3884 (Admin).

⁸³ The latter is only susceptible to judicial review in very limited, exceptional circumstances, see *R (Birmingham) v Director of the Serious Fraud Office*, supra note 31 at para 64, and *R (McKinnon) v Secretary of State for Home Affairs*, [2009] EWHC 2021 at para 53.

⁸⁴ [2019] EWHC 211 (Admin) at para 38.

⁸⁵ *Dibden v France*, supra note 81 at para 35 per Simon J.

⁸⁶ Supra note 82 at para 27.

⁸⁷ *Scott v US*, supra note 48 at paras 28-31.

⁸⁸ Supra note 48.

expressed is not that the UK, or indeed the requesting state, is the most appropriate jurisdiction, but rather, and merely, that the UK is not.

The second specific role a prosecutor can play in a forum bar decision is through the issuance of a prosecutor's certificate. Sections 19D and 83C of the 2003 Act define it as a certificate which provides that a responsible prosecutor has considered the offences for which requested person could be prosecuted in the UK, decided that one or more correspond to the extradition offence, and that he has made a formal decision that the individual should not be prosecuted. The reasons for the decision must be that there is insufficient admissible evidence or the prosecution would not be in the public interest. Alternatively, the certificate can certify that the requested person should not be prosecuted because of concerns about the disclosure of sensitive material. Operationally, internal CPS guidance provides that a certificate can only be issued upon the basis of the Full Code Test.⁸⁹ This is the test that must be met prior to the start or continuance of a prosecution within England and Wales, found in the Code for Crown Prosecutors. As with the expression of a belief, the issuance of a certificate is entirely at the discretion of the prosecution. A certificate has never been issued.⁹⁰ Unlike the expression of a belief, where a certificate is issued the judge must decide that the extradition is not barred by reason of forum. A certificate, therefore, *prima facie* determines forum by default in the favour of the requesting state.⁹¹ In other words it simply affirms that the requested person will not be tried in the UK. The finality of a prosecutor's certificate, however, is not absolute. It can be judicially challenged under rules applicable to judicial review. It is evident that the limited and optional roles given prosecutors under the bar affect it materially. The terms of the bar have not created a scheme whereby the most appropriate jurisdiction is identified, far less one that leads to a trial there. The introduction of the bar has not resulted in greater prosecutorial transparency, nor the judicialisation of the operation of the guidance on concurrent criminal jurisdiction. Simply, prosecutors are not obliged to state whether the UK is,

⁸⁹ See *Dibden v France*, supra note 81 at para 21. It is found at <https://www.cps.gov.uk/publication/code-crown-prosecutors>.

⁹⁰ A certificate was issued unintentionally in *Dibden v France*, *ibid*, noted at para 21.

⁹¹ In addition to the time and expense of the Full Code Test seemingly preventing the issuance of certificates may be the fact that they could arguably give rise to a breach of the *non bis in idem* or double jeopardy rule, or be an abuse of process, where an individual is extradited subsequent to one being issued. That noted, in *Minister for Justice Equality and Law Reform v Bailey* [2012] IESC 16 the Irish Supreme Court held that the decision not to prosecute Bailey for an alleged murder in Ireland of a French national did not preclude his surrender.

or is not, the most appropriate jurisdiction, and courts, therefore, do not have the formal opportunity themselves to consider either question. This is not to aver that courts should be given that opportunity. It is argued below that this in fact is the first misplaced premise upon which the forum bar was based.

9.2 The Forum Bar Premises

There are two related premises that underpinned the enactment of the forum bar. The first was that it is generally appropriate for extradition hearings to consider a UK prosecution in the context of concurrent jurisdiction. The second was that where the forum bar was upheld a prosecution within the UK would follow or at least be considered or reconsidered. Both of these are misplaced. As a result the first premise was only given partial and conditional effect. The second found no place in the bar at all. At a basic level it is these two misapprehensions that led to the bar's failure.

9.2.1 The first premise – it is appropriate for courts to play a role

The forum bar is based upon the premise that it is generally appropriate for extradition hearings to consider a UK prosecution in the context of concurrent jurisdiction. Ted Heath MP said in a debate on the first incarnation of the bar:

“Forum is not a matter that can be left to the prosecuting authorities. It is an absurd contention that somehow it is in the interests of justice for the prosecuting authorities of the UK and the US to get together to decide who would like first shot at a British subject. That is a matter for a court to determine in the interests of justice”.⁹²

Transparency was an aspect of the interests of justice. The then Home Secretary, Theresa May, in announcing she would block the extradition of Gary McKinnon, stated:

“A key reason for the loss of public and parliamentary confidence in our extradition arrangements has been the perceived lack of transparency in the process. I believe extradition decisions must not only be fair, they must be seen to be fair, and they must be made in open court, where decisions can be challenged and explained”.⁹³

⁹² Supra note 35 at col 1417.

⁹³ House of Commons Hansard, 16 October 2012, vol 551, at col 165, cited at <https://hansard.parliament.uk/Commons/2012-10->

These arguments won the day – in the context of the political machinations taking place at the time. Amongst the counter-arguments were views based upon prosecutorial independence and existing extradition safeguards. Joan Ryan MP stated:

“Where prosecutors have decided that a case should be tried in country A, rather than country B or C, it is not proper for a judge to second-guess that. If a person is requested for extradition, the Extradition Act in any case—right now—provides for the extradition to be halted if the prosecutors here decide to take proceedings... [O]ne of the strengths of our prosecution system is that it is independent of the judiciary. We do not wish to discard that, and the amendment would mean that we had to discard it”.⁹⁴

This latter sentiment was repeated by Baroness Scotland within the subsequent debate in the House of Lords. There she quoted Lord Dilhorne who said in a different context “A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution”.⁹⁵

At the heart of the question of whether there should be judicial involvement in decisions to prosecute in cases of concurrent jurisdiction is whether the distinct influences that affect extradition in such cases render a judicial role appropriate or, like prosecution decisions generally, it remains inappropriate. It is clear that the arguments leading to the bar failed to appreciate that prosecution decisions in the extradition context are in essence similar to prosecution decisions generally. As such judicial involvement in concurrent jurisdiction decisions is something to be eschewed. Indeed the well-established exceptionality of judicial scrutiny of prosecutorial decisions (not to prosecute) applies with even greater strength in extradition. This follows from the extra-legal and international aspects of extradition and the particular interests it serves. Prosecutorial independence is also a relevant factor. It is discussed below in relation to the second premise.

9.2.1.1 The extra-legal and international aspect of extradition

[16/debates/12101642000005/Extradition](#). Of course extradition decisions are made in open court, it is decisions to prosecute that are not.

⁹⁴ Supra note 35 at cols 1399-1400.

⁹⁵ House of Lords Hansard, Vol 686, 1 Nov 2006, cited at <https://hansard.parliament.uk/Lords/2006-11-01/debates/06110149000003/PoliceAndJusticeBill?highlight=forum%20bar#contribution-06110149000179>, in DPP v Humphreys [1977] AC 1 at p 26.

Decisions to prosecute in cases of concurrent jurisdiction in extradition are necessarily imbued with extra-legal and international dimensions. They are rightfully not taken nor influenced by judges. This is not to gainsay or object to the lessened executive role within extradition and a corresponding increased judicialisation of the process within the UK under the EAW and more generally over the recent past. Indeed, the 2003 Act was "... intended to limit the executive's role in extradition to the greatest possible extent and thus remove any perception that decisions are taken for political reasons or influenced by political considerations".⁹⁶ This development has gone the furthest under the EAW where the role of Secretary of State has almost been eliminated. As regards both EU and non-EU cases, the Secretary of State is limited to deciding between competing extradition requests under ss 179 and 126 respectively, and may prevent a surrender on the grounds of national security under s 208. Whilst the role played by the executive in non-EU cases is wider than this, the general discretion that existed under the Extradition Act 1870 and the Extradition Act 1989 has ended.⁹⁷ Significantly, the Secretary of State's human rights role was removed by s 50 and schedule 20 of the Crime and Courts Act 2013.⁹⁸ The point that needs to be emphasised, however, is not that the role of the executive has not been curtailed, it has. Instead it is that there is an important distinction between the executive per se and the prosecution services. They are and should be distinct. The judicialisation of extradition rightfully comes at the expense of political involvement, not prosecutorial. That noted, it must also be recognised that decisions to prosecute in the extradition context entail extra-legal and international considerations that are not suited for judicial decision making and should be generally immune from judicial influence.⁹⁹

⁹⁶ Baker Review, *supra* note 1 at para 91.8.

⁹⁷ Notable cases of past intervention have taken place as regards Augusto Pinochet and Gary McKinnon.

⁹⁸ This was a result of requested persons raising a human rights point subsequent to the end of the judicial phase of the proceedings, and in particular in the case of Gary McKinnon, see *The Guardian*, Home Secretary Theresa May Overhauls Extradition Laws, 6 February 2013, at <https://www.theguardian.com/politics/2013/feb/06/home-secretary-overhauls-extradition-laws>.

⁹⁹ Those considerations are akin to those traditionally non-justiciable, such as foreign relations and those under the Crown prerogative. Lord Sumption has described the basis of non-justiciability as "... the proposition that the very nature of the relations between states means that there are no juridical standards by which to determine the lawfulness of sovereign acts done in the conduct of the sovereign's foreign relations", in *Foreign Affairs in the English Courts since 9/11*, a Lecture at the London School of Economics, 14 May 2012, at p 4 cited at: https://www.supremecourt.uk/docs/speech_120514.pdf. In *Re*

Decisions to prosecute in cases of concurrent jurisdiction arising in the context of extradition encompass the factors akin to domestic prosecutorial decisions and more. Those within the domestic context include the seriousness of the offence, the circumstances of the victim and the impact on the community.¹⁰⁰ In addition to these are further factors that arise from extradition being, in a non-EU context at least, an inter-governmental act pursuant to agreements concluded under the prerogative. The process necessarily and inherently entails extra-legal and international considerations.¹⁰¹ It is a co-operative exercise. As the commentary to the Harvard Draft Convention on Extradition 1935 stated:

“The suppression of crime is recognized today as a problem of international dimensions and one requiring international co-operation... [T]he most effective deterrent to crime is the prompt apprehension and punishment of criminals, wherever they may be found. For the accomplishment of these purposes States cannot act alone; *they must adopt some effective concert of action*”.¹⁰²

It is the UK prosecution services, not the courts, that are most suited to undertake ‘concert of action’. This action includes co-operating with prosecution services in third countries and then deciding where to prosecute. The guidance, agreements and institutions mentioned above exist precisely for this purpose. Addressing the point directly was Lord Lloyd who argued against the enactment of the bar:

“The basic mistake is to believe that the question of where a defendant should be prosecuted when there are different countries claiming jurisdiction should be decided by a judge... Where there are competing jurisdictions, the question *can only sensibly be decided by agreement between the two competing jurisdictions*. One of the main considerations in these cases must always be where the bulk

Hutchings [2019] UKSC 20 the reasons why the issuance of a certificate excluding a jury trial did not admit scrutiny included that they will “... usually be of the impressionistic and instinctual variety...”, at para 13 per Lord Kerr. A similar sentiment applies in the area of concurrent jurisdiction. The issue there, though, is not one of the legality of the action of the requesting state or the UK, but rather its appropriateness in all the circumstances.

¹⁰⁰ These are found in the Full Code Test, paragraph 4.14, cited at <https://www.cps.gov.uk/publication/code-crown-prosecutors>. This is not to suggest that the Full Code Test is undertaken in cases of concurrent jurisdiction, it is not.

¹⁰¹ Offering insight into the process was Liberty which explained to the Joint Committee on Human Rights that the human rights bar had had a relatively minor impact because of “... judicial reluctance to engage in what is seen as the largely diplomatic and political process which is extradition”, supra note 18 at para 44.

¹⁰² Supra note 10, at p 32, cited in *Norris v US*, supra note 3 at para 119 per Lord Collins. Emphasis added.

of the evidence lies on which the defendant is to be convicted, if he is to be convicted. That is essentially a question for the prosecuting authorities. They will have all the material at their disposal".¹⁰³

With knowledge of domestic and foreign evidential considerations, the nature and locus of the effect of the alleged crime, the interests of the respective states in pursuing the matter and the difficulties attendant to proceeding in one jurisdiction or another the prosecution services are best placed to ultimately decide where a prosecution should take place, if at all.¹⁰⁴

It is the admixture of orthodox domestic factors and varied international considerations that make decisions to prosecute in the context of extradition ill-suited for judicial determination. International co-operation and legal obligation, comity and reciprocity are inherent to extradition. They in a sense condition the entire process. Decisions to prosecute in the context are *sui generis*. Domestically the Privy Council has highlighted:

"... the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits... [and] the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account".¹⁰⁵

Whilst not made in the context of concurrent jurisdiction in extradition this passage is of particular import to it. Somewhat similarly in *R (Birmingham) v Director of the Serious Fraud Office*, in rejecting Birmingham's application for judicial review of an SFO decision not to investigate the High Court stated, "... there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision-maker that there will very rarely be legal space for a reviewing court to interfere".¹⁰⁶ There are, in short, cogent reasons why decisions upon concurrent jurisdiction in the context of extradition are

¹⁰³ Supra note 19 at col 894-895, emphasis added.

¹⁰⁴ Agreeing that, in England and Wales, the CPS is best placed to "reach sensible conclusions" in cases of concurrent jurisdiction upon applying the relevant guidance is the House of Lords Select Committee on Extradition, supra note 2 at para 138.

¹⁰⁵ Sharma-Brown-Antoine [2007] 1 WLR 780 at para 14, as cited in the Baker Review at p 223.

¹⁰⁶ Supra note 29 at para 63.

taken by the UK's prosecution services not the courts.¹⁰⁷ Indeed, "A decision about where a case should be tried is *par excellence* a prosecutorial decision".¹⁰⁸

9.2.2 The second premise – a UK prosecution would follow or be considered

The second premise underlying the forum bar is that where it has been upheld a prosecution within the UK would follow, or at least be considered or reconsidered. As seen above, this was an important part of the rationale behind the bar. In *Love v US* the High Court exhorted the CPS to act in this way:

"If the forum bar is to operate as intended, where it prevents extradition ... prosecution in this country rather than impunity should then follow.... Much of Mr Love's argument was based on the contention that this is indeed where he should be prosecuted. The CPS must now bend its endeavours to his prosecution, with the assistance to be expected from the authorities in the United States, recognising the gravity of the allegations in this case, and the harm done to the victims. As we have pointed out, the CPS did not intervene to say that prosecution in England was inappropriate. If proven, these are serious offences indeed".¹⁰⁹

As noted above, there has not been a prosecution of Love to-date.¹¹⁰ Nor has there been a prosecution following *Scott v US*, although, in opposition to this premise, the High Court upheld the bar knowing that no prosecution was likely.¹¹¹

The fact that a prosecution within the UK does not necessarily follow the forum bar being upheld is simply the consequence of the independence of the UK's prosecution services. They cannot be required, or indeed, expected to commence a prosecution. As noted above, governing decisions to institute criminal proceedings in England and Wales is the Code for Crown Prosecutors.¹¹² It generally provides that a prosecution can only commence

¹⁰⁷ A practical factor in favour is that prosecutorial agreement avoids parallel proceedings, as noted in *Dibden v France*, supra note 81 at para 29.

¹⁰⁸ Baker Review, supra note 1 at para 6.68.

¹⁰⁹ Supra note 48 at paras 125-126.

¹¹⁰ In *Love v NCA* [2019] 2 WLUK 464, the District Court noted that the investigations were ongoing. It also noted the "substantial inconvenience in making all the US evidence available to a trial court in this jurisdiction".

¹¹¹ Supra note 48.

¹¹² Supra note 100.

where it passes the evidential and public interest stages of the Full Code Test. Paragraph 2.1 of the Code describes the independence of the prosecutor, it provides:

“The independence of the prosecutor is central to the criminal justice system... Prosecutors are independent from persons or agencies that are not part of the prosecution decision-making process... Prosecutors must be free to carry out their professional duties without political interference and must not be affected by improper or undue pressure or influence from any source”.¹¹³

In Scotland the Lord Advocate is similarly independent. He is “... the master of the instance in all prosecutions for the public interest”.¹¹⁴ The sacrosanct nature of prosecutorial independence in Scotland led to the forum bar not being extended to that jurisdiction because of the belief that it could lead to an interference with prosecutorial independence. The lack of UK prosecutions following the bar being upheld is fully consonant with the terms of the bar. The only avenue in which a prosecutorial decision can be reviewed under the bar is following the issuance of a certificate. Even then, where a certificate is successfully challenged the consequence is a review of the original decision, not necessarily a prosecution. The premise that a prosecution, or consideration or reconsideration of a prosecution will necessarily follow the forum bar being upheld is fallacious.¹¹⁵

10. Is the Forum Bar redeemable (or instead a necessary failure)?

The forum bar is a failure. A question arising is whether it is redeemable, or instead whether it is a necessary failure. There appear to be two possible avenues to address the bar’s failings. The first is through adding to the specified matters the requirement that a judge must consider the precise question of whether the UK is the most appropriate jurisdiction for a prosecution. As the law stands, this fundamental point cannot be directly considered. Courts are explicitly restricted to the seven specified matters.¹¹⁶ Whilst this option is appealing in that it specifically tackles the

¹¹³ Ibid.

¹¹⁴ Boyle v H.M. Advocate 1976 JC 32, per Lord Cameron at p 36.

¹¹⁵ A failing of the bar not mentioned above is that it may act in a way that is inimical to victims of crime. The Joint Committee of Human Rights cites a witness to it as stating that a UK trial following the forum bar being upheld would “... be an abuse of victim’s Human Rights if they and/ or their families... had to incur overseas travelling costs to see justice done”, supra note 18 at para 95.

¹¹⁶ This is in contrast to the view expressed in Scott v US, supra note 48, where the High Court interestingly stated “... consideration of the interests of justice under section 83A(3)

essence of forum, for the reasons discussed above it is untenable. It would oblige courts to consider matters properly recognised as non-justiciable. Whilst this exercise is appropriate in private international law it ill-accords with the criminal sphere. The considerations affecting a decision of a private person to seek a remedy under the civil law and of a prosecutor to commence proceedings in an extradition context are fundamentally different. As mentioned, there are extra-legal and international factors in cases of concurrent jurisdiction are not suited for judicial determination. Further, even if the law were amended in this way the consideration of a prosecution, let alone a prosecution itself, is not guaranteed. As is perhaps likely in the case of *Love v US*, the CPS may well fail to heed a judicial determination that the UK is the most appropriate jurisdiction for a prosecution. In order to give effect to this type of a bar the introduction of a mechanism through which courts could require at least the consideration of a prosecution in such circumstances would be needed. This, it is submitted, would amount to an inappropriate incursion into the realm of prosecutorial independence.

A second avenue that might address the failings of the forum bar is a provision that required the issuance of a prosecutor's certificate following every contested extradition request. As presently, these certificates could be subject to possible judicial review. A successful case would oblige the CPS etcetera to reconsider the matter. If the original decision was confirmed that is where the matter would end, if not a prosecution would take place. Countering this suggestion is the very considerable and time-consuming addition to the workload of the UK's prosecution services that it would entail. As seen, the CPS has at present adopted a policy requiring the application of the Full Code Test prior to a certificate being issued. The scale of extradition requests to the UK is such that it is not realistic that the test is undertaken in such a way. In the calendar year 2017, for example, 16,837 requests were made under the EAW and 1510 arrests followed.¹¹⁷ A suggestion that has been made to counter this problem is that the requirement be restricted to requests for UK nationals. This would be akin to a conditional nationality bar. Of course the UK has traditionally eschewed barring the extradition of its nationals, in contrast to the position of a

is primarily concerned with the question whether a prosecution for the conduct which is the subject of the extradition request... should take place in this country or in the requesting state", at para 34.

¹¹⁷ The National Crime Agency, at <https://nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/fugitives-and-international-crime/european-arrest-warrants>. Excluded are non-EU requests to the UK.

number of other states, particularly civilian ones.¹¹⁸ This suggestion was made by, *inter alia*, David Bermingham to the Select Committee on Extradition Law.¹¹⁹ Countering it has been the Baker Review. It noted that to introduce a bar on the extradition of nationals and a concomitant obligation to prosecute upon an extradition request being refused "... would first affect the principle of prosecutorial discretion" and, as just noted, "would have significant resource implications including enforcing any sentence imposed".¹²⁰ Overall, the forum bar is irredeemable. The two possible avenues to address its deficiencies run counter to central tenets of criminal justice and the essence of the process of extradition. They would involve a considerable judicial incursion into prosecutorial decision making and involve an unduly burdensome cost. The preferable way forward is to repeal the forum bar and for the courts to develop existing bars so that relevant forum issues such as the individual's connection to the UK (to the extent that they are not already) are taken into account in the balancing exercise under them. The repeal of the forum bar would be recognition of the fact that it is simply not possible to replicate the approach taken to forum in private international law in an extradition hearing.

11. Conclusion

The introduction of the forum bar in the 2003 Act was an attempt to address what were thought to be egregious claims to jurisdiction. It was unnecessary. Existing bars to extradition together with prosecutorial guidance can and do appropriately address the mischief that led to its enactment. This is not to suggest that the bars to extradition and prosecutorial guidance are not without fault. Careful consideration of both is necessary, especially in the light of evolving criminality. It does appear clear, however, that the mischief that led to the forum bar was exaggerated and amplified by sections of the press and various politicians. The uproar led to an ill-conceived provision that complicates the law and does not necessarily benefit requested persons. The forum bar is a failure. It does not act to determine the most appropriate jurisdiction for a trial to take place in cases of concurrent jurisdiction, as its supporters believed it would. Nor does it necessarily lead to a prosecution, or the consideration or reconsideration of one. The prosecution services in the UK have generally not engaged in the operation of the bar by expressing a belief or issuing a

¹¹⁸ See, for example, Shearer, I., *Extradition in International Law*, Manchester University Press, Manchester, 1971, at p 97-110.

¹¹⁹ *Supra* note 2 at para 163.

¹²⁰ *Supra* note 1 at para 6.54.

prosecutor's certificate. A belief has been expressed only twice, and not a single certificate has been issued. This lack of engagement by the prosecution under the forum bar is the immediate reason for its failure. More importantly the forum bar is founded upon two misplaced premises. Decisions on where a prosecution should take place in cases of concurrent jurisdiction are appropriately made by the prosecution services in the relevant nations based upon existing and public guidance. Prosecutorial authorities are and should remain free to decide whether a prosecution should take place subsequent to the forum bar being upheld. Judicial and prosecutorial independence are central tenets of UK criminal justice that should be protected as far as it is appropriate to do so.

The forum bar is irredeemable. Such are the roles of the prosecution and judiciary in the UK's legal systems and the nature and purpose of extradition that a forum bar is simply not tenable. The judiciary should not be tasked with deciding the most appropriate jurisdiction for a criminal prosecution. It is not a legal issue. The institution of criminal proceedings is a manifestation of sovereignty that the UK has delegated to its prosecution authorities. The UK, as most states, is reluctant to curtail this power, be it judicially or through international law.¹²¹ It must be remembered that all outgoing UK extraditions are conditioned by human rights law, including the right to a fair trial. Where an extradition takes place the trial abroad will also occur under the protections offered by the requesting state – a party with which the UK has voluntarily undertaken an extradition agreement. Practically, the repeal of the bar would simplify the law and would allow greater focus on the operation and evolution existing protections in response to forum-type arguments. The time has come for the repeal of the forum bar.

¹²¹ The Harvard Draft Convention on Jurisdiction with Respect to Crime, supra note 10, has not led to a treaty. Similarly the Council of Europe Draft Convention on the Settlement of Conflicts of Jurisdiction in Criminal Matters 1965 has never entered into force, it is cited at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14457&lang=en>.