APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 22
HCA/2019/009/XM

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL UNDER SECTION 103 OF THE EXTRADITION ACT 2003

by

JAMES CRAIG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: O'Neill QC, Macintosh QC; Dunne Defence, Edinburgh
Respondent: M Richardson QC, AD representing the Lord Advocate on behalf of the American Authorities; Crown Agent

3 June 2020

Introduction

[1] The appellant, a United Kingdom national, is the subject of an extradition request under Part 2 of the Extradition Act 2003 by the United States of America, accused of the commission of an offence relating to securities fraud. It is alleged that although the appellant benefited only slightly from the scheme, shareholders in the companies to which the fraud related sustained losses in the region of $1.6 million. Extradition proceedings were

commenced in June 2017 but continued, among other reasons, in order to allow the appellant to bring an application for judicial review of the failure to bring into force in respect of Scotland certain amendments to the 2003 Act, legislated for by section 50 of, and schedule 20 to, the Crime and Courts Act 2013 (the "forum bar provisions").

[2] In the proceedings for judicial review the Lord Ordinary (Lord Malcolm) pronounced a declarator dated 12 December 2018 holding that in its continuing failure to bring into force in Scotland the forum bar provisions, the United Kingdom government was acting unlawfully and contrary to its duties under section 61 of the 2013 Act (the decision is now reported as *Craig* v *Advocate General for Scotland* 2019 SC 230). Before Lord Malcolm, counsel did not insist on that part of the petition seeking an order for specific performance, seemingly on the basis that it was anticipated that the UK government would act upon the declarator, although no doubt other matters relating to the form, nature and practicality of such an order may have played a part. In a subsequent extradition hearing the appellant relied on this finding to resist extradition. He also argued that extradition would be oppressive, given the role of the Lord Advocate in contributing to the decision of the UK government not to commence the forum bar provisions in relation to Scotland. The sheriff rejected his arguments, concluding that extradition of the appellant would be compatible with his Convention rights and that there was no basis for discharging him. That decision is challenged in this application for leave to appeal under section 103. In addition, it is submitted that the sheriff had erred in granting an extension of the required period within which the Scottish Ministers might make an order for the appellant's extradition.

Statutory context

[3] As is familiar, where a request is made for the extradition of a requested person to a

category 2 territory, such as the United States of America, whether that person's extradition is ordered will depend on the outcome of a series of sequential decisions made at the appropriate points in the sequence by the executive (in Scotland the Scottish Ministers) and by the court (in Scotland, at first instance a designated sheriff). The framework for this process of decision-making is set out in part 2 of the Extradition Act 2003, as amended. A purpose of this statutory framework is to protect the various interests of the requested persons. Thus, if the Scottish Ministers receive a valid request for extradition, unless section 70(2) applies, they must issue a certificate to that effect and send the request and the certificate to the sheriff: section 70(9). On receipt of these documents the sheriff may issue a warrant for the arrest of the requested person if he has reasonable grounds to believe the matters set out in section 71(2). If a requested person has been arrested under a warrant issued under section 71 he must as soon as practicable be brought before the sheriff who must give him certain information, remand him in custody or admit him to bail and fix a date on which the extradition hearing is to begin (sections 72 and 75). When the requested person appears before the sheriff for the extradition hearing the sheriff must make the first of what I have described as the series of sequential decisions which are required before a requested person can be lawfully extradited. These decisions are whether the documents sent to him by the Scottish Ministers consist of or include the materials listed in section 78(2); and whether the requirements set out in section 78(4) are met, namely that the person before the sheriff is the person whose extradition has been requested, that the offence specified in the request is an extradition offence and that the documents sent to the sheriff by the Scottish Ministers have been served on the person. If he decides these questions in the affirmative, the sheriff must then proceed under section 79.

[4] If the sheriff is required to proceed under section 79 he must then decide whether the extradition of the requested person to the category 2 territory is barred by reason of one or other of the considerations listed in the relevant paragraphs of section 79(1). If the sheriff decides that the person's extradition to the category 2 territory is barred by one or other of these considerations, he must order the requested person's discharge (section 79(3)). It is only if the sheriff decides the question of the application of the listed considerations in the negative that the sheriff may proceed further. I shall have to return to section 79(1) and the implications of the fact that whereas in the subsection as it applies to Scotland there are four listed considerations by reason of which extradition is barred ((a) the rule against double jeopardy; (b) extraneous considerations; (c) the passage of time; and (d) hostage-taking considerations), in the subsection as it applies to England and Wales and Northern Ireland there is a further consideration: "(e) forum", but for present purposes it is sufficient to note that the scheme for extradition under part 2 of the Act includes within it a recognition that there are interests of the requested person which require protection and which may outweigh the broad policy considerations favouring extradition which underlie the arrangements made with category 2 territories. The mechanism for providing that protection is the power conferred on the sheriff by section 79(1) to decide that extradition is "barred".

[5] If the sheriff decides that none of the section 79(1) considerations apply and that the requested person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large, then he must proceed under section 84. However, where the requesting category 2 territory is designated for the purposes of section 84(7), as is the case with the United States of America, and therefore there is no need to demonstrate a case for the requested person to answer, the sheriff must then immediately proceed under section 87.

Section 87 requires him to decide whether the requested person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998. If the sheriff decides that question in the negative, he must order the person's discharge. However, if the sheriff decides that the requested person's extradition would be compatible with his Convention rights, he must send the case to the Scottish Ministers for their decision, in terms of section 93, whether the appellant is to be extradited. It is only then, if they do not decide that they are prohibited from doing so by virtue of section 93(2), that the Scottish Ministers must order the requested person to be extradited.

[6] On the sheriff sending a case to the Scottish Ministers, in the event that the Scottish Ministers do not make an order for a requested person's extradition or discharge within the required period of 2 months starting with the date when the sheriff sends the case to the Scottish Ministers for their decision ("the appropriate day": section 102(7)), then section 99(2) provides that if the requested person applies to the sheriff to be discharged, the sheriff must order his discharge. In terms of section 99(4), if before the required period ends the Scottish Ministers apply to the sheriff for it to be extended the sheriff may make an order accordingly.

Forum as a reason for barring extradition: the 2013 amendment to the 2003 Act

[7] As appears from the opinion of Lord Malcolm in *Craig* v *Advocate General*, the Crime and Courts Act 2013 was preceded by *A Review of the United Kingdom's Extradition Arrangements* by Sir Scott Baker, published on 30 September 2011. Part 6 of the *Review* discussed the introduction into statute of a "so-called forum bar to extradition". Here, the *Review* noted, "*forum*" is used as meaning the most convenient or appropriate place for a legal proceeding to be heard and determined. Where it is available, the underlying aim of

forum bar is to prevent extradition where the extradition offence or offences can be fairly and effectively tried in the requested state (here the United Kingdom), and it is not in the interests of justice that the requested person should be extradited (*Love* v *Government of the USA* [2018] 1 WLR 2889 at para 22). As at 2011, at least explicitly, this did not form part of the law in any part of the United Kingdom. The proposal that forum bar should be introduced was controversial, as consideration of part 6 of the *Review* demonstrates, and as Lord Malcolm noted. The *Review* summarises the arguments for and against. Among the arguments for was that interference with the right to respect for family life guaranteed by article 8 of the Human Rights Convention must be exceptionally serious before this can outweigh the importance of extradition and the introduction of forum bar would add an extra layer of protection to the extradition process. Among the arguments against were that prosecuting authorities are better placed than the courts to decide the question of forum; that its introduction would undermine the prosecutor's independence; and that it would generate satellite litigation, in particular applications for judicial review directed at prosecutors seeking to compel a prosecution in the United Kingdom. The *Review* notes particular concern over these latter considerations in Scotland.

[8] The *Review* concluded that forum bar provisions should not be implemented. However, as Lord Malcolm observed at para [19] of *Craig*, the United Kingdom Government disagreed with Scott Baker's conclusion and invited the Westminster Parliament to legislate accordingly across the whole of the United Kingdom. Parliament acceded, but left it to the Government to decide when the forum bar provisions would come into force. Not long after the 2013 Act received Royal Assent, the forum bar provisions were commenced in England, Wales and Northern Ireland, in terms of the Crime and Courts Act 2013 (Commencement No 5) Order 2023 (SI 2013/2349) but they were not commenced in Scotland.

[9] For England, Wales and Northern Ireland the forum bar provisions add "(e) forum" to the list of considerations in section 79(1) of the 2003 Act. They also introduce sections 83A to 83E. Section 83A(1) provides that the extradition of a requested person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.

[10] Section 83A(2) provides that extradition will not be in the interests of justice if the judge decides (a) that a substantial measure of D's activity which is material to the commission of the extradition offence was performed in the United Kingdom; and (b), having regard to the matters specified at section 83A(3), that the extradition should not take place. The specified matters are (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur; (b) the interests of any victims of the extradition offence; (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence; (d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom; (e) any delay that might result from proceeding in one jurisdiction rather than another; (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—(i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom; and (g) D's connections with the United Kingdom.

[11] Subject to section 83D, which allows such a certificate to be questioned by the court on judicial review principles at the stage of an appeal against an extradition decision, sections 83B and 83C provide for the determination that extradition is not barred by forum by the issue to the extradition judge of "a prosecutor's certificate". The particular matters which are to be addressed in a prosecutor's certificate are detailed in section 83C but, broadly, a prosecutor's certificate is a statement to the effect that, the issue having been considered by a designated prosecutor, it has been decided not to prosecute the requested person in the United Kingdom for an offence which corresponds to the extradition offence.

[12] Extradition is a reserved matter. Responsibility for commencing the forum bar provisions lies with the United Kingdom Government. However, it is reasonable to conclude that it has been decided not to commence them in relation to Scotland and that that is because of sensitivity to the views of the Scottish Ministers and in particular the Lord Advocate, as head of the prosecution service. Having considered material before him including the written evidence submitted by the then Lord Advocate to the House of Lords Select Committee on Extradition Law on 16 September 2014 and the answer given by the responsible minister to certain Parliamentary questions on 21 December 2017, Lord Malcolm concluded in *Craig* that the reason for the forum bar provisions not having been commenced in relation to Scotland was "acceptance of the concern in Scotland that a forum bar defence would amount to an inappropriate interference with the prosecutorial independence of the Lord Advocate" (*Craig* v *Advocate General supra* at para [19]).

[13] Nonetheless, as I have already stated, Lord Malcolm found the failure of the United Kingdom Government to commence the forum bar provisions in relation to Scotland while commencing them in relation to England and Wales and Northern Ireland, to have been contrary to the intention of Parliament and accordingly unlawful.

Proceedings before the sheriff in the appellant's case

Preliminary procedure

[14] The appellant first appeared at Edinburgh Sheriff Court on 28 June 2017 following the grant of a warrant under section 71 of the 2003 Act when he accepted that he was the person named in the warrant but that he did not consent to extradition. The appellant was admitted to bail. After a number of adjournments granted at the instance of the appellant, on 12 April 2018 a minute was lodged on his behalf intimating his intention to raise a devolution issue within the meaning of schedule 6 to the Scotland Act 1998 ("the devolution minute"). Put short, the contention set out in the devolution minute was that the extradition of the appellant would result in a contravention of his rights as guaranteed by articles 5, 6, 8, 13 and 14 of the European Convention on Human Rights by reason of the failure to commence the forum bar provisions bar provisions (in subsequent proceedings the appellant has maintained the contention that his extradition would result in a breach of his Convention rights but before this court he expressly stated that this contention did not give rise to a devolution issue).

The appellant's submissions at the extradition hearing

[15] Among the reasons for adjourning the proceedings before the sheriff was to allow the appellant to bring a judicial review of the failure to commence the forum bar provisions in Scotland. Having succeeded in the judicial review and armed with the declarator pronounced by Lord Malcolm on 12 December 2018, the appellant finally came before the sheriff at an extradition hearing on 13 June 2019. The appellant gave evidence. The sheriff then heard submissions under reference to the respective written cases and argument which had been lodged on behalf of the appellant and by the Lord Advocate, as representing the

judicial authorities of the United States of America. As the sheriff puts it in his report to this court, the key question was the consequence of Lord Malcolm's decision. The appellant did not found on any of the bars to extradition listed in section 79(1) as it applied to Scotland. He accepted that the forum bar provisions were not in force in Scotland. However, he submitted that he would have had a real prospect of meeting the test contained in section 83A had the forum bar provisions applied to Scotland and the fact that they did not pointed to a breach of his Convention rights for the purposes of section 87 and oppression on the part of the Lord Advocate as a matter of common law. Turning to the terms of section 83A(2), the appellant submitted that a substantial part of his relevant activity (the use of digital media while resident in Scotland) had been performed in the United Kingdom. As far as the place where harm had occurred no information had been provided beyond the assertion that shareholders of the named US corporations had sustained losses over $1.6 million. The gain made by the appellant had been assessed at a mere $97. Prosecution in the United Kingdom did not appear to have been considered as an option but much of the evidence relied on appeared to have been seized from the appellant's home in Scotland and would therefore be available in the United Kingdom were he to be prosecuted there. Six years had passed since the offence came to light; the decision to proceed in the United States had therefore caused delay. The appellant's connections were all with the United Kingdom. It was his submission that, on balance, consideration of the matters specified in section 83A(3) favoured the conclusion that were it open to a sheriff to do so, there was a real prospect that he would decide that it was not in the interests of justice to extradite the appellant. However, it was not necessary to come to concluded view, the court should look to the broader issue of Convention compatibility. The appellant accepted that it is only in exceptional circumstances that the court will be justified in not ordering extradition where

that would otherwise be lawful (*Calder* v *HM Advocate* 2006 SCCR 609) but this was a case where it had been held that the United Kingdom had acted unlawfully. The interference with the appellant's rights under article 8.1 of the Convention which would be the consequence of extradition would not therefore be in accordance with law and thus not compatible with these rights for the purposes of section 87 of the 2003 Act. Even if that argument were not accepted the appellant submitted that the circumstances were sufficiently exceptional to point to the incompatibility with Convention rights on carrying out of the balancing exercise described in *Polish Judicial Authority* v *Celinski* [2016] 1 WLR 551 at paras [15] to [17]. In addition, it was submitted that the proceedings for the extradition of the appellant were oppressive and accordingly the appellant should be discharged. Just as the court had power to prevent the Lord Advocate from acting oppressively in exercise of his function of prosecuting crime (*Stuurman* v *HM Advocate* 1980 JC 111, *McFadyen* v *Annan* 1992 JC 53), the court had power to prevent the Lord Advocate from acting oppressively in exercise of his function in conducting extradition proceedings. The present proceedings had been brought by the Lord Advocate in exercise of the function conferred by section 191 of the 2003 Act. That function included conducting extradition proceedings in Scotland and advising on any matters relating to extradition proceedings in Scotland. Oppression arose from the fact that on the one hand the Lord Advocate was insisting on these proceedings while on the other he had manipulated the UK government into illegally restricting the bars to extradition which were available to the appellant.

The sheriff's decision of 4 July 2019

[16] The sheriff advised his decision on the issues raised at the extradition hearing, at a continued extradition hearing on 4 July 2019.

[17] As appears from his decision, the sheriff considered that he was entitled to consider the issue of forum bar in the context of his assessment under section 87, and to do so by reference to the test which would apply under section 83A, had that provision been introduced in Scotland. If application of the latter would not lead to the conclusion that extradition would not be in the interests of justice, it may enable the court to discount forum bar points in the consideration of Convention rights. However, if the court were satisfied that the contrary result would follow, it would be necessary to see how that fitted with the appellant's Convention rights and the more traditional approach to forum considered in *Calder*. The sheriff addressed the issue of forum bar and concluded that were he to be in a position to apply section 83A extradition would not be barred by reason of forum. In these circumstances, if the forum bar point lacked strength the remaining arguments as to Convention rights and oppression, which hinged on establishing a case on forum bar, could not succeed.

Subsequent procedure and the sheriff's decision of 3 September 2019

[18] Having decided in the affirmative the question of whether the appellant's extradition would be compatible with his Convention rights, the sheriff was obliged to send the case to the Scottish Ministers for their decision, in terms of section 93 of the 2003 Act, as to whether the appellant was to be extradited. On the sheriff sending a case to the Scottish Ministers, in the event that the Scottish Ministers do not make an order for a requested person's extradition or discharge within the required period of 2 months starting with the date when the sheriff sends the case to the Scottish Ministers for their decision ("the appropriate day": section 102(7)), then section 99(2) of the 2003 Act provides that if the requested person applies to the sheriff to be discharged, the sheriff must order his discharge. In terms of

section 99(4), if before the required period ends the Scottish Ministers apply to the sheriff for it to be extended the sheriff may make an order accordingly.

[19] The sheriff's advised his decision on 4 July 2019 in open court. Both the appellant and the Lord Advocate, on behalf of the government of the United States of America, were represented at that hearing. The order of the sheriff included "in terms of section 87(3) and 141(1) of the Act sends the case to the Scottish Ministers for their decision whether James Allan Craig is to be extradited."

[20] Notwithstanding the terms of the sheriff's order the Sheriff Clerk did not send a copy of the sheriff's decision to the Scottish Ministers until 9 August 2019. In answers lodged to the note of appeal, the Scottish Ministers aver that they first became aware of the case on 6 August 2019 when contacted by Justiciary Office in connection with a proposed (but premature) appeal by the appellant. Thereafter, enquiries were made and it was established that the case had not been sent to Scottish Ministers. Papers were received by Scottish Ministers from the Sheriff Clerk on 12 August 2019. On 30 August 2019 the Scottish Ministers applied for an extension of time under section 99(4). The Scottish Ministers did not intimate that application to the appellant or those acting for him. As the sheriff reports in his Supplementary Report of 19 November 2019, he granted the application, it having been placed before him on 3 September 2019, the day on which the required period was due to expire. He considered that the delay by the Sheriff Clerk in sending the case to the

Scottish Ministers provided a sufficient basis for an extension (until 9 October 2019). The sheriff granted the extension without hearing the appellant.

The grounds of appeal

[21] The amended grounds of appeal are five in number:

(1) That the Sheriff's approach in carrying out a "forum bar" assessment was *ultra vires*.

(2) *Esto* the Sheriff was entitled to carry out such an assessment, it was vitiated by error in the conclusions he reached.

(3) That extradition in the circumstances would be incompatible with Convention rights, (primarily article 8), as being without a lawful basis.

(4) It would be oppressive and a breach of the principles of substantial justice to allow the Lord Advocate to secure the appellant's extradition when the Lord Advocate bore "some responsibility" for the unlawful failure to commence the forum bar provisions in Scotland.

(5) A decision to grant a section 99(4) extension application without intimation to the appellant amounted to a breach of the appellant's article 6 rights.

Submissions for the appellant

[22] Senior counsel for the appellant made general over-riding submissions as to the statutory extradition framework, the legal principles and associated case law relating to the separation of powers, parliamentary sovereignty, and the respective roles within the rule of law of the court, Parliament and the Executive. Reference was made *inter alia* to *Cherry & Others* v *Advocate General for Scotland* 2019 SLT 1097 and 2019 SLT 1143 and *Miller* v *Secretary of State for Exiting the European Union* 2018 AC 61. The respondent took no issue with these general submissions and I do not repeat them here. They are contained more fully in a

speaking note produced on the morning of the appeal in support of the written submissions previously lodged. It was submitted that an essential part of the rule of law was that when the court had made a final authoritative decision, such as the judicial review in the associated proceedings, the Executive was bound by that ruling. Extradition was a coercive power subject to the rule of law and required recognition of the decision in the judicial review.

[23] Turning to the specific grounds of appeal the submissions were as follows:

(1) *Ultra vires. T*he forum bar provisions having unlawfully not been commenced in Scotland, the sheriff was not entitled to consider them in any capacity. Where the Executive has acted unconstitutionally it is not for judges to fill in the gaps and maintain the substance of the law. In the face of an un-remedied and continuing unlawfulness of the extradition regime, then all extradition applications for those who could otherwise have prayed in aid section 83A had to fall. The forum bar provisions were not there only for those who would benefit from them. Parliament's intention had been for anyone to have the opportunity to try to persuade the court to consider the balancing factors, as long as they met the requirements of section 83A(2)(a). The court should not attempt to squeeze the favourable parts of the provisions into section 87: forum bar rights should be treated differently from Convention rights, see *Love* v *Government of the United States of America* [2018] 1 WLR 2889, paragraph 22.

(2) *The esto argument*. The sheriff's decision as to factors (b), (d) and (e), was incorrect. So far as factor (g) is concerned, whilst the finding that this factor strongly favoured discharge was correct, no sufficient reasons had been given for the determination. The sheriff should have treated factors (b) to (f) as neutral; and factor (a) as only "favouring" extradition rather than "strongly favouring" extradition.

(3) *Incompatibility with Convention rights*. The Scottish Ministers and the Lord Advocate had each "procured" the unlawful failure to make available the forum bar provisions which was a breach of the appellant's Convention rights. In pressing for the extradition in knowledge of this procurement the Lord Advocate was acting incompatibly with the appellant's Convention rights, as were the Scottish Ministers in their decision to extradite. Articles 5, 6 and 8 in particular were engaged in the present case. The UK Government's failure to take steps to remedy the situation was itself a breach of Article 6 and a breach of the general requirement of legality inherent in the Convention. Those in Scotland who might otherwise benefit from the statutory protections had to rely on less effective protection in line with *Calder* v *HM Advocate* 2006 SCCR 607 which required the meeting of an exceptional circumstances test.

(4) *Oppression*. For similar reasons it would be oppressive and a breach of the principles of substantial justice to allow the Lord Advocate to obtain the appellant's extradition. The ability of a sheriff to prevent oppression was an aspect of the power of the court not a right of the accused or requested person.

(5) *Granting an extension to the required period without hearing the appellant*. The time limit which the Scottish Ministers initially had available within which to make an order for extradition or discharge ("the required period") started on 4 July 2019 ("the appropriate date") and expired on 3 September 2019. The "permitted period" within which the Scottish Ministers were required to consider any representations received from the appellant in terms of section 93(5) expired 4 weeks from the appropriate date, on 1 August 2019. The Scottish Ministers were aware that the appellant was represented by solicitors at least from the date when they received the relevant papers from the Sheriff Clerk on 12 August 2019. They nevertheless did not intimate their application for extension of the required period

either to the appellant or his representatives. They therefore deprived the appellant of the opportunity to be heard by the sheriff on his submission that the Scottish Ministers must be taken to have been aware of the extradition proceedings before the sheriff and his decision as at 4 July 2019 and in any event on 12 August 2019 and for that reason the circumstances were not exceptional and the application for extension should not be granted.

Submissions for the Lord Advocate

[24] The appellant's position before the sheriff was that there was a real prospect that had the provisions applied, he could successfully have relied upon them and extradition would have been barred. To argue on appeal that the sheriff had no power to determine that was an oddity. To determine the arguments advanced to him, it was necessary for the sheriff to assess whether section 83A, assuming it to be in force and if properly applied, would have resulted in extradition being barred. The sheriff cannot be criticised for addressing the arguments made to him. Turning to the individual grounds:

(1) *Ultra Vires*. In acting as he did, the sheriff was not making up for the failures of the Executive, acting contrary to the rule of law or acting unconstitutionally. The sheriff required to determine the effect of the failure to commence the forum bar provisions and give a remedy in so far as it could be shown that the failure had an impact of the person before the court. It was a legitimate means of assessing what that impact was to consider the position under section 83A on a hypothetical basis using guidance issued by the High Court of England and Wales.

(2) *The esto argument.* Although issue might be taken with some aspects of the sheriff's approach, his overall conclusion was correct. The appellant's criticisms were misguided and

in some respects the approach adopted by the sheriff erred in favour of the appellant. The factors taken together pointed to extradition and this ground of appeal should be rejected.

(3) *Incompatibility with Convention rights* and (4) *Oppression*. Neither ground added anything to the arguments already advanced. The issue of incompatibility only arose in the event that the appellant could demonstrate that he had been prejudiced by the non-commencement of section 83A. Unless he could show that, the section was irrelevant because reliance on it would have made no difference.

(5) *Granting an extension to the required period without hearing the appellant.* The circumstances which led to this arose from an administrative error by the Sheriff Clerk and a concern that the delayed notification could cause confusion in respect of the timing available to the appellant to make representations. This met the test of exceptional circumstances for an extension which was in the interests of justice under section 99. Any prejudice from a lack of hearing could be remedied and cured in the current appeal were any such prejudice to be identified (which it had not been).

Analysis and decision

[25] Shorn of their rhetoric, the legality arguments (grounds 1 and 3) advanced on behalf of the appellant may perhaps be summarised in this way: it was unlawful for the UK government not to commence the forum bar provisions in Scotland; the failure to do so meant that, in any case where an individual maintained that he would otherwise have been able to bring himself within the scope of section 83A, the remaining provisions of the Extradition Act 2003 could not lawfully be relied upon; and the individual in question, being deprived of the opportunity directly to rely on the statutory provisions must be discharged. There was no lawful basis upon which the extradition of the appellant could be insisted on

while the legal protections enacted for his benefit have been denied him by Executive inaction. In relying on the existing provisions of the 2003 Act in force in Scotland, and in purporting to take account of the issue of forum, the sheriff had acted beyond the scope of his powers. His decision could not stand and the appellant required to be discharged. For similar reasons, the continuation of extradition proceedings against the appellant breached the principle of legality which underpinned his Convention rights. The fact of the appellant having been unlawfully deprived of the "possibility of directly relying in these proceedings on the forum bar provisions" rendered the proceedings non-compliant with the Convention's principle of legality, and unlawful in terms of section 6 of the Human Rights Act 1998 and required the appellant to be discharged.

[26] It is worth noting that this does not reflect the appellant's position before the sheriff, which was that he acknowledged that he required, and maintained that he could, show that there was a real prospect that had the forum bar provisions been in force, he would have successfully relied upon section 83A and his extradition would have been barred.

[27] In any event I am unpersuaded by the submissions for the appellant. In my view it does not follow, from the unlawfulness of a failure to commence the forum bar provisions, that the entire existing mechanism of extradition is itself rendered unlawful. In considering what is in fact the result of an unlawful failure such as this, it is critical to consider the effect, as a matter of fact, which the failure may have on an individual who may otherwise have been able to argue that the additional legislative provisions applied to him. That in turn requires consideration of (a) the purpose of the provision(s) in question and (b) the extent to which the individual as a result of the failure, has been prohibited from relying on arguments which could otherwise have been made. The addition of the forum bar provisions in England and Wales did not make the existing legislation inapplicable, and it

did not alter the mechanism or procedure to be followed. Had the forum bar provisions been introduced in Scotland, it would still be possible to seek extradition of the appellant under the 2003 Act.

[28] The issues underlying and argument relating to forum bar are already arguments which could be, and frequently have been, advanced in submissions based on the existing legislation. The intention of the addition of section 83A was that forum bar should be elevated to a separate and formalised basis for refusing extradition, and of course, an argument on such a formalised basis is not available to the appellant or those in his position. However, the arguments forming the underlying rationale for the forum bar provisions are available to him, in terms of section 87, and were indeed considered in detail by the sheriff.

[29] The sheriff's power (*vires*) to consider the arguments did not hinge on an application of the forum bar provisions in legislative terms. The sheriff proceeded on the basis that the arguments which were effectively forum bar arguments were relevant to the assessment which he had to make and were available for consideration by him in that context; he made no attempt to rely in terms on the uncommenced legislative provisions. The sheriff already had power to consider these arguments (see for example *Calder* v *HM Advocate* 2006 SCCR 609) and did not require to find separate legislative authority to do so. For example, in *United States* v *B* [2019] SC EDIN 45, the sheriff discharged an extradition under section 87(2) on the basis that it would not be compatible with the appellant's Convention rights under articles 5, 6 and 8, taking account in so concluding of the issue of forum.

[30] I recognise that such an approach is not the same as direct reliance on legislative forum bar provisions. However, in addressing the issue within the terms of section 87, the sheriff would of course be expected to include as part of the balancing exercise the fact that the non-commencement of the forum bar provisions in Scotland has been found to be

unlawful. This would not require the sheriff to act as if the provisions were in force. It would be to take into account, in terms of the decisions he is required to make, the potential prejudice to an applicant of the failure to introduce provisions. The court would be searching for a remedy which does not involve a practical imposition of such prejudice. In this case, in making his assessment under section 87, the sheriff had regard to guidance which would apply in England and Wales regarding the correct approach to forum bar. In weighing the merits of associated forum related arguments under section 87, the court would be entitled to assess the merits of any argument that, had the provisions been in force, they would have operated as a complete bar to extradition in the individual case. The fact that the state had acted unlawfully in failing to commence provisions which would have operated this way in favour of the appellant would be a powerful factor in assessing the effect on his convention rights and enabling a conclusion to be drawn that there were exceptional circumstances requiring his discharge. The sheriff in the present case was able to make an appropriate assessment and did so. In my opinion grounds 1 and 3 must fail.

[31] The appellant's contention in ground 2 is that, on the assumption that he was entitled to engage in such an exercise with a view to determining the impact of the failure to commence the forum bar provisions on the appellant's case, the sheriff's conclusion that, on a consideration of the factors specified in section 83A, the appellant's extradition would not "not be in the interests of justice", is fundamentally vitiated by error. I disagree

[32] The sheriff accepted that while the evidence as to the location of the appellant's activity which was material to the commission of the extradition offence was somewhat vague, it could be inferred that a substantial measure of that activity (in the sense of logging onto a computer or computers, creating accounts and posting material) had taken place or at had at least been facilitated in Scotland. He accordingly turned to consider the matters

relating to the interests of justice which are specified in section 83A(3). The first of these is "(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur". The sheriff located the place where most of the harm resulted as the United States. It is not argued that he was wrong to do so. In my opinion, on the material before the sheriff, he could not have decided otherwise. The fraud of which the appellant was accused involved the distortion of a United States securities market (the NASDAQ exchange) by the dissemination of false information. That in itself was harmful but, as the sheriff correctly stated, there will have been consequential harm for the US registered companies whose securities were affected as well as financial losses for investors who traded on the basis of the false information, many of whom, it might reasonably be assumed, would be of US domicile. The Divisional Court in *Love*, at para 28, described consideration (a) as a very weighty factor. I agree.

[33] Consideration (b) is "the interests of any victims of the extradition offence". The sheriff thought it reasonable to infer that there were significant United States victim interests. The appellant submits that he did not identify what these interests were and how they would be met by trial in the United States. He goes on to argue that the appellant's settlement with the SEC can be taken to have satisfied any such interests, making this consideration neutral. I am not persuaded that the appellant's settlement with the SEC, on the basis of payment of a sum equivalent to his modest profit from the fraud advances his position. It was not accompanied by any admission of culpability on the part of the appellant. While I see there to be more substance in the appellant's submission that the sheriff did not identify what were the United States victim interests or how they would be affected by trial in the United States, the submission does not, and in my opinion could not, go the distance of arguing that there are no victim interests. If an example were required, I

would point to the interest of those having responsibility for the relevant securities market in maintaining the integrity of that market as a reliable indicator of the value of the securities traded on it, and accordingly in supporting the prosecution of those who unlawfully undermine the integrity of the market. In *Love* at para 29 the Divisional Court saw it as self-evident that the interests of victims are likely to favour trial in the jurisdiction where a trial will take place. I would agree. The Divisional Court also stated in *Love* that victims of crime may have an interest in having the case tried according to their own local laws and procedures, and in any sentence being imposed following conviction reflecting the values of their own legal system. I would take no issue with that. There was nothing before the sheriff to suggest that there was any likelihood of a prosecution in the United Kingdom. A trial in the United States would be according to the laws, procedures and values of such victims as can be localised. Like the sheriff I consider that this factor clearly favours extradition.

[34] The sheriff took the view that consideration (c) was neutral in the absence of any statement of belief on the part of a prosecutor in the United Kingdom. The appellant does not suggest otherwise.

[35] Consideration (d) is that were the requested person to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom. The sheriff considered that it was not clear how complex and demanding it would be to obtain evidence of impact on the relevant market if the matter was to be prosecuted in Scotland. I can see that that might well be so, but I also see force in the what was said by the Divisional Court in *Scott* v *Government of the United States of America* [2019] 1 WLR 774 at para 35: there is an air of unreality about considering the ease or otherwise with a

prosecution could be brought in the United Kingdom when the fact is that there is no real prospect of such a prosecution. At para 50 in *Scott* the Divisional Court said:

> "When the practical reality is that there will be no trial in this country it is hard to see that this factor has any part to play in determining where the interests of justice lie pursuant to section 83A."

I would agree. It follows that while it is difficult to criticise the sheriff for following parties' invitation to consider this factor, he should have left it out of account. A similar point can be made in relation to consideration (e): any delay that might result from proceeding in one jurisdiction rather than another. Where there is in fact no choice to be made, for the reasons given by the Divisional Court, I would simply leave this consideration out of account. The sheriff can therefore be said to have erred in finding that consideration (e), like consideration (d), favoured extradition.

[36] Consideration (f) is the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction. This matter does not arise. The sheriff attached no weight to it.

[37] Looking to consideration (g), the requested person's connections with the United Kingdom, the sheriff accepted that that strongly favoured discharge. The appellant agrees but nevertheless submits that the sheriff did not subject the clarity and strength of the appellant's connection with Scotland to a sufficiently rigorous analysis. Reference is made to *Love* at para 40 where the Divisional Court held that "connections with the United Kingdom" went beyond the legal connections of citizenship and right of residence. Having accepted that the appellant's connections with the United Kingdom strongly favoured discharge, I do not see why the sheriff was required to go further. I do not understand it to have been disputed that the appellant was thoroughly connected with the United Kingdom, through citizenship, residence and no doubt many other ties. Such a person has a legitimate

expectation that, if he is to be prosecuted, he will be prosecuted in the United Kingdom. However, for reasons of good policy, the United Kingdom allows the extradition of its nationals who are resident in and otherwise connected with the United Kingdom where their conduct has made them subject to the criminal jurisdiction of other territories. There is nothing in the sheriff's approach to consideration (g) which amounts to an error.

[38] As the court has been invited to do by the appellant, I have examined the way in which the sheriff approached each of the statutory considerations bearing on assessment of whether extradition would not be in the interests of justice. The appellant's object in adopting this approach has been to demonstrate that the sheriff gave weight to factors which he should not have given weight to, with a view to inviting this court to consider the matter afresh. The appellant has succeeded in his approach to the extent that whereas the sheriff found considerations (d) and (e) to favour extradition, I would accept that these are considerations which should have been left out of account in a case where there is no practical alternative forum on offer to that which is proposed by the requesting state. However, the question for this court is whether the sheriff was wrong in finding that extradition would not "not be in the interests of justice." While I accept that the sheriff gave weight to considerations which he took to favour extradition which he should have left out of account, I do not consider that the sheriff was wrong in the conclusion he came to on the hypothetical question of what would have been the result had section 83A applied in Scotland.

[39] So far as ground 4 is concerned, I do not accept the underlying assumption that extradition is a remedy for the benefit of the Lord Advocate. The role of the Lord Advocate as representing the requesting authority is well understood. In any event, the decision not to commence the provisions is one made by the UK Government and the fact that the Lord

Advocate might have made representations as to the suitability or otherwise of doing so does not shift responsibility from the UK Government to the Lord Advocate. It does not deprive a requesting authority of the opportunity to rely on existing extradition provisions which remain in legal force in Scotland.

[40] As for ground 5, I cannot detect any error in law on the part of the sheriff. In the absence of any statutory requirements it was a matter of the sheriff to determine what procedure he adopted when considering the application made to him in terms of section 99(4). On the substance of the matter it cannot be said that the sheriff's decision, in what was an exercise of discretion, was not one which was open to him in the circumstances. These circumstances, as the Lord Advocate submitted, were exceptional, there had been a delay of more than a month in sending the sheriff's decision to the Scottish Ministers. Extension allowed additional time lest there had been confusion over when the appellant had to make representations, should he have wished to do so.

[41] I propose that the appeal be refused.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 22
HCA/2019/009/XM

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF LORD BRODIE

in

APPEAL UNDER SECTION 103 OF THE EXTRADITION ACT 2003

by

JAMES CRAIG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: O'Neill QC, Macintosh QC; Dunne Defence, Edinburgh
Respondent: M Richardson QC, AD representing the Lord Advocate on behalf of the American Authorities; Crown Agent

3 June 2020

[42] I respectfully agree with your Ladyship that this appeal should be dismissed for the reasons that your Ladyship gives. I merely seek to add a few observations in relation to what was said in support of the appellant's grounds 1, 3 and 4.

Ground 1

[43] This is an appeal in terms of section 103 of the 2003 Act. Strictly, it lies only with leave but that is not of importance in that the practice of the court is to consider the question of leave together with the substance of the appeal. However, the court's powers to allow an

appeal are limited by the provisions of section 104. In terms of section 104(2) the court may allow an appeal only if the conditions in subsection (3) or (4) are satisfied. The respective conditions are as follows:

> "(3) The conditions are that—
> (a) the judge ought to have decided a question before him at the extradition hearing differently;
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
> (4) The conditions are that—
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
> (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

[44] It is not entirely easy to fit ground of appeal 1 into the framework provided by section 104(2), (3) and (4). A "question," as that word is used in subsection (3) is clearly a reference to one of the matters that the Act requires the judge to determine sequentially in the course of the extradition hearing. Here the question the sheriff thought he was deciding when he gave consideration to the hypothetical impact of section 83A was whether the appellant's extradition would be compatible with his Convention rights in terms of section 87. He answered that question in the affirmative. Had he answered it in the negative he would have been obliged to discharge the appellant. However, what is complained of in the ground of appeal is not that the sheriff ought to have answered the section 87 question in the negative, rather the complaint is that he ought not to have answered the question at all; according to the appellant for the sheriff even to address the question was "*ultra vires* – indeed unconstitutional". This is a surprising assertion, and all the more surprising in that the appellant would seem to have expressly invited the sheriff to address the question at the extradition hearing. However, if the appellant's complaint is that the sheriff even asked the

section 87 question (or a hypothetical section 83A question) then there would seem to be no scope, on the appellant's approach, for the sheriff lawfully deciding the question "as he ought to have done", that being in a way that "he would have been required to order the person's discharge". If the sheriff had no power to address and then decide the section 87 question, he had no power to discharge the appellant. Neither does this court have the power to allow the appeal, at least on the basis that the subsection (3) conditions are satisfied. The result is no different if it be supposed that the proposition that the sheriff had no power to address and then decide the section 87 question (or a hypothetical section 83A question) is regarded as "an issue [which has been] raised that was not raised at the extradition hearing", and therefore within the ambit of subsection (4). This court can only allow the appeal under reference to subsection (4) if the subsection (4) issue would have resulted in the sheriff deciding a question before him at the extradition hearing differently and that if he had decided the question in that way, he would have been required to order the person's discharge. The subsection (4) issue, on the appellant's approach, would be the absence of power to decide a question. At risk of repetition, if the sheriff had no power to make a decision, he could not discharge the appellant.

[45] Now, it may be suggested that this is a rather pedestrian, or unduly literal, approach to the submissions made on behalf of the appellant in support his ground of appeal 1. The fact remains that if the sheriff did not have power to act, he certainly did not have power to discharge the appellant. Equally, if the sheriff had no power to make decisions, this court has no power to allow what is a statutory appeal. It is difficult to see what would be the outcome of such a situation of judicial powerlessness, but, in my opinion, such a situation does not arise. The 2003 Act is in force in Scotland, although the forum bar provisions which apply in England and Wales and Northern Ireland and which Parliament must be

taken to have intended to apply in Scotland if they were commenced in England are not in force. I accept that compliance with the rule of law would require the United Kingdom government to commence the forum bar provisions and accordingly the government's continuing failure can properly be described as unlawful, but that does not have the effect of invalidating all the other provisions of the Act. In so far as these provisions confer powers on the sheriff and on this court, the sheriff and this court have these powers. They do not, of course, have powers that are not conferred. Therefore, the appellant is entitled to argue that the sheriff did not have power to act as if the forum bar provisions were in force. That is not what the sheriff did (see report paras [43] to [45]). Rather, he applied his mind to what would have been the outcome in the hypothetical situation where the forum bar provisions had been commenced in Scotland, with a view to then considering how that outcome should be regarded as impacting on the proportionality and legality of extradition from the perspective of article 8 rights and section 87 of the 2003 Act. At risk of repetition, that is what he was invited to do by the appellant but also, in my opinion, in proceeding in the way he did the sheriff respected the rule of law by providing something very close to the protection that Parliament intended requested persons should have, but within the framework of the law as it actually applies to Scotland. As the sheriff assessed the various section 83A considerations in relation to the appellant's case, he did not consider that extradition would have been barred by reason of forum (see report para [49]), he therefore did not reach the stage of determining how a balance in favour of a hypothetical forum bar would impact on whether the extradition of the appellant would be in accordance with the law and proportionate, but by considering the issue he had afforded the appellant equivalent protection to that which would have been afforded to the appellant had the forum bar provisions been in force. I do not see how the sheriff can be criticised.

Ground 3

[46] The appellant's submission in support of ground 3 comes to be that for the Lord Advocate and the Scottish Ministers to press for the extradition of the appellant and order his extradition when they know they had procured the unlawful failure to make available the forum bar provisions is acting in a way which is incompatible with the appellant's Convention rights.

[47] Notwithstanding a number of references to authority, just why "pressing" for the extradition of the appellant and ordering his extradition "when [the Lord Advocate and the Scottish Ministers] know they procured the unlawful failure to make available the forum bar provisions" is incompatible with the appellant's Convention rights is not explained.

[48] The relevant question for the sheriff, in terms of section 87, was whether the appellant's extradition would be compatible with Convention rights. Accordingly, if it be the case that the failure of the Secretary of State to commence the forum bar provisions following Lord Malcolm's decision in *Craig* is a breach of the appellant's article 6 rights because the State has denied him an effective remedy, as the appellant suggests under reference to *Chis* v *Romania* [2010] EctHR 3360/03, that is beside the point; the focus of section 87 is the requested person's extradition giving rise to incompatibility, not anything else.

[48] It is true, as the sheriff fully appreciated, that the appellant's extradition will interfere with the interests which are protected by article 8 and that such interference, if it is not to be incompatible with Convention rights must be "in accordance with law". Lord Malcolm held the failure to commence the forum bar provisions in Scotland to be unlawful. It does not follow, as the appellant would seek to suggest (at least in respect of a person a substantial

measure of whose relevant activity was performed in the United Kingdom), that extradition to a category 2 territory is thereby rendered other than in accordance with law. There is no Convention right to have the benefit of forum bar provisions, and I do not understand the appellant to say that there is. What he does seem to say is that the unlawful failure to commence the forum bar provisions so taints or disrupts the provisions of part 2 of the 2003 Act which are in force in Scotland that they no longer operate as law. That is simply not so. The court has no power to strike down an Act of the United Kingdom Parliament and has not purported to do so. Part 2 of the 2003 Act is in force in Scotland without the forum bar provisions. Notwithstanding that, I can see that it can be argued that to apply those provisions of the Act which are in force in Scotland without any regard to what Parliament must be taken to have intended in respect of forum bar, might not be fully "in accordance with law". However, if before sending the case to the Scottish Ministers in terms of section 87(3) the sheriff has effectively afforded the requested person the protections that Parliament intended that he should have, by considering whether had the forum bar provisions been in force how this would have affected the appellant's position, it appears to me that any extradition which follows will be in accordance with law. That is what happened in the present case.

Ground 4

[49] The appellant complains of oppression on the part of the Lord Advocate. The point was taken before the sheriff; the appellant moved him to "uphold the plea in bar of oppression" (report paras [25] to [28]). The argument involves two propositions: (1) that the sheriff had, and should have exercised, an "ability …to intervene to prevent oppression"; and (2) that as the holders of the office of Lord Advocate from time to time bear some

responsibility for the unlawful failure to commence the forum bar provisions in Scotland, it would be oppressive and a breach of the principles of justice to allow the Lord Advocate to obtain the extradition of the appellant in these proceedings by the application of the 2003 Act as it applies to Scotland (characterised by the appellant as the "unlawfully limited legislation"). I do not accept either proposition.

[50] Part 2 of the 2003 Act is Parliament's attempt to balance the interest in complying with the United Kingdom's international obligations and facilitating the bringing of alleged offenders and convicted offenders to justice, on the one hand, and the interest in avoiding manifest injustice or oppression being suffered by the individual who is the subject of a request, on the other (Scott Baker *Review* paras 2.3 and 2.5). It does so by enacting a code which allocates a role to the executive and a role to the court and which provides a precise decision-making framework within which the two bodies must operate. It imposes certain duties and it confers certain powers. These powers include the power of the court to discharge a requested person in specified circumstances (but not otherwise). Among these powers is the power conferred by section 87(2) to discharge the requested person if his extradition would not be compatible with his Convention rights. That is potentially a wide, albeit not entirely open-ended, power to ensure that the interests of the requested person are protected. Given this structure I have difficulty in seeing any scope for extra-statutory discharge on the ground of "oppression". It is true that the English courts have felt able to develop a jurisdiction to add considerations of allegations of abuse of process to extradition proceedings (*R (Government of USA)* v *Bow St Magistrates' Court* [2007] 1WLR 1157, paras 83 to 94) but, as Sheriff Welsh QC in *Lord Advocate (for the Government of the United States of*

America) v *Mirza* 2015 SLT (Sh Ct) 89 observes, this is not a jurisdiction that has been recognised in Scotland.

[51] Assuming in the appellant's favour that the legislation allows room for a requested person to argue that continuing with proceedings for his extradition, despite it being permissible under reference to the relevant statutory provisions, would nevertheless be oppressive, I do not consider that anything approaching such a case has been made out here. Although subjected to vehement criticism by counsel for the appellant as having procured an undermining of the rule of law, I find it difficult to see what the Lord Advocate (I include in that reference the present office-holder and his predecessors and their representatives) has done wrong. He opposed the introduction of the forum bar provisions for reasons of policy which the Scott Baker *Review* considered to be sound. That position has no doubt been maintained, but responsibility for commencing the forum bar provisions in England and Wales and Northern Ireland but not in Scotland is that of the United Kingdom government. The Lord Advocate has acted on behalf of the United States Government as statute requires him to do but in doing so has been content that the appellant effectively be given the protection that the forum bar provisions are intended to provide. More critically, because the appellant has effectively been given that protection, the appellant cannot say that he has suffered prejudice. That is what the plea of oppression, in the context of criminal proceedings with which the appellant seeks to draw an analogy, is intended to prevent. The appellant referred to the Full Bench decision in *McFadyen* v *Annan* 1992 JC 53. In that case all of the five judges delivered opinions and all of them relied on what had been said by Lord Justice General Emslie in *Stuurman* v *HM Advocate* 1980 JC 111 delivering the opinion of the court in what was another Full Bench decision:

> "The test which fell to be applied and which was applied in disposing of the plea in bar is not in doubt. As the authorities show, the High Court of Justiciary has power to intervene to prevent the Lord Advocate from proceeding upon a particular indictment but this power will be exercised only in special circumstances which are likely to be rare, The special circumstances must indeed be such as to satisfy the Court that, having regard to the principles of substantial justice and of fair trial, to require an accused to face trial would be oppressive. Each case will depend on its own merits, and where the alleged oppression is said to arise from events alleged to be prejudicial to the prospects of fair trial the question for the Court is whether the risk of prejudice is so grave that no direction of the trial Judge, however careful, could reasonably be expected to remove it."

What oppression is about in this context therefore is conduct which produces prejudice of such gravity that no action on the part of the court can obviate it. That cannot be said to have occurred here.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 22
HCA/2019/009/XM

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF LORD TURNBULL

in

APPEAL UNDER SECTION 103 OF THE EXTRADITION ACT 2003

by

JAMES CRAIG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: O'Neill QC, Macintosh QC; Dunne Defence, Edinburgh
Respondent: M Richardson QC, AD representing the Lord Advocate on behalf of the American Authorities; Crown Agent

3 June 2020

[52] I have read the opinions of your Ladyship in the chair and your Lordship. I agree that the appeal should be refused for the reasons given by your Ladyship in the chair. There is nothing further which I can usefully add.