

**SHERIFFDOM OF LOTHIAN & BORDERS at EDINBURGH
UNDER THE EXTRADITION ACT 2003-Part 2**

[2019] SC EDIN 45

Case No E84/17

JUDGMENT OF SHERIFF FRANK RICHARD CROWE

in the cause

UNITED STATES OF AMERICA

Against

KB whose domicile of citation has been specified as an address in Scotland

**Act: Knipe; Lord Advocate on behalf of the United States District Court for the Southern
District of Texas**

Alt: Mackintosh; Dunne Defence, Solicitors

Edinburgh 16 May 2019

Introduction

[1] This is one of 2 cases (the other one being USA v James Craig Ref E60/17) which were the subject of Judicial Review proceedings before the Hon Lord Malcom at the Court of Session on 12 December 2018 (see *James Craig v the Advocate General for Scotland and The Scottish Ministers* [2018] CSOH 117). The issue in these proceedings was that the “forum bar” provisions contained in Section 50 of the Crime and Courts Act 2013 and inserted as Sections 83A to 83D of the Extradition Act 2003 have not been commenced in Scotland. However these provisions were brought into force for England & Wales and Northern Ireland in October 2013. The Requested Person’s position is that the absence of the “forum bar” challenge would mean his extradition would not be compatible with his Convention Rights under the Human Rights Act 1998.

Chronology of the Case

[2] It is alleged that between March and September 2014 the Requested Person induced a 14 year old girl living in Texas to send him naked pictures of herself, enticed her to carry out a sexual act on video and received and distributed child pornography.

[3] A complaint was made on behalf of the child to Homeland Security Investigations in the US in September 2014. The Requested Person and the child had met online as players in a war game and began a relationship even though the child said she was only 14. When the child tried to end the relationship in the summer of 2014 the Requested Person threatened her and posted naked images of the child to the child's mother and other relatives.

[4] HSI notified Police Scotland of the matter, having ascertained that the IP address of the perpetrator of the offences was located in Dundee.

[5] Police Scotland in response to this information obtained a search warrant and searched the Requested Person's home where they seized a laptop computer and an i phone. Forensic examination of this equipment revealed a video recording of the child carrying out a sex act. In this recording the child becomes upset but a male voice orders her to continue and sounds as though he is masturbating. The recording lasts almost 37 minutes.

[6] After the search the Requested Person was interviewed by police. He waived his right to a solicitor and made various admissions that he was the male on the tape and that he had threatened to send naked pictures of herself to her parents thus forcing her to perform on the video recording.

[7] After completing their investigations on 14 March 2017 a grand jury in Texas returned an indictment charging the Requested Person with the four charges mentioned above. The US Attorney General signed the extradition papers on 6 July 2017 and the file

was submitted to the Secretary of State for Foreign and Commonwealth Affairs by the US Embassy in London on 28 July 2017.

[8] Michael Matheson, then Cabinet Secretary for Justice on behalf of Scottish Ministers, certified the extradition request under section 70 of the Extradition Act 2003 on 21 August 2017. My colleague Sheriff Norman McFadyen granted the extradition warrant on 4 September 2017 and the Requested Person appeared on this warrant at Edinburgh Sheriff Court on 7 September 2017. Various diets of the case took place after that as the Requested Person had health issues which required an MRI scan and his solicitor wished to investigate a possible human rights issue.

[9] At a diet on 30 November 2017 the defence requested a further adjournment to await the outcome of the Lauri Love case (later reported as *Love v Government of the United States of America (Liberty intervening)* [2018] 1 WLR 2889) and to await the outcome of the MRI scan. Further adjournments took place to obtain sanction for counsel and in respect of a Devolution Minute which was lodged on 19 April 2018 (see Production No.11).

[10] Subsequently a petition for Judicial Review was lodged in the Court of Session and a timetable was set by the Hon Lord Malcolm on 24 May 2018. This culminated in a Hearing on 31 October and the issue of His Lordship's Opinion on 12 December 2018 ([2018] CSOH 118).

[11] Following the publication of that Opinion at a hearing before me on 10 January 2019, a final Preliminary Hearing was set for 7 February 2019. The Full Hearing took place on 28 March after which the case was continued to 8 April for parties' submissions then to 2 and 16 May for the issue of my decision and reasons thereon. The Requested Person has remained on bail throughout this procedure.

Evidence at the Full Hearing

[12] The Hearing began on 28 March 2019. It was accepted that there were no issues as regards section 78(2) of the Extradition Act 2003, the documents which were sent to me by the Secretary of State were in proper form so I answered the question posed in the affirmative and moved to section 78(4).

[13] The Requested Person accepted he was named in the warrant and that he had received copies of the documents sent by the US authorities in conjunction with the warrant. It was agreed by parties the offences contained in the Request were extradition offences in terms of section 137(2) of the 2003 Act and I proceeded under section 79.

[14] I was advised that while there was a challenge at common law of oppression there were no bars to extradition, since the Requested Person was not a fugitive, and I moved to section 84 of the 2003 Act. It was agreed there was a sufficiency of evidence and I moved to consider section 87 of the Act which involved Articles 5, 6 and 8 grounds under the European Convention on Human Rights and oppression at common law.

[15] After lodging a Joint Minute of Agreement covering most of the evidential matters (Production No.15), the Requested Person gave evidence. He said that he was 26 years of age and lived with his mother, MB aged 45 who suffered from depression, anxiety, kidney problems and agoraphobia (see Productions 12 (1) & (2) Social Work Report and Psychological Report. He is his mother's carer and they live in a one bedroom flat; he sleeps in the bedroom as his mother finds it easier to sleep on the couch in the living room.

[16] His parents split up some time ago and he has not seen his father for 10 years. He has a younger sister aged 22 who lives nearby. She is pregnant and her boyfriend suffers from ADHD and she is her carer. She does visit her mother regularly but is no longer in a position to care for her on a daily basis. The Requested Person helps his mother dress and does all

her shopping for her and she is virtually housebound. There is a Social Worker involved but since his mother is still relatively young she is not entitled to free personal care.

[17] The Social Work Report dates from September 2018 at which point the Requested Person said he hoped to secure work as a labourer. This has not taken place and currently, due to fluctuating mental health problems, is unable to work and in receipt of Employment Support Allowance.

Defence Submissions

[18] These are set out in written form in the Case and Argument (see Production No.13). The Requested Person was not seeking to evade responsibility for the offences but wished to be tried in Scotland. It was submitted that following the logic in *R (Government of USA) v Bow Street Magistrates* [2007 1 WLR 1157 which held that extradition could be refused when the request was motivated by “extraneous circumstances” would constitute under English law an abuse of process (see Lord Phillips of Worth Matravers at para 92).

[19] It was accepted by Mr Mackintosh that oppression in Scots criminal law could not necessarily be read across into extradition cases (see the test in *McFadyen v Annan* 1992 JC 53). This principle was confirmed in *HMA v Havrilova* 2012 SCCR 36 T paras [12]-[13]. However, it was submitted, fair trial considerations under Article 6 of ECHR will be infringed if the Requested Person is extradited.

[20] It was noted that my colleague Sheriff T Welsh QC in *The Lord Advocate v Mirza* 2015 SLT (Sh Ct) 89; [2015] SC EDIN 32 at paras 10-17 after describing the abuse of process argument under English law concluded that it “has no root or branch in Scots Law.”

[21] Reference was made to *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42. In that case Bennett was traced to South Africa by English police investigating

offences committed in England. At that time there was no extradition treaty between the two countries. Bennett was kidnapped by the police and brought back to the UK. The House of Lords was concerned for respect for the law and they regarded the act of kidnapping the “illegal foundation upon which the case rested” (see p 68B). There is no suggestion in this case that the US, UK or Scottish authorities acted illegally.

[22] In *Calder v HMA* 2006 SCCR 609 the appellant was sought by the US authorities for producing chemicals used in the manufacture of illegal drugs. These items were shipped to the USA and the appellant’s extradition to the US was sought to try him there, where most of the witnesses were present even though the appellant had never been to the US. The Appeal Court ordered extradition as there were more compelling arguments than allowing a prosecution to take place in Scotland. They said at para 3 (ii) “that criminal proceedings and an indictment were first initiated there, that it was wholly understandable that no indictment had been served in Scotland”.

[23] A similar argument to be tried in Scotland failed in *Wright v The Scottish Ministers* 2004 SLT 823 even although the evidence appeared to be thin and the appellant was critical of the lack of a requirement for corroboration under Estonian law. As Lord Hardie said at para [27] “if a crime has been committed in Estonia it is appropriate that the alleged perpetrator should be tried in that jurisdiction according to the laws of evidence there, subject always to the right to a fair trial enshrined in art.6 of the Convention.”

[24] The absence of the “forum bar” challenge in Scotland was the subject of Judicial Review proceedings in this case and that of *James Craig* [2018] COSH 117. At para [26] of *Craig* the Hon Lord Malcolm granted declarator that the UK government was “acting unlawfully by its continuing failure to bring into force in Scotland the extradition forum bar proceedings”. It followed from that ruling it was submitted that no detention pre-trial could

take place (see *Del Río Prada v Spain* (2014) 58 EHRR 37 para 125 and *Halford v UK* (1997) 24 EHRR 523 at para 49).

[25] Since the extradition request has been certified by the Scottish Ministers, the Lord Advocate remains under the statutory duty under section 191 to conduct extradition proceedings. That duty is identical to the one placed upon the Director of the CPS in section 190 in respect of cases in England and Wales and on the DPP and Crown Solicitor in Northern Ireland under section 192.

[26] Mr Mackintosh said that for various reasons namely the time it would take, the need for further legal aid sanction and the possible uncertainties inherent in such a course he had decided not to seek specific implement but noted there had been no appeal against Lord Malcolm's decisions. It was legitimate to consider when weighing up the Requested Person's Article 8 rights the criteria contained in the forum bar provisions which require to be considered in determining whether extradition is in the interests of justice (see section 83A(3) of the Extradition Act 2003). These provisions were considered in the case of *Shaw v Government of the USA* [2014] EWHC 4654 (Admin) where extradition was held not to be in the interests of justice (see also *Lauri Love* at paras 12-17). Prior to the introduction of the forum bar provisions in England and Wales the CPS published *Director's Guidance on the handling of cases where the decision to prosecute is shared with prosecuting authorities overseas* on 17 July 2013. Neither these guidelines nor the section 83A criteria specifically mention the position and circumstances of the Requested Person but do highlight the interest of victims. It was submitted this argument can be advanced in the context of Article 8 of ECHR in terms of *Calder* (see para [20] above) and a balancing exercise in terms of *Polish Judicial Authorities v Celinski & others* [2016] 1 WLR 551. It had to be appreciated that in this case the presumption in favour of extradition was not opposed by discharge and no prosecution but potential

proceedings in Scotland rather than the USA and there was no question of the Requested Person being considered a fugitive. I was urged to take into account the Requested Person's family circumstances and the greater possibility to assist and support his mother if prosecuted, convicted and imprisoned in Scotland. He had only been 21 at the time of the allegations.

[27] It was submitted the case could easily be prosecuted in Scotland as there had only been 2 witnesses listed on the original indictment who were not Scottish Police officers neither of whom was the complainer. While the complainer, who is now an adult, could give evidence down the line with local witness support if need be, Mr Mackintosh suggested there would be no need for this given the terms of the Requested Person's police interview in which various admissions were made amounting to special knowledge of the crimes – a *Manuel-type* confession (see 1958 JC 41) which would only require the interviewing officers and the interview disc (see also *Shuttleton v Procurator Fiscal Glasgow* [2019] HCJAC 12).

[28] Finally I was asked to consider the extraordinary chronology of this case before the extradition warrant was executed on 5 September 2017 (see below and Joint Minute of Agreement Production No. 15 and Inventory of Documents Production No. 16).

[29] Following upon the search of the Requested Person's flat and his interview by Scottish police officers on 11 November 2014 (see Para [5] above) the Requested Person appeared on petition the following day charged with between 8 September 2014 and 11 November 2015 possessing and taking indecent photographs of children contrary to the Civic Government (Scotland) Act 1982 sections 52A and 52.

[30] On 8 October 2015 an indictment was served upon the Requested Person charging him with the offences contained on the petition and also a charge of distributing indecent photographs of children contrary to section 52(1)(b) of the 1982 Act. He was also charged

with a contravention of section 36 of the Sexual Offences (Scotland) 2009 recording a child in Texas performing a sexual act and finally a contravention of sections 31, 33 and 34 of the Sexual Offences (Scotland) Act 2009 by using a child in Texas to participate in sexual activity, cause her to look at indecent pictures and communicate indecently with her.

[31] This indictment was replaced with a fresh indictment served on 12 October 2015 which contained the two original petition charges only. Due to the Requested Person moving house he failed to appear at the First Diet and a warrant was granted. A third indictment was served on 7 January 2016 with the same 2 Civic Government (Scotland) Act charges together with an allegation of failing to appear at court on 27 October 2015. It was a matter of agreement that the Requested Person pled not guilty to the charges and the case was continued to trial in the sitting commencing 15 February 2016 but the case was not called and no further proceedings appear to have been taken in Scotland thereafter.

Submissions of Behalf of the Lord Advocate

[32] Ms Knipe spoke to Crown submissions found in Production No.14. She submitted the principle of legality is restricted to crimes and penalties and does not apply to extradition cases. It was a matter for the US authorities how long if at all the Requested Person would be detained.

[33] Ms Knipe conceded that while the forum bar procedures were not in place in Scottish cases the Requested Person could raise forum as an issue in terms of *Calder and Wright* under Articles 5, 6 and 8 ECHR. Ms Knipe was unable to expand upon the arguments made on behalf of the Advocate General and Scottish Ministers in *Craig* and was unable to give any information as to whether there had been any talks between the Scottish and Westminster governments about commencing the forum bar proceedings in Scotland.

[34] She explained it would be suitable to either to arrange for the complainer to give her evidence by a remote link or in person at court in Texas supported by court staff or a friend. Ms Knipe said that proceedings had only been raised in Scotland to support future US proceedings and that the productions seized by police initially such as the interview discs had since been returned to Texas pending trial proceedings there.

[35] Since the Requested Person had appeared on petition some time ago in respect of the Civic Government (Scotland) Act charges and the failure to appear charges these were time barred.

Decision

[36] I found the decision of the Scottish Government not to seek to have the forum bar provisions extended to Scotland hard to fathom on the basis of the limited information given to Parliament following Parliamentary Questions put by Mr Alistair Carmichael MP on 21 December 2017 and the lack of information provided to the court and the obstructive attitude by the Advocate General's Office in the *Craig* Judicial Review proceedings. As I recall Mr Carmichael's interest in the forum bar provisions arose from a case in 2011-2013 involving Jake Leslie Davis, then aged 18 and living in Shetland who was accused of hacking into US Government institutions. Somehow 4 days after his arrest Mr Davis was transferred to London where he was prosecuted and sentenced.

[37] There has always been a structure in the Extradition Act 2003 (sections 190-192) that UK authorities in the 3 jurisdictions covered by the Act appear effectively as procurators for the Requesting State. They can give advice but have to argue the case if that is what the Requesting State wishes. I am not sure if that position always extends to undertaking appeals. I recall in *Commonwealth of Australia v O'Neill*, Edinburgh Sheriff Court, 11 June

2010 the Requesting State was not happy with my decision to discharge the accused but in the event no appeal was taken. I cannot see how the forum bar provisions make a difference and impinge upon the office of Lord Advocate. In Hohfeld's theory, possession is nine parts of the law. If a country has jurisdiction over an offence, causes inquiries to be made and has a sufficiency of evidence to prosecute the accused who resides in that country there is not much another country also having jurisdiction over the offence can do about it until the first country has completed its case.

[38] Unlike the case of *Calder* (see para [20] above) Scottish proceedings were instituted long before US ones and it was submitted had merely been raised to keep things ticking over until the US authorities were ready. Ms Knipe said that indicting the Requested Person with all of the charges in the first indictment was a "mis-step" and had been carried out without the authority of Crown Counsel which I must say I found inconceivable given that all indictment proceedings run in the name of the Lord Advocate and require his or Crown Counsel's authority before that step is taken by the local Procurator Fiscal. As I understand matters all petitions containing sexual offences and other serious charges are considered by Crown Counsel at the outset before the local Procurator Fiscal places the accused before the court. The decision to institute petition proceedings in court requires careful consideration as it starts the clock running in terms of section 65 of the Criminal Procedure (Scotland) Act 1995.

[39] It is well known that the vast majority of child pornography cases emanate from data bases and search facilities in the USA. Information about computer IP addresses used to access such material is passed to the relevant national police authorities who carry out local checks before seeking search warrants. Operation Ore, as this procedure is called, is well known among sheriffs. While Ms Knipe suggested the information was passed to Scottish

Police on a mutual assistance basis, the officers concerned may have regarded it as another Operation Ore case. Be that as it may, inquiries were made, a search warrant obtained and evidence was secured both from the address concerned and from admissions made by the Requested Person. Having found evidence of crimes committed in Scotland this information was transmitted with all due speed to the Procurator Fiscal (in terms of section 20 of the Police and Fire Reform (Scotland) Act 2012) who in turn immediately instituted petition proceedings.

[40] Some charges were allowed to time bar but it would have been legitimate to have sought an extension of the 12 month limit until sure the US authorities were taking over the case. It is possible to seek a retrospective extension even at this stage (see *Farrell v HMA* 2002 JC 50; *HMA v Sands* 2002 SLT 1323c.f. *HMA v AD* [2018] HCJAC 2).

[41] The Requested Person had an arguable Article 8 case but the charges are fairly serious. Not only do they involve the possession and distribution of child pornography they extend to threatening and inducing a child to perform a pornographic act. It would be possible to include other charges on the indictment based upon the evidence shown to the court.

[42] Finally there are vast differences in penalty were proceedings to be taken in the USA compared to Scotland. The first charge on the warrant, exploiting a minor child, carries a minimum sentence of 15 years' imprisonment and maximum penalty of 30 years' imprisonment. Enticement of a minor child carries a minimum sentence of 10 years' imprisonment and a maximum sentence of life imprisonment, while distribution and possession of child pornography carries a minimum sentence of 5 years imprisonment and a maximum penalty of 20 years' imprisonment. By comparison the maximum sentence of imprisonment which may be imposed for these offences is 5 years imprisonment apart from

the contravention of section 31 of the Sexual Offences (Scotland) Act 2009 for which the maximum sentence is 10 years' imprisonment. However when the case was indicted in Scotland on all charges the forum selected by the Crown was the sheriff and jury court.

[43] The Requested Person is still a young man – the offences occurred when he was 21. He is the carer for his mother and his own mental health fluctuates. There is joint jurisdiction for all of the offences. Whereas proceedings in the Requesting Country would be convenient for the complainer and 2 other witnesses, a large number of Scottish police officers would have to give evidence in the USA in some way.

[44] In terms of a *Celinski* structured approach to the various factors in this case the normal extradite/discharge dichotomy is not present in these proceedings. The decision to make in this case is whether to extradite for proceedings in the USA or to discharge leaving the Crown to prosecute in Scotland. Taking the list of "pros" and "cons" in the *Inglot* case at para 73 of *Celinski*, only the importance of the UK honouring its extradition arrangements remains to which can be added the satisfaction of the complainer having the accused prosecuted in her local court. As against that most if not all or perhaps further charges can be prosecuted in Scotland if proceedings are taken here. There is no inconvenience to the complainer and other witnesses whose evidence can be adduced by live link, the Requested Person will be better placed to continue caring for his mother. He does not appear to have committed further offences, but his physical and mental health remain problematic.

[45] I do not consider extradition would be compatible with the Requested Person's Convention Rights under Articles 5, 6 and 8. I therefore answer the question posed in the negative and in terms of section 87(2) order the Requested Person's discharge. This does not mean that the Requested Person cannot be prosecuted for these offences. It would be

possible to seek the return of the productions from the USA, petition for the extension of time bars and institute proceedings in Scotland.