



Press Summary

23 February 2022

Craig (Appellant) v Her Majesty's Advocate (for the Government of the United States of America) and another (Respondents)

(Scotland)

[2022] UKSC 6

On appeal from: [2020] HCJAC 22

Justices: Lord Reed (President), Lord Lloyd-Jones, Lord Kitchin, Lord Burrows, Lord Stephens

Background to the Appeal

The appellant, Mr Craig, is a British citizen living in Scotland. In May 2017, the US Government made a request for his extradition to the US, where he is accused of committing an offence relating to securities fraud.

The process for determining whether a person should be extradited from the UK is governed by the Extradition Act 2003 (“**the 2003 Act**”). By the Crime and Courts Act 2013 (“**the 2013 Act**”), Parliament inserted into the 2003 Act a number of provisions referred to as “the forum bar provisions”. These provisions aim to prevent extradition where the offences could be fairly and effectively tried in the UK, and it is not in the interests of justice that the requested person should be extradited. Section 61 of the 2013 Act provides that the forum bar provisions will “come into force on such a day as the Secretary of State may by order appoint”. The Secretary of State brought the forum bar provisions into force in England, Wales and Northern Ireland in October 2013, but he did not bring them into force in Scotland.

Mr Craig wanted to rely on the forum bar provisions in the extradition proceedings brought against him in Scotland. He therefore issued a claim against the Advocate General for Scotland and the Scottish Ministers, arguing that the Secretary of State’s failure to bring the forum bar provisions into force in Scotland was unlawful. In December 2018, the Outer House of the Court of Session found in Mr Craig’s favour and made an order in which it “declared... that in its continuing failure to bring into force in Scotland the extradition forum

bar provisions... the UK Government is acting unlawfully and contrary to its duties under section 61 of [the 2013 Act]”.

Notwithstanding that order, the UK Government failed to bring the forum bar provisions into force in Scotland until September 2021. In the meantime, the Lord Advocate continued to pursue extradition proceedings against Mr Craig. In July 2019, a sheriff decided that there was no bar to Mr Craig’s extradition under the 2003 Act and that his extradition would be compatible with the European Convention on Human Rights (“**the Convention**”). The sheriff sent the matter on to the Scottish Ministers, who in September 2019 decided that Mr Craig should be extradited to the US.

Mr Craig appealed, unsuccessfully, to the High Court of Justiciary. He now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. A new extradition hearing may be held before a different sheriff, at which Mr Craig will be able to rely on the forum bar provisions (in addition to any other arguments properly available to him).

Lord Reed gives the sole judgment, with which the other Justices agree.

Reasons for the Judgment

Section 57(2) of the Scotland Act 1998 provides that a “member of the Scottish Government has no power to... act, so far as the... act is incompatible with any of the Convention rights” [25]. This means that the Lord Advocate has no power to conduct extradition proceedings against Mr Craig, and the Scottish Ministers have no power to order his extradition, if those acts are incompatible with Mr Craig’s rights under the Convention [37], [47].

There is no dispute that the extradition of Mr Craig would interfere with his right to respect for his private and family life, as guaranteed by article 8(1) of the Convention. Such an interference could, however, be justified under article 8(2), if it is “in accordance with the law”, if it pursues a “legitimate aim”, and if it is “necessary in a democratic society”. To satisfy the first of those three requirements, the interference must be in conformity with domestic law and the domestic law must meet the requirements of the rule of law, so as to afford adequate legal protection against arbitrariness. This is an absolute requirement. The executive is afforded no margin of discretion in meeting it [48]-[50].

The interference with Mr Craig’s rights under article 8(1) was not “in accordance with the law”, within the meaning of article 8(2) [52]. The order made by the Outer House in December 2018 was expressed in the present tense, making clear that the Secretary of State was “continuing” to act in breach of section 61 of the 2013 Act by failing to bring the forum bar provisions into force. The Secretary of State had a duty to act in conformity with that order, and his failure to do so was unlawful [41]-[42]. The extradition procedure followed in Mr Craig’s case did not therefore accord with section 61 of the 2013 Act [52].

It is no answer to this that the order made by the Outer House was merely declaratory, rather than coercive [43]. It is firmly established that there is a clear expectation that the Government will comply with declaratory orders, and it is in reliance on that expectation that the courts usually refrain from making coercive orders against the Government and grant declaratory orders instead [44]. This is one of the core principles of our constitution. It is vital to the mutual trust which underpins the relationship between the Government and the courts [46].

Accordingly, the extradition proceedings against Mr Craig were not conducted “in accordance with the law” and so were incompatible with his rights under article 8 of the Convention. It follows that the extradition order made against him is invalid [53].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)