The Extradition of Mike Lynch – Should the Forum Bar be Amended?

In May 2023 Mike Lynch was extradited to the United States after his permission to appeal was denied by the High Court.[1] The United States is now prosecuting him on charges that relate to the $11 billion sale of the software company, Autonomy, to the US company Hewlett-Packard. It is alleged Lynch overinflated the value of Autonomy, and in doing so committed, *inter alia*, wire fraud, conspiracy to commit wire fraud and securities fraud. If convicted, Lynch faces a maximum prison term of 20 years. Lynch's case first came before Westminster Magistrates' Court in February 2021. One of the arguments his lawyers made was that his extradition should be barred on the ground of forum. Simply, this provides that an extradition may be stopped where the links of a requested person and his crime to the UK are such that it is not in the interests of justice to proceed. Particularly, it was argued that Lynch "… is a British citizen with lifelong links to the UK; the alleged conduct concerns the takeover of a UK company which applied UK accounting standards and was audited by a UK auditor; *'this is a factual matrix, par excellence, which should engage the protection of the forum bar'*".[2]

Lynch stated that his extradition "is surely an affront to the sovereignty of British courts and the British justice system. Is it not time, to borrow a phrase, that we 'took back control'?"[3] Siding with Lynch were some of the UK's most prominent business figures, who called on the prime minister to block Lynch's extradition in an open letter reported in *The Times*.[4] The former Brexit Secretary David Davis MP also argued publicly against Lynch's extradition.[5] The extradition judge at first instance and two High Court judges considering permission to appeal all disagreed. As extradition law and prosecutorial practice stand, Lynch's efforts at winning his appeal were doomed to fail. This article considers why this is the case. The forum bar does not operate as many politicians believed it would. It does not allow a court to decide which is the 'best' forum for prosecution in a complex multi-jurisdictional case. That is a prosecutorial decision *'par excellence'* and must remain so.

The Forum Bar

Following political concern and media campaigns over the extradition of accused white-collar criminals, the forum bar was inserted into the Extradition Act 2003 in

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[1] *Lynch v Government of the Unites States of America* [2023] EWHC 876 (Admin)
[2] *USA v Lynch, Westminster Magistrates' Court* 22 July 2021 at [7], emphasis in original.
[3] As quoted in *The Scottish Mail* on Sunday, 8 January 2023.
[4] Tom Howard, "Stop Mike Lynch extradition, say leading City figures" (28 February 2023, *The Times*)
[5] "David Davis MP speaks out against the extradition of Dr Mike Lynch" available at *https://www.daviddavismp.com/david-davis-mp-speaks-out-against-the-extradition-of-dr-mike-lynch/*.

2013.[6] It was enacted to address the perception that UK nationals who had committed acts within the country were too readily extradited. The bar applies to requests for surrender to the now EU-27 under s 19B, and to extraditions to all other states with which the UK has entered an extradition agreement under s 83A. It is limited to accusation cases, where the requested person is sought to stand trial in the requesting state as opposed to serve a sentence. The forum bar provides that an extradition is to be blocked where it is not in the interests of justice for it to proceed. This firstly turns on a judge deciding that a substantial measure of the requested person's relevant activity was performed within the UK. If that is found to be the case, the judge is then required to decide whether extradition should not take place having regard to seven specified factors. They are a) the place where most of the harm occurred or was intended to occur, b) the interests of victims, c) any belief of a UK prosecutor that the UK is not the most appropriate jurisdiction, d) the availability of evidence, e) any delay that might arise, f) the desirability and practicability of all prosecutions taking place in one jurisdiction and g) the connections between the requested person and the UK. The judge has to have regard to all of these matters and no others. There is no ranking of their importance, and the court will make a "value judgement overall on whether the extradition of the requested person would not be in the interests of justice".[7]

The Decision of Westminster Magistrates' Court

The facts surrounding Lynch's case *prima facie* align with the reasons for which the forum bar was enacted. Simply, he is a British national living in the UK and running a UK-based company. His connections to the UK are by far greater than those he has with any other country. A UK national, with a wife and children in the UK, he holds or held a number of notable roles including fellowships of the Royal Society and Royal Academy of Engineering. Lynch was also receiving treatment in the UK for his health issues. The District Judge found Lynch's ties to the UK "strong and long standing".[8] He arguably appears to be subject to an 'exorbitant' claim to jurisdiction by the US.[9] The District Judge's judgment on the connections between Lynch and the UK, though, comprised only two of its 211 paragraphs. Evidence of those connections was contained within Lynch's written statement, which went untested as he did not give evidence on oath. The district judge accepted, with some hesitation, twelve facts substantiating the connection, alluded to above. There were no exceptional physical or mental health factors noted, as existed in four of the five cases where the bar was upheld, noted below.

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[6] See Paul Arnell and Gemma Davies, "The Forum Bar to Extradition – An Unnecessary Failure" (2020) 84(2) Journal of Criminal Law 142.

[7] *Atraskevic v Lithuania* [2015] EWHC 131 (Admin) at [14].

[8] Supra note 2 at [168].

[9] The High Court in *Love v United States* [2018] EWHC 172 (Admin) rejected the suggestion of the NGO Liberty that the US was seeking to exercise 'exorbitant' jurisdiction in Love's hacking case, at [7].

Further reference to Lynch's health is found later in the judgment when his article 8 arguments against extradition are considered. Nowhere in the judgment, however, are factors which could support his particular reliance on familial support within the country, or indeed medical treatment that could not be secured within the US prison system. Strong and longstanding ties to the UK in the absence of especial factors are not in themselves sufficient to bar extradition if all other factors weigh in its favour.

DJ Snow confirmed the position set out in previous judgments that location of harm, although not definitive, is a very weighty factor. The loss or harm, it was held, "was always intended to fall on a US-based entity".[10] That harm was both financial and reputational. As to the specified matter of the interests of any victims, it was held that most of the loss fell on HP and its US-based shareholders who had an interest in securing justice "according to their own local laws and procedures".[11] A belief of a UK prosecutor was given, with the Serious Fraud Office issuing a 'detailed and reasoned statement' that the UK was not the most appropriate forum for Lynch's prosecution. The District Judge found that belief considered and reasonable. The specified matters relating to the availability of evidence, any delay that might result from proceeding in one jurisdiction rather than another and the desirability and practicability of all prosecutions taking place in one jurisdiction were held to strongly favour extradition or to be a weighty factor in its favour. Evaluating the specified matters, the District Judge found that all bar his connections to the UK strongly favoured trial in the US, such that their preponderance and collective weight satisfied him that Lynch's extradition was in the interests of justice. In July 2021 DJ Snow rejected his arguments and sent the case to the Secretary of State to consider his extradition, the last stage of the process in non-EU cases.

The High Court Judgment

A requirement of permission to appeal decisions of a district judge in extradition cases was introduced in 2014.[12] In considering leave, the High Court examined the judgment at first instance. Under section 104(3) of the Extradition Act 2003 the High Court can allow an appeal only if the district judge ought to have decided a question before him differently and, if he had decided it as he ought to have done, he would have had to discharge the appellant from the extradition proceedings. This has been interpreted to mean that an extradition appeal considers the single question of whether or not the district judge made the wrong decision.[13] The general rule that findings of fact at first instance must ordinarily be respected has been adopted in the context of forum bar appeals. It has been held that the appellate court is "entitled to stand back and say that a question

[10] Supra note 2 at [119].
[11] Ibid at [129].
[12] By s 104(3) of the Anti-social Behaviour, Crime and Policing Act 2014.
[13] *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin) at [24].

ought to have been decided differently because the overall evaluation was wrong: crucial factors should have weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed".[14] The High Court cited the cases of *Love* and *Scott* favourably and concluded their "principal task is to determine whether the district judge erred in his assessment of the statutory factors and, if so, whether that leads us to conclude that his rejection of the forum bar was wrong".[15] Applying this approach Lord Justice Lewis and Mr Justice Julian Knowles refused leave to appeal, finding that the district judge had been correct in all of his conclusions confirming that all factors save Lynch's ties to the UK strongly favoured trial in the USA.

The High Court's decision is in line with the now well-established position that only in exceptional circumstances will a requested person's connections with the UK trump the specified matters of the place of harm and the interests of victims. Evidencing this fact forum bar arguments have been upheld only six times since 2013.[16] Those cases were materially different from Lynch's on their facts. In all except one of them, all of the acts of the requested persons giving rise to the charges had occurred in the UK. Whilst the preponderance of Lynch's allegedly fraudulent acts occurred in the UK, certain acts also took place in the US. These include a meeting with the CEO of Hewlett-Packard on 12 April 2011. In both Lynch's case and where the bar has been upheld, the harm caused and the victims were in the US. Unlike in Lynch's case, however, those factors were outweighed by particular aspects of the requested person's connection to the UK. Those aspects went further than citizenship, family, and professional links. They were related to significant physical or mental health issues of the requested persons such that their ties to their relatives, and thus their connection to the country, was strengthened. This feature was found in the cases of Love[17], Scott[18], McDaid[19], and Taylor.[20] In only one of the cases where the bar has been upheld were there not such circumstances. In that case, the court's decision rested primarily on an unjustifiable delay between the offence and extradition request and the fact the requested person had admitted the offences in interview believing this would result in prosecution in the UK.[21] Most recently the bar was upheld in the case of Hamilton.[22] The case primarily turned on the requested person's potentially life-

[14] *Love v United States* supra note 9 at [26].
[15] *Lynch v USA* supra note 1 [85].
[16] The cases are noted below.
[17] Supra note 9
[18] *Scott v United States* [2018] EWHC 2021 (Admin).
[19] *United States v McDaid* [2020] EWHC 1527 (Admin).
[20] *United States v Taylor*, 7 Dec. 2020, Westminster Magistrates' Court, cited at *https://www.judiciary.uk/wp-content/uploads/2020/12/usa-v-taylor-judgment-071220.pdf*.
[21] *USA v Osbourne* [2022] EWHC 35 (Admin).
[22] Christopher Hamilton v The Government of the United States of America [2023] EWHC 2893

threatening medical condition and the fact that most of the harm had occurred in the UK.

Should the Forum Bar be Amended?

As enacted, the forum bar largely fails to address the mischief it was designed to counter. It was instituted after public outcry resulting from the extradition to the US of the Natwest Three[23] (wanted for offences as part of the Enron scandal) and Ian Norris[24] (one-time Chief Executive Officer of Morgan Crucible). The disquiet was largely based on the fact that the requested persons were alleged white collar criminals who in the main acted within the UK in pursuant of their supposed crimes. Ironically, the bar would very likely not have applied in those cases. It was thought by legislators that the bar would prevent extradition following exorbitant claims to jurisdiction, and thus provide protection to requested persons. Exorbitant claims include attempts to prosecute persons where their circumstances and acts are more closely connected to another jurisdiction. In practice the bar only operates when there are exceptional personal circumstances which strengthen an individual's connection to the UK outweighing other factors which tend towards extradition. The argument that Lynch's extradition is "an affront to the sovereignty of British courts" carries little weight. The impact of much activity (lawful and criminal) within one country may well be felt in another. The criminal act Lynch is alleged to have committed resulted in billions of dollars of loss in the USA. Importantly, it was always open to the Serious Fraud Office to prosecute Lynch had they wished to do so. Clearly, however, it is thought in some circles that the bar as enacted failed to address the concerns that gave rise to it. The question then arises of whether it should be amended such that it does. The answer appears to be no, with the possible amendments that could be made bringing their own problems.

One way the forum bar could be amended is to include consideration of where the relevant activity giving rise to the offence occurred. Whilst a prerequisite to the application of the forum bar, this is not one of the specified factors determining what is in the interests of justice. Indeed, at present only the place where most of the harm occurred or was intended to occur is included as a relevant factor. Were this amendment made it would allow the court to acknowledge, in the parlance of international law, the importance of subjective territoriality (where the individual acted), objective territoriality (where the harm or loss took place) and

[23] In *R. (on the application of Bermingham) v Director of the Serious Fraud Office* [2007] QB 727 an attempt to require an SFO investigation into the case against the three requested persons failed.

[24] In *Norris v United States* [2010] UKSC 9 the requested person's appeal against extradition based on his right to respect for his private and family life was refused.

the effects principle (where the consequences of the act were realised).[25] As to the first, there are cogent arguments in favour of the assumption of jurisdiction on a subjective territorial basis, such as enhanced deterrence on account of the geographic criminal immediacy of the transnational acts.[26] Where that happens the court could recognise that the requesting state has felt the harm or loss of the alleged crime, but also that all, or a substantial part, of the conduct was conducted in the UK. The additional subjective territorial factor could either be added to the interests of justice list, or there could be a presumption against extradition in such cases which is capable of rebuttal when weighed against the other forum bar factors. Such an amendment would make space for the express argument that as a British citizen carrying out a British business Lynch had an expectation that he would be subject to British law were an accusation be made against him.

A second, more radical, option would be to give greater weight to the connection of the requested person to the UK. Whilst this could assist anyone with a connection, it would primarily benefit permanent residents and British citizens. It would therefore operate akin to a nationality bar. Historically the UK has never felt it appropriate to include such a bar in its extradition relations, although the relevance of nationality for the UK has increased post-Brexit. This is because the Trade and Cooperation Agreement 2020 allowed EU states to apply a nationality bar in their extradition relations with the UK. An option which has been taken up either fully or partially by 13 Member States.

Both possible amendments are problematic. Firstly, they would result in a notable increase in the number of cases where the bar is upheld. This would benefit all requested persons, not just those accused of white-collar crimes. Whilst there is history of British nationals accused of white-collar crime attracting political, media and public backing, that is unlikely to exist where the requested person is accused of violent or sexual crimes.[27] Secondly, impunity would follow. Of the six instances where the bar has been upheld there has only been one subsequent UK prosecution.[28] This is despite direct calls from the extradition judge for the CPS to launch a domestic prosecution after the forum bar has been upheld.[29] As the authors previously argued "[t]he premise that a prosecution or consideration or

[25] See Cedric Ryngaert, *Jurisdiction in International Law*, 2nd edn (Oxford: Oxford University Press, 2015) and Paul Arnell, "Criminal Jurisdiction in International Law" [2000] Juridical Review 179.
[26] See Paul Arnell and Bukola Faturoti, "The Prosecution of Cybercrime – Why Extraterritorial and Transnational Jurisdiction should be Resisted" (2023) 37(1) International Review of Law, Computers and Technology 29.
[27] Notably the forum bar to-date has assisted those accused of such crimes, see *Taylor*, supra note 20 and *Osbourne*, supra note 21.
[28] That was of Christopher Taylor for securing access to computer material, voyeurism and possession of extreme pornography, see *The Telegraph*, 27 April 2023.
[29] See Love, Supra note 9, at [125-126] "The CPS must now bend its endeavours to his prosecution" and Hamilton, Supra note 22, at [112] "The consequence of the appellant's success on this appeal is not that he secures impunity: it is that he should be answerable to the law in the UK rather than the US."

reconsideration of a prosecution will necessarily follow the forum bar being upheld is fallacious."[30] Impunity may well lead to breaches of the UK's international obligation to extradite or prosecute as found in a number of treaties or parts of treaties, including the Trade and Cooperation Agreement 2020.

The difficulties in prosecuting transnational cases

The principle of *non bis in idem* or double jeopardy provides that extradition is not tenable where an individual has been prosecuted for the same acts forming the basis of a request. If the UK had made the decision to prosecute Mike Lynch, his extradition would have been barred. Domestic prosecutions of transnational cases, however, come at a significant cost for already stretched prosecuting authorities. They also require enhanced cooperation to ensure witnesses are available and evidence is admissible and disclosed in accordance with the law. In complex fraud trials the documentation can run into millions of pages. There have been high profile cross-border trials which have resulted in collapse or the quashing of convictions due to non-disclosure issues.[31] In July 2022 the former Director of Public Prosecutions, Sir David Calvert-Smith conducted an independent review of the SFO severely criticising the organisation including its disclosure mechanisms.[32] There are also broader issues around cooperation in criminal matters which makes these cases difficult. For example, it is not always easy to establish whether an interview will be admissible within the UK.

The systems for obtaining mutual legal assistance also present difficulties for prosecuting authorities. Requests can often take months or longer to be responded to. The SFO reported that the 2023 successful prosecutions of Balli Steel executives relied on mutual legal assistance requests from 36 different jurisdictions.[33] Further, evidence obtained by the UK pursuant to a mutual legal assistance request can only be used for the purpose specified in the request unless there is consent of the foreign authority. This may also complicate matters. In the Lynch case the High Court noted the "novel and untried procedures" available to secure immunity for the witnesses from prosecution in the US for evidence given in the UK, difficulties with compelling witnesses to give evidence in the UK through mutual legal assistance and the undoubted delay which using such mechanisms would create.[34] Those who argue Lynch should be tried in the UK should also consider how the UK's criminal justice systems can be adequately resourced to

[30] Davies and Arnell, Supra note 6.
[31] For example, *Ziad Akle and Paul Bond v The Crown* [2021] EWCA 1879.
[32] Sir David Calvert-Smith "Independent Review into the Serious Fraud's Office's handling of the Unaoil Case – R v Akle & Anor", July 2022, at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092872/DCS_report_-__FINAL_-_21_July_08.31_.pdf*.
[33] "Serious Fraud Office secures three convictions in $500 million trade finance fraud", 2 February 2023, at *https://www.sfo.gov.uk/2023/02/02/serious-fraud-office-secures-three-convictions-in-500-million-trade-finance-fraud/*.
[34] Supra note 1 at [145] citing Lynch supra note 2 at [145-147].

ensure justice in transnational cases where much of the evidence will be in the state where the harm occurred. It is understandable that over-stretched and under-funded authorities would rather hand over jurisdiction to that state than risk a costly and possibly unsuccessful UK prosecution.

Conclusions

As states expand their extraterritorial reach, cases of concurrent jurisdiction will increasingly present themselves. Complex fraud cases will almost always have a significant cross-border aspect to them. There are no international rules which prioritise one state's claim to jurisdiction over another. It is open to individual states to decide how the law will operate in relation to claims for extradition when there is concurrent jurisdiction. UK and US prosecutors have agreed a set of principles which are to be considered before any requests for extradition are brought. These rules currently favour prosecution in the state where most of the harm was felt. If a wanted person is in the UK, then the UK has enforcement jurisdiction. The US can only assert its jurisdictional right to charge a crime if the UK agrees to hand over custody of the individual through extradition. If UK prosecutors choose to charge the individual with a crime first, then the extradition will be stayed and may be barred on double jeopardy grounds if the prosecution covers substantially the same facts as those in the extradition request. The UK therefore has the upper hand in cases where the accused is present within it. The simple fact is that in a number of cases the UK decides not to prosecute and so, in essence, to defer to the foreign prosecution.

If there is an issue with US claims of exorbitant jurisdiction it is best addressed at the stage of investigation when prosecutors can consider a wide range of factors when deciding whether to bring charges in the UK. The courts only role is to consider the question of forum to the limited extent Parliament provided for. This is right. The courts have only intervened to prevent extradition on the grounds of forum when exceptional circumstances presented themselves. The fact that Lynch is a British citizen running a British company does and should not prevent him being prosecuted for alleged fraud in another country, particularly when all of the harm occurred in that state. In light of the facts of his case and the relevant case law it was highly unlikely that the forum bar would have prevented extradition in his case.

A knee-jerk attempt to reform extradition law by strengthening the forum bar would be misguided. Reform could negatively impact prosecutorial independence and would lead to impunity in a larger number of cases than seen to date. It could conflict with the UK's traditional approach to extradition as a process serving a strong public interest ensuring individuals are prosecuted for alleged crimes. That approach emphasises the UK's adherence to its international extradition treaty obligations. If there is a problem with US extraterritorial reach, the best place for this to be addressed is at the stage of investigation and prosecution, not by the courts at an extradition hearing. Complex cross-jurisdictional crimes present significant difficulties for prosecutors. Rather than reforming the forum bar the focus should instead be on the increasing the effectiveness of the UK's

international legal cooperative framework. This could be accomplished by modernising the domestic rules that govern mutual legal assistance and the admission of evidence obtained from overseas and ensuring sufficient resourcing of our international cooperation frameworks. If we were able to ease some of the current challenges faced by prosecuting authorities in transnational cases this could allow space for reconsideration of current prosecutorial practice. Greater weight could then be given to ensuring prosecution occurs in the UK when we have subjective territorial jurisdiction. Until then the understandable position is that jurisdiction is often ceded when most of the evidence is overseas.