

Lauri Love – How high has the forum bar really been set?

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In what has been hailed as a landmark decision, the High Court recently refused to allow the extradition of UK citizen Lauri Love to the USA for offences of cyber theft, activating the forum bar for the first time since its inception in 2003. Following Mr Love's test case, how far will the forum bar really be applied?

Back in October 2013 the FBI asked the UK's National Crime Agency ("NCA") for assistance in their investigation into the activities of Mr Love, whom the FBI suspected was involved in hacking US computers and stealing confidential data. The NCA in turn started their own investigation and that same month executed a search warrant at an address in leafy Suffolk, where Mr Love lived at home with his parents. Less than a year later, the Crown Prosecution Service decided not to prosecute, and instead let the US investigation take priority. The US authorities subsequently sought Mr Love's extradition so that he could face trial in America.

Following a contested hearing at Westminster Magistrates Court, a judge ruled in favour of the United States and held that Mr Love's case should be sent to the Home Secretary for her decision. Mr Love appealed to the High Court, relying (as he did in the Magistrates Court) on a concept called the forum Bar, which prohibits extradition to a category 2 territory (this includes the USA) if it would not be in the interests of justice due to forum considerations. He also argued that it would be oppressive, in all the circumstances, to extradite him. In support of the defence arguments, his lawyers called expert evidence from doctors, a psychologist and a US prison expert, who testified about his acute suffering with eczema, his struggles with Aspergers Syndrome, his precarious mental health and the risks of suicide, were extradition to be ordered.

The Lord Chief Justice presided over the case, with the High Court ultimately overruling the Magistrates Court decision in favour of Mr Love.

The Forum Bar

The forum bar as a defence to a person's extradition was introduced in 2003 following the refusal by the then Home Secretary Theresa May to order the extradition of Gary McKinnon to the United States for computer hacking offences. Mr McKinnon, like Mr Love, had Asperger's Syndrome and suffered from depression. The forum bar requires a court to consider a number of individual factors as part of any request for extradition to a category 2 territory, namely:

- (i) The place where most of the harm took place;
- (ii) The interests of any victims;
- (iii) Any belief of a UK prosecutor that the UK is not the most appropriate jurisdiction;
- (iv) The availability of evidence for a prosecution in the UK;
- (v) Delay in either jurisdiction;

- (vi) The desirability of all prosecutions taking place in one jurisdiction;
- (vii) Connection of the defendant with the UK.

In Mr Love's case, the High Court found in favour of the United States on (i) above – the place where most of the harm took place being, of itself, a weighty factor in support of extradition. However, it found in favour of Mr Love on (ii) – since it held that were extradition to be ordered there was a significant risk that Mr Love would be unfit to stand trial in the US, (iii) – there was no such evidence from a UK prosecutor and (vii) – Mr Love's "*entire well-being*" was bound up with his connection to his parents here in the UK. The court remained relatively neutral on (iv), (v) and (vi).

Ultimately, the court found that whilst the considerations in (ii) and (iii) would not, on their own, have persuaded them, combined with (vii) - Mr Love's connection to his parents in the UK as a result of his particular physical and mental attributes - this was sufficient to operate the forum bar and decline to order his extradition.

Oppression

In addition to the forum bar arguments, Mr Love's defence team advanced submissions that he should also be discharged under the provisions of the Extradition Act 2003 already dealing with oppression, specifically "*if the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him*". There was extensive analysis of the medical and prison evidence, with the High Court coming to the conclusion that any measures taken in the US to prevent Mr Love from committing suicide would invariably involve him being separated from others and as a result of his own particular mental health difficulties would have a seriously adverse effect on his very vulnerable wellbeing. As a result, in addition to succeeding under the forum bar, the High Court found Mr Love's very particular circumstances to be such that it would be oppressive to order his extradition.

Where does this leave extradition to category 2 territories?

Whilst this case has demonstrated that, in the right circumstances, the forum bar is an effective tool to fight extradition, it does not mean that there will be a successful flurry of cases as a result. Mr Love's physical and mental condition was such that the court had real concerns that he would be unfit to stand trial in the United States, and his connection to the UK through his heavy, almost child-like, reliance on his parents was particularly strong. Oppression, as a bar to extradition, also continues to require a very strong threshold and it was only Mr Love's combination of circumstances that caused the court to rule in the way they did. It may also be that the facts of Mr Love's alleged conduct amounted to the 'right type of offence' to allow the forum bar to be utilised in this country. Despite the gravity of the allegations, historically the courts of England and Wales have had a more complicated relationship with white collar offending, including computer hacking, than its counterparts in the US. The forum bar may have been lowered, but only for the "right" type of case.

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