OUTER HOUSE, COURT OF SESSION

[2018] CSOH 117

P220/18

OPINION OF LORD MALCOLM

in the Petition of

JAMES CRAIG

Petitioner

against

LORD KEEN OF ELIE QC, ADVOCATE GENERAL FOR SCOTLAND,
as representative of the UK government in Scotland

First Respondent

and

THE SCOTTISH MINISTERS

Second Respondents

for judicial review of decisions of the UK and Scottish governments concerning the extradition forum bar provisions of section 50 of, and schedule 20 to, the Crime and Courts Act 2013

Petitioner: O'Neill QC, Mackintosh; Balfour + Manson LLP
First Respondent: Webster QC; Office of the Advocate General
Second Respondents: Johnston QC, O'Neill (sol adv); Scottish Government Legal Directorate

12 December 2018

[1] At the heart of this petition for judicial review is a complaint that the UK government has failed to commence in Scotland the extradition forum bar provisions in section 50 of, and schedule 20 to, the Crime and Courts Act 2013 which have been in force in the rest of the UK

since October 2013. The petitioner is the subject of an extradition request by the government of the USA, which he is currently challenging in Edinburgh Sheriff Court. He considers that he could mount an additional defence under and in terms of the forum bar provisions were they to apply in Scotland. The underlying aim of the provisions is to prevent extradition if the alleged offence can be fairly and effectively tried in the UK and it is not in the interests of justice that the accused person be extradited: see *Love* v *USA* [2018] 1 WLR 2889 at paragraph 22. The relatively complicated provisions are discussed in some detail in *Scott* v *The Government of the USA* [2018] EWHC 2021 (Admin) at paragraphs 23-35.

The background to the forum bar provisions in the 2013 Act

[2] The 2013 Act was preceded by a review chaired by Sir Scott Baker. In the course of his review he received a letter dated 31 January 2011 from the then Crown Agent. On behalf of the Crown Office and Procurator Fiscal Service she advised that forum bar to extradition would, amongst other things, be a challenge to the independence of the Lord Advocate as head of the prosecution system in Scotland, in that the court would be invited to consider the merits of a prosecutorial decision. While the courts in England and Wales were prepared to contemplate judicial review of such decisions, that was not the tradition in Scotland. The Baker review concluded that the forum bar provisions should not be introduced in the UK, generally because prosecutors were best placed to make decisions on forum. The UK government did not accept that recommendation, considering that enhanced protections were needed, including scrutiny of decisions in open court. In due course a bill containing, amongst other things, a forum bar defence for the UK as a whole (extradition being a reserved matter) was passed by the UK Parliament as section 50 of, and schedule 20 to, the Crime and Courts Act 2013. Provision is made for the possibility of a

prosecutor's certificate to the effect that a decision has been made not to prosecute for the alleged offence in the UK, which would then require the extradition judge to decide that extradition is not barred by reason of forum. The decision underlying the certificate can be questioned on appeal – for Scotland, see sections 19E(3) and 83D(3) of the Extradition Act 2003 (as would be amended if section 50 of, and schedule 20 to, the 2013 Act were brought into force in Scotland). Under these provisions, if the High Court of Justiciary quashes a certificate it must consider the issue of forum bar for itself.

Subsequent events

[3] On 16 September 2014 the then Lord Advocate submitted written evidence to the House of Lords Select Committee on Extradition Law. On the present topic he stated that:

> "The provisions relating to forum bar brought into force under the Crime and Courts Act 2013 will only be implemented in Scotland if the Scottish Ministers request it. They have thus far not done so and, as far as I am aware, there is no intention to do so for the foreseeable future. This is consistent with the historic position in Scotland where prosecutors are fully independent and have a fundamental discretion on whether to raise a prosecution or not and with the independent role of the Lord Advocate guaranteed by section 48(5) of the Scotland Act 1998 heading that prosecution system."

On 21 December 2017 the Rt Hon Alistair Carmichael MP tabled three questions in the House of Commons for the Home Department to answer. The questions were:

> "1. To ask the Secretary of State for the Home Department, for what reasons section 50 of the Crime and Courts Act 2013 has not been commenced in Scotland.
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> 2. To ask the Secretary of State for the Home Department, what the timetable is for the commencement of section 50 of the Crime and Courts Act 2013 in Scotland.
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> 3. To ask the Secretary of State for the Home Department, what discussions she has had with the Lord Advocate on the commencement of section 50 of the Crime and Courts Act 2013 in Scotland."

On 21 December 2017 the then Minister of State at the Home Office, the Rt Hon Brandon Lewis MP replied to all three questions on behalf of the Secretary of State as follows:

> "The Scottish Government has decided that it does not wish section 50 of the Crime and Courts Act 2013 to be commenced in full in Scotland and there is no timetable for its commencement. This is a decision for the Scottish Government and there have been no recent discussions on the issue."

The petitioner's submissions on illegality

[4] The commencement and extent provisions of the 2013 Act are in section 61 which, so far as is relevant for present purposes, is in the following terms:

> "**61 Short title, commencement and extent**
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> (2) Subject as follows, this Act comes into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes and, in the case of Part 4 of Schedule 16 and section 44 so far as relating to that Part of that Schedule, for different areas.
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> …
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> (8) An order which brings the monitoring provisions into force only in relation to a specified area may provide that they are to be in force in relation to that area for a specified period; and in this subsection '*the monitoring provisions*' means Part 4 of Schedule 16 and section 44 so far as relating to that Part of that Schedule.
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> …
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> (10) An order which includes provision for the commencement of section 49 or Schedule 19 may not be made unless the Secretary of State has consulted the Scottish Ministers.
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> …
>
> (12) Subject as follows, this Act extends to England and Wales, Scotland and Northern Ireland."

[5] The petitioner contends that section 61(12) demonstrates that, once commenced, section 50 applies to the whole of the UK. Subsection 2 provides that section 50 may come

into force on such day as the respondent may appoint and that different days may be appointed for different purposes, but not for different areas. The power is given in section 61(2) and (8) to commence some provisions selectively for different areas, but no such power is given in respect of section 50. Any reading of section 61 which permits the UK government to commence section 50 in different parts of the UK on different dates would render subsections (2) and (8) otiose, contrary to the principles of statutory interpretation. Further there is no provision in relation to section 50 or schedule 20 which is akin to section 62(10) in requiring the Secretary of State to consult with the Scottish Ministers before commencing these provisions. The submission is that the intention of the UK Parliament was:

(1) That the Secretary of State had no power to bring into force the forum bar provisions in England, Wales, and Northern Ireland without also commencing them in Scotland;

(2) That there was no duty placed on the Secretary of State to consult with the Scottish Ministers prior to bringing the provisions into force in Scotland;

(3) That the Scottish Ministers had no veto over the commencement of the provisions in Scotland;

(4) That the Secretary of State had a duty to bring the forum bar provisions into force across the United Kingdom, including Scotland, even where the Scottish Ministers had not requested, or indeed had opposed, the bringing into force of the provisions in Scotland.

[6] The Crime and Courts Act 2013 (Commencement No 5) Order 2013/2349 was made by the Secretary of State for the Home Department in exercise of the powers conferred by section 61(2) of the 2013 Act. The order brought into force the forum bar provisions in

England, Wales and Northern Ireland with effect from 14 October 2013. The proposition for the petitioner is that the commencement of the provisions in only part of the UK was illegal given the terms of the power granted to the Secretary of State by section 61. The petitioner refers to *R* v *Secretary of State for the Home Department, ex parte Fire Brigades Union and others* [1995] 2 AC 513 and *RM* v *Scottish Ministers* 2013 SC (UKSC) 139. Furthermore it is contended that the UK government has fettered its discretion unlawfully by, in effect, delegating decision-making to the Scottish Ministers. There is a secondary submission that the purported decision of the Scottish government that the forum bar provisions should not be introduced in Scotland is unlawful and ultra vires. Extradition is a reserved matter, and the UK Parliament made clear its intention that the forum bar scheme would apply throughout the UK.

The *Fire Brigades Union* and *RM* decisions

[7] The parties made extensive reference to the *Fire Brigades Union* decision as the leading case on the subject. While a number of different views were expressed by the eight judges who sat in the Court of Appeal and then the House of Lords, the following general principles can be derived from the speeches in their Lordships' House. (What follows is principally taken from the speeches of Lord Browne-Wilkinson, pages 550-553; Lord Mustill, pages 559 and 561; Lord Lloyd of Berwick, pages 571/572; and Lord Nicholls of Birkenhead at pages 574/576.)

[8] A commencement provision of the kind under consideration is widely used, and is intended to place a duty on the minister to consider when, not whether, the statutory scheme will be brought into force. Until the power is exercised, or Parliament repeals the legislation, this is a continuing duty to be exercised in good faith. A variety of factors may

render it appropriate to delay commencement, including a change of circumstances, such as unforeseen problems or costs. The power cannot be lawfully renounced, nor Parliament's purpose frustrated by the acts of the executive. If the relevant minister fails in this duty, or abuses his power by acting in a manner inconsistent with it, it is the "paramount duty" of the court to say so (Lord Lloyd of Berwick at 571E-F).

[9] In *RM* v *Scottish Ministers* it was stressed that "Parliament makes the law and the executive carries the law into effect" (paragraph 34). Where discretion is given as to when a law will commence, this is to allow time for practical considerations relating to its effective operation to be addressed (paragraph 35). If regulations are needed, Parliament expects them to be made, not that the law remains a dead letter for an indefinite period. It is a "basic principle of administrative law that a discretionary power must not be used to frustrate the object of the Act which conferred it…" (paragraphs 41/42). If a statute confers a discretionary power, the failure to exercise the power will be unlawful if it is contrary to Parliament's intention (paragraph 47).

Parliamentary privilege

[10] The UK government has brought the forum bar provisions into force everywhere in the UK other than Scotland. The obvious question is, why not Scotland? Here is where the proceedings took a surprising turn. The question is not answered in the pleadings. During the hearing, and on more than one occasion, the court inquired of counsel for the Advocate General for Scotland (who is the UK government's representative in Scotland) as to the reason, but he was either unable or unwilling to provide an explanation. And there was no explanation for the failure to provide an explanation. Unsurprisingly there was no mention of national security, state secrets, or anything of that nature.

[11] One might think that reference would be made to the answer given by the Minister of State to Alistair Carmichael MP (see above at paragraph 3). However counsel submitted that for the court to proceed upon that basis would be a breach of parliamentary privilege; thus it was contended that there was no evidential basis for the petitioner's claim that the will of Parliament was being thwarted. (If speculation is allowed, the coyness might have been caused by a desire to maintain this line of defence.) At the hearing, and for the first time, mention was made of recent discussions on the matter between the UK and the Scottish governments; discussions which it was acknowledged had been prompted by these proceedings. No detail was given as to the content or purpose of the discussions, nor any assurance that the outcome would be the commencement of the forum bar provisions in Scotland. As I understood it, the intention was to assure the court that the UK government was keeping the matter under review in the sense discussed in the *Fire Brigades Union* decision. If nothing else, the reference to these discussions confirms that whatever it is which has prevented the commencement of the provisions in Scotland, it has something to do with the views of the Scottish government.

[12] Even without any reference to these discussions, or to the minister's answer to Mr Carmichael, and given the absence of any other explanation, in my view it is a reasonable inference from all the other available information, including the pleadings for the Scottish Ministers, that the forum bar defence was not introduced in Scotland because of the concerns about the position of the Lord Advocate. Even assuming that the plea of parliamentary privilege was well taken, nonetheless in all the circumstances I would be content to proceed on the above basis. Indeed I can see no alternative, it being quite unreal that the court should accept the vacuum urged upon it by the Advocate General. It follows

that my views on the issue of parliamentary privilege are not necessary to the ultimate determination of the petition.

[13] The Advocate General objects to any reliance on the answer given by the Minister of State to various questions (see above), and also to a reference made in the petitioner's submissions to a statement made by Jeremy Browne MP when promoting the bill as Parliamentary Under-Secretary of State before the House of Commons Public Bill Committee on 12 February 2013 that "because Scottish Ministers and courts have a role in the process, we have decided that the [forum bar] provisions should be commenced only with their consent". This is on the basis that to do so would be in breach of the parliamentary privilege attaching to these statements.

[14] It would, I think, be surprising if an answer of the kind made by the Minister of State could not be relied upon as an explanation of why the government had not brought the forum bar provisions into force in Scotland. No doubt it could have been reported in the media, and if one were a journalist or an interested member of the public subsequently inquiring of the department, it is likely that one would be referred to the answer. There is no suggestion that the minister was in error or misled the House. No contrary explanation for the current state of affairs has been proffered to the court. Nonetheless under reference to various authorities, including *Adams* v *Guardian Newspapers Ltd* 2003 SC 425 and *Coulson* v *HM Advocate* 2015 SLT 438, it was insisted that neither the petitioner nor the court could have regard to the answer (or Mr Browne's statement) for the purpose of the present proceedings.

[15] I am not of that view. It would be possible to embark upon a detailed analysis of a large number of cases and other material, however I consider that sufficient guidance can be found in the decision of the Privy Council in *Toussaint* v *Attorney General of St Vincent and the*

Grenadines [2007] 1 WLR 2825. The judgment of the Board was delivered by Lord Mance. At paragraph 16 it was noted that the House of Lords had on a number of occasions stated that use could be made of ministerial statements in Parliament in judicial review proceedings. It was described as "an established practice" in *Wilson* v *First County Trust Ltd (No 2)* [2004] 1 AC 816. His Lordship continued at paragraph 17:

> "In such cases, the minister's statement is relied upon to explain the conduct occurring outside Parliament, and the policy and motivation leading to it. This is unobjectionable although the aim and effect is to show that such conduct involved the improper exercise of a power 'for an alien purpose or in a wholly unreasonable manner': *Pepper v. Hart*, per Lord Browne-Wilkinson at p 639A. The Joint Committee (on parliamentary privilege) expressed the view that Parliament should welcome this development, on the basis that 'Both parliamentary scrutiny and judicial review have important roles, separate and distinct, in a modern democratic society' (para 50) and on the basis that 'The contrary view would have bizarre consequences', hampering challenges to the 'legality of executive decisions … by ring-fencing what ministers said in Parliament', and 'making ministerial decisions announced in Parliament … less readily open to examination than other ministerial decisions': (para 51). The Joint Committee observed, pertinently, that
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> > 'That would be an ironic consequence of article 9 (of the Bill of Rights). Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts.'"

[16] At paragraph 23 Lord Mance said:

> "In relation to the points identified in the previous three paragraphs, the Board observes that the meaning of the Prime Minister's statements to the House is an objective matter. Mr Clayton accepts that Mr Toussaint can only rely on the statements for their actual meaning, whatever the judge may rule that to be. While no suggestion may be made that the Prime Minister misled the House by his statement, Mr Toussaint also remains free to deploy any evidence available to him on the issue whether the public purpose recited in the declaration was a sham – for example, evidence as to the nature and location of the land and the likelihood or otherwise of its being required for a Learning Resource Centre. The Prime Minister's statement to the House is potentially relevant to Mr Toussaint's claim as an admission or explanation of the executive's motivation. If the Prime Minister were to suggest that he expressed himself incorrectly, and did not intend to say what he said, then it would not be Mr Toussaint who was questioning or challenging what was said to the House."

[17] Failing parliamentary privilege, a subsidiary argument was presented that, in any event, the answer given by Mr Lewis did not signal that the forum bar provisions would never be introduced in Scotland. It did not indicate a closed mind, nor a delegation of responsibility to the Scottish government. In this connection it is worth repeating the terms of the answer, which was in response to questions asking why the forum bar provisions had not been commenced in Scotland; the timetable for their commencement; and as to any discussions which had taken place with the Lord Advocate.

> "The Scottish government has decided that it does not wish section 50 of the Crime and Courts Act 2013 to be commenced in full in Scotland and there is no timetable for its commencement. This is a decision for the Scottish government and there have been no recent discussions on the issue."

The words used could hardly have been clearer or more emphatic. While reference was made to a decision of the Scottish government, in reality the UK government had decided not to bring the terms of section 50 and schedule 20 into force in Scotland, and this would not change unless and until the Scottish government altered its view on the matter. (The same comes across loud and clear from Mr Browne's earlier statement to the Public Bill Committee, see above at paragraph 13.) It is worth repeating that there was no suggestion that anything had changed in terms of UK government policy.

Advocate General's further submissions on illegality

[18] Counsel for the Advocate General submitted that, even if the court accepts the petitioner's position as to the reason for non-commencement in Scotland, nonetheless there has been no illegality. There is no statutory time limit for commencement. Section 61 of the 2013 Act permits commencement in different parts of the UK on different days ("different days may be appointed for different purposes"). Failing that, the provision should be

construed to that effect – *Inco Europe Limited* v *First Choice Distribution* [2000] 1 WLR 586 at 592. Partial commencement does not fetter the discretion of the UK government on commencement elsewhere. In any event there is no admissible statement of intent not to commence the provisions in Scotland, and no failure on the part of the UK government to do something which it is required to do under and in terms of section 61. Reliance is placed upon a passage in the judgment of Hobhouse LJ in the Court of Appeal in the *Fire Brigades Union* case to the effect that, until a statutory provision is brought into force, it cannot create any enforceable rights and duties.

Analysis of the submissions on illegality

[19] Before considering the terms of section 61, it is worth revisiting the history of this part of the extradition legislation. The forum bar to extradition proposal was controversial. Having considered the various arguments, Sir Scott Baker recommended against such provisions. The UK government disagreed and invited the UK Parliament to legislate accordingly across the whole of the UK. Parliament acceded, but left it to the government to decide when this would come into force. Not long thereafter, the necessary order commenced this part of the Act in England, Wales and Northern Ireland, but not in Scotland. The reason for this 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.

[20] Several years passed, and then the matter was raised in this petition (and in a parallel petition at the instance of another Scottish resident subject to an extradition request by the USA). The claim is that there has been a breach of statutory duty by the executive. In essence the submission is that, without any proper basis (the continuing concerns in

Scotland not being a good reason to thwart the declared will of Parliament), there has been an unlawful refusal, failing which at least an unwarranted delay in commencing the provisions in Scotland. As discussed earlier (paragraphs 7/9), the lesson of the *Fire Brigades Union* and *RM* decisions is that, absent a good reason to delay commencement, a failure to do so amounts to an abuse of the discretionary power given to the executive. It is likewise if the relevant minister renounces the power, fails to keep the matter under review, or delegates decision-making to a third party.

[21] Turning to the Advocate General's submissions, I do not find them persuasive or compelling. First, I disagree with the proposition that section 61 envisages, or at least permits, commencement of the forum bar provisions in different parts of the UK at different times. On the contrary there was express provision for this only in respect of a different part of the legislation, namely part 4 of schedule 16, no doubt to facilitate the partial and gradual introduction of electronic tagging in different parts of England and Wales. Were the submissions for the Advocate General to be correct, there would have been no need for this specific permission. As to the allowance of different days to be appointed for different purposes, this is a wholly understandable provision in the context of a complex and multifaceted piece of legislation which deals with a number of different topics, of which forum bar is but one. The Advocate General contends that the phrase "different purposes" comprehends "different areas", but this is contrary to the ordinary meaning of the words, and is contradicted by the use of "different areas" later in the same section, which would be unnecessary if the submission was correct.

[22] Reliance was placed upon *Inco Europe* (cited earlier). The case concerned the proper interpretation of section 18(1)(g) of the Supreme Court Act 1981 with regard to whether it excluded an appeal from a decision on an application to stay proceedings pending referral to

arbitration. It is not necessary to recount the details; the view was taken that the draftsman "slipped up" and the provision should be read in a manner which gave effect to the clear parliamentary intention, albeit such must be done only after the exercise of considerable caution to avoid judicial legislation. I find nothing in the speech of Lord Nicholls of Birkenhead, with which the rest of the committee agreed, which is of assistance for present purposes, and certainly nothing to suggest that Parliament must have intended that the forum bar provisions could be commenced at different times in different parts of the UK.

[23] Reference was made to the decision in *Singh* v *Secretary of State for the Home Department* 1993 SC (HL) 1. The view was taken that when section 18(1) of the Immigration Act 1971 empowered the Secretary of State to make regulations to provide for certain specified matters, including giving notice to a person affected by an immigration decision, Parliament expected that the regulations would be made, and the Secretary of State was accordingly under a duty to make them. This seems an unsurprising decision, which provides no support for the Advocate General's position in the present case. It is true that the forum bar provisions in the 2013 Act are primary provisions, not ancillary in nature nor required to give effect to statutory provisions already in force. The proposition for the Advocate General is linked to Hobhouse LJ's observations in his dissenting opinion in the Court of Appeal decision in the *Fire Brigades Union* case ([1995] 2 AC 513 at 529/530) to the effect that a court cannot give effect to provisions not yet in force. The short answer is that the court is not being asked to give effect to provisions not yet in force. It is being asked to recognise the duty placed on the executive by section 61 of the 2013 Act, a provision which is in force. Hobhouse LJ's concerns were persuasively answered by Lord Lloyd of Berwick – see pages 570G-571B. The commencement provision was to be understood as meaning that the substantive provisions at issue "*shall* come into force *when* the Home Secretary chooses,

and not that they *may* come into force *if* he chooses." (emphasis in the text) His Lordship observed that the Home Secretary had no power to reject the new law or set it aside as if it had never been passed.

[24] I conclude that Parliament intended that the forum bar provisions would be brought into law throughout the UK, and that there was no power to do so in different parts at different times. Even if I am wrong on the latter point, this does not mean that the petition should be refused. The submission was that commencement in Scotland can be delayed for as long as the executive chooses. In response to questions from the court it was submitted that this would remain true if in 10 years, or even 50 years, nothing had changed. I consider this to be a wholly unreal position, which, even on the most favourable view of section 61 for the UK government, is clearly contrary to Parliament's intention.

[25] One returns to the question – why were the forum bar provisions not brought into force in Scotland? It was not because more time was needed. It was not because of a change of circumstances. It was not because of unforeseen problems or costs. It was because the decision was taken not to do so. It may be that, prompted by this petition, matters are being reviewed, though with no promises as to the outcome. If the decision is changed, it will be because the Scottish government's concerns are no longer considered to be a sufficient reason to exclude Scotland from the extradition forum bar provisions. That would return matters to the position as decided by Parliament at the outset. The court was not told that the provisions will be commenced in Scotland at some point in the future, let alone in the near future. There was only a vague reference at the hearing to recent discussions with the Scottish government. I am not persuaded that any weight can be placed on this information, nor that it amounts to an answer to the petitioner's complaint of illegality.

[26] The court is asked to declare that the UK government is acting unlawfully by its continuing failure to bring into force in Scotland the extradition forum bar provisions contained in section 50 of, and schedule 20, to the Crime and Courts Act 2013. Having regard to the legal principles laid down in the *Fire Brigades Union* and *RM* decisions (summarised earlier) I am prepared to grant that declarator. For the sake of completeness, I should mention other matters which were the subject of parties' submissions.

Article 14 discrimination

[27] The petition suggests that, given that articles 6 and 8 of ECHR are engaged, the non-enforcement of the forum bar provisions amounts to unlawful discrimination against persons resident in Scotland, such as the present petitioner, all in terms of article 14. I am doubtful as to whether, in practical terms, this adds anything to the primary argument. If the primary argument fails, the UK Parliament has condoned different treatment in different parts of the UK, or at least has allowed the minister a discretion on the matter. It is not unusual for the UK Parliament (or the Scottish Parliament) to act in a manner which creates important differences on either side of the border. It was not suggested that the laws on extradition had to be the same throughout the UK.

[28] It was said in *R(A)* v *The Health Secretary* [2017] 1 WLR 2492 at paragraph 49, that differential treatment based on place of residence might fall within the terms of Article 14, but nonetheless it may be justified. It was contended that the historic independence of the Lord Advocate is not a sufficient reason to justify the absence of forum bar provisions north of the border (petition paragraph 52). This is in the nature of an unsupported assertion. It has not persuaded me that, if article 14 is in play, there is a violation.

[29] In any event, there remains a real issue as to whether, for the purposes of the present circumstances, residence in Scotland is a protected characteristic in terms of article 14. In *R(A)* Lord Reed discusses the topic of different treatment within a devolved system such as the UK. He notes the decision in *Magee* v *UK* [2000] 31 EHRR 35, which he explains as meaning that differences in treatment based on the jurisdiction to whose law a person is subject by reason of his geographical location are not based on that person's "status" within the meaning of article 14. As to the subsequent decision in *Carson* v *UK* [2010] 51 EHRR 13, GC, the distinguishing feature there was that one law in one jurisdiction was being applied in different ways depending on a person's place of residence. As I understand it, his Lordship's discussion is supportive of the view taken in *Magee* (paragraph 50) that there does not always require to be a uniform approach to legislation in the constituent parts of the UK, and that differences do not require to be justified to avoid a violation of article 14.

[30] Strictly, perhaps article 14 could bite if, as I have held, the UK Parliament intended a uniform approach to the forum bar provisions throughout the UK, but in that respect it adds little, if anything, to the primary argument. And it seems unlikely that the minister could successfully present a purported justification which contradicted the will of Parliament.

The "decision" by the Scottish Ministers

[31] The petitioner seeks an order that a purported decision by the Scottish government that the forum bar provisions should not be commenced in Scotland is unlawful. I agree with the Scottish Ministers' submission that the expression of a view communicated to the real decision-maker, the UK government, is not in the nature of a decision which is susceptible to judicial review. The Scottish Ministers have no power to decide when or whether the provisions should be commenced in Scotland. That position is not altered if the

UK government decides to proceed upon the basis of their concerns. When asked by the court, senior counsel for the petitioner was unable to envisage an outcome whereby the petitioner would fail against the first respondent yet succeed in his claim against the Scottish Ministers. At best, this argument is a fifth wheel on the wagon.

Oppression

[32] The petitioner presented an argument that, given the aforesaid illegality, it would be oppressive for the Scottish Ministers to extradite him. Whatever force there might be in that submission – if it comes to it – that is a matter which I was told is, along with other defences, being pursued in the legal challenge to the extradition proceedings. No doubt the merits of such a challenge will depend, at least in part, on the specific circumstances, including whether, if it was in force, a forum bar defence would be reasonably available to the petitioner. That is not a matter which I can determine in these proceedings. The Scottish Ministers submitted that the challenge to the extradition is still ongoing, and in any event, there may never be a decision to extradite the petitioner, thus it is premature to raise this issue now. I agree with that submission. I do not consider that this is a matter which can or should be addressed in this application for judicial review.

Interdict and time-bar

[33] The petitioner also seeks interdict against the extradition. For reasons similar to those mentioned in the context of oppression, I do not consider that, at least at this stage such an order can be made. I will refuse it *in hoc statu* (in the present circumstances). A plea that the petition was time-barred in terms of section 27A of the Court of Session Act 1988 was withdrawn at the hearing.

Decision

[34] I shall pronounce decree of declarator that in its continuing failure to bring into force in Scotland the extradition forum bar provisions in section 50 of, and schedule 20 to, the Crime and Courts Act 2013, the UK government is acting unlawfully and contrary to its duties under section 61 of the Act. Counsel for the petitioner indicated that if the court was prepared to grant that declarator, he would not insist upon an order for specific performance requiring the provisions to be brought into force in Scotland. Declarators are sought against the Scottish government in respect of alleged illegality and oppression, and also interdict prohibiting the extradition of the petitioner to the USA. For the reasons given above these orders will be refused.