

TRUST AS A CORE PRINCIPLE OF THE CONSTITUTION

In *Craig (Appellant) v Her Majesty's Advocate (for the Government of the United States of America) and another (Respondents) (Scotland)* [2022] UKSC 6, decided on 23 February 2022, the Supreme Court unanimously allowed an appeal against an extradition order made by the Scottish Ministers. Consequently, the extradition order pertaining to the appellant was discharged under section 87 of the Extradition Act 2003 (the 2003 Act), because it was made in breach of his ECHR rights. On its surface, *Craig* is a straightforward application of Art 8 ECHR jurisprudence. However, what lies beneath the surface is a concerning vignette about the executive's failure to respect a court order, and in turn, the rule of law. Lord Reed, delivering the judgment of the Court, emphasised that the executive's conduct had undermined trust as a core principle of the constitution.

The procedural history, which is required to understand the ruling, is as follows. James Craig, a British citizen resident in Scotland, was the subject of an extradition request issued by the United States of America. He was alleged to have manipulated the prices of shares by spreading false information online. As a result, shareholders were said to have lost \$1.6million USD.

In May of 2018, Craig launched judicial review proceedings in Scotland, following his arrest under section 71 of the 2003 Act. The basis of his successful judicial review claim was that the UK Government had acted unlawfully by failing to commence legislation which would have provided him with a defence against extradition. The legislation in question was the Crime and Courts Act 2013 (the 2013 Act), paragraphs 1 to 3 of schedule 20. These provisions would have amended section 79(1) of the Extradition Act 2003 to provide the subject of an extradition order with a 'forum bar' defence. This defence was introduced after widespread consultation revealed concerns that United States legislation had cast the jurisdictional net unduly broadly for alleged offences involving computers. The defence would allow persons subject to extradition proceedings the opportunity to argue that extradition was 'not in the interests of justice' before a court applying judicial review principles.

In December 2018 Lord Malcolm, in the Outer House of the Court of Session, held that failure to commence the relevant provisions of the 2013 Act was an 'abuse of power' (*Craig v Advocate General for Scotland* [2018] CSOH 117; 2019 SC 230). He issued a declaratory order stating that the Government had acted unlawfully and contrary to its duties under section 61 of the 2013 Act. The abuse of power by the executive mirrored *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513. In *Fire Brigades Union* a Minister had acted unlawfully by failing to commence a statutory scheme, instead opting to rely on prerogative powers. Lord Reed observed that before the Court of Session, counsel for the Advocate General 'was either unable or unwilling to provide any explanation for the Government's failure to bring the forum bar provisions into force in Scotland' [19].

The logical corollary of the Court of Session's declaratory order was that the UK government was expected to commence the legislation permitting the forum defence in Scotland (it had already been commenced in England). However, it did not do so. The appellant then had an extradition hearing in the Sheriff Court in June 2019. By way of defence, he raised a devolution issue, under Schedule 6 of the Scotland Act 1998. The nature of the devolution issue was that the extradition order unlawfully interfered with his Art 8 ECHR rights. If extradition did breach the appellant's Convention rights, it would be unlawful per section 57 of the Scotland Act 1998, which precludes the Scottish Ministers from any action contrary to the ECHR. The Sheriff Court rejected this argument, holding that there was no breach of art 8 ECHR and therefore no bar to extradition under section 79 of the 2003 Act.

In September 2019 the Scottish Ministers decided that the appellant should be extradited under section 93 of the 2003 Act. The appellant unsuccessfully challenged this decision in the High Court of Justiciary (*HM Advocate v Craig*, unreported). The High Court of Justiciary granted leave

to appeal to the UK Supreme Court. On 6 September 2021 the Secretary of State made the Crime and Courts Act 2013 (Commencement No. 19) Order 2021 (SI 2021/1018), which made the ‘forum bar’ defence generally available in Scotland. However, the defence was not available in the appellant’s case because it was decided before the relevant statutory provisions were in force.

There were two issues before the UK Supreme Court. The first issue, core to Craig’s case, was whether his extradition was compatible with Art 8 ECHR. The Supreme Court held that it was not. The High Court of Justiciary had erred in approaching the compatibility of the extradition order with art 8 ECHR and the unavailability of the ‘forum bar’ defence separately. Lord Reed held that the correct approach was to view them as inextricably linked [50]. The result of this link was that the appellant’s extradition failed at the first hurdle of the generally accepted four-part proportionality test which applies to a ‘qualified’ ECHR right, such as art 8 (*Bank Mellat v Her Majesty’s Treasury* (No. 2) [2014] 1 AC 700 [20]). The extradition would not be ‘in accordance with law’ because the forum bar defence legislation had not been commenced.

Articles 8-11 ECHR are described as ‘qualified rights’ because of their textual structure. They each contain a second sub-paragraph detailing broad public policy goals which amount to legally justified limitations on the right itself. In the case of art 8 ECHR these are ‘national security, public safety or the economic wellbeing of the country’ the ‘prevention of disorder or crime’, ‘the protection of health or morals’, or ‘for the protection of the rights and freedoms of others.’ Despite its status as a ‘qualified right’, Lord Reed emphasised that the requirement that any interference must be ‘in accordance with law’ was ‘an absolute requirement.’ Effectively, the first limb of the proportionality test did not grant the state any latitude. As such ‘Convention states have no margin of appreciation under the Convention’ in meeting the ‘in accordance with law’ standard’ [50]. The respondent’s argument that the extradition order was in ‘accordance with law’ because it satisfied the requirements of the 2003 Act and that it met the Convention requirements of ‘accessibility and predictability’ was flawed [51]. It was flawed because section 61 of the 2013 Act, which laid out the procedure for commencing the forum bar defence ‘was undoubtedly in force and part of domestic law’ when the extradition order was made [52]. This granular assessment of proportionality by the Supreme Court is to be welcomed. Lord Reed is correct to insist that there are certain minimum thresholds to be met before arguments about justified interference with Convention rights can be considered.

The Supreme Court then turned its attention to the broader issues raised by the executive’s failure to respect the declaratory remedy issued by the Court of Session. Lord Reed acknowledged that the failure to commence the legislation in Scotland arose from confusion as opposed to malice. The Home Secretary, in an address to the House of Commons, had been mistaken in the belief that commencement of section 61 had been a decision for the Scottish Ministers. Under section 61, however, ‘the decision was for the Secretary of State alone’ [14].

Lord Reed also firmly addressed (and rejected) the respondent’s argument that the appellant’s counsel should have applied for a coercive, as opposed to merely declaratory order in the Court of Session [43]-[46]. It had been a ‘clear expectation’ since *M v Home Office* [1994] 1 AC 377 that ‘the executive will comply with a declaratory order’ [44]. This was also true in respect of declaratory orders from the Scottish Courts, as indicated by *Vince v Advocate General for Scotland* [2019] CSIH 51; 2020 SC 90 [45]. Lord Reed pithily reiterated that government compliance with court orders is ‘one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts’ [46]. Vital to the maintenance of that trust was the ‘Government’s compliance with declaratory orders in the absence of coercion’ [46].

The lasting importance of *Craig* will be that it brings to the fore the necessity of mutual trust between our constitutional institutions as a necessary pre-requisite for the maintenance of the rule of law. It is regrettable that the Supreme Court felt the need to re-emphasise the importance of a concept which is generally latent in the legal realm. After all, ‘it is because ours is

a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced' [46] that the concept of trust occupies so little space in the minds of constitutional lawyers. This ruling, and the facts surrounding it, starkly illustrates that trust and the rule of law have a relationship of mutual interdependence which should not be taken for granted.