



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 17
HCA/19-09/XM

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL UNDER SECTION 103 OF THE EXTRADITION ACT 2003

by

JAMES CRAIG

Appellant

against

THE LORD ADVOCATE REPRESENTING THE AMERICAN AUTHORITIES

Respondent

Appellant: Macintosh QC, A Crosbie; Dunne Defence
Respondent: McBrearty QC, AD, Irvine; Crown Agent

31 March 2022

[1] The history of proceedings in this case is set out in the judgment of the UKSC in *Craig v Lord Advocate* [2022] UKSC 6. The appeal to the UKSC concerned a devolution issue, the scope of which was identified in para 37 of the court's judgment, namely "whether the Lord Advocate and the Scottish Ministers were acting ultra vires in performing their functions in relation to the appellant's extradition". The court concluded (para 53) that

“the acts of the Lord Advocate in conducting the extradition proceedings, and the act of the Scottish Ministers in making the extradition order, were incompatible with the appellant’s Convention rights, and were therefore ultra vires by virtue of section 57(2) of the Scotland Act. In the language of paragraph 1(d) of Schedule 6 to the Scotland Act (para 24 above), they were merely “purported” acts, and were therefore invalid.”

[2] In its determination it stated (para 54) that it would allow the appeal but leave it to the High Court of Justiciary to make

“such orders as fall to be made in consequence of this judgment in order to enable a new extradition hearing to be held before a different Sheriff”.

[3] Parties were not in agreement about the order which should be made by this court.

The appellant submitted that this court should allow the appeal, discharge the appellant and quash the extradition order. For the Lord Advocate it was accepted that this would be an order which the court could make. However, it was also submitted that there was a route by which the current proceedings could be kept alive, on an assumption that the procedure relative to the appellant’s extradition was voided only to the date of Lord Malcolm’s interlocutor in *Craig v Advocate General for Scotland* 2019 SC 230; and by means of a somewhat convoluted construction of sections 71 and 75 of the Act.

[4] In our view the approach of the appellant is a simpler, neater solution and is to be preferred. So far as this court is concerned, it has before it a statutory appeal under section 103 of the Extradition Act 2003. Its powers are constrained by section 104 as follows:

“(1) On an appeal under section 103 the High Court may —

- (a) allow the appeal;
- (b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
- (c) dismiss the appeal.

(5) If the court allows the appeal it must —

- (a) order the person’s discharge;
- (b) quash the order for his extradition.”

[5] The matter is only before the court as a statutory appeal. The fact that the point of law raised under section 103 is one which means that the actions of the Lord Advocate and Scottish Ministers were void, invalidating the proceedings, does not mean that the court should not make a decision allowing the appeal under section 104(1) with the consequences set out in section 104(5). There is force in the appellant's submission that had this court originally reached the same conclusion as the UKSC, it would have proceeded to make the relevant orders under section 104(1)(a) and (5). We will therefore allow the appeal, order the appellant's discharge, and quash the order for his extradition.