

CASE COMMENTARY



Autism spectrum disorder and suitability for extradition: *Love v the Government of the United States* [2018] 1 WLR 2889; [2018] EWHC 172 (Admin) per Burnett LCJ and Ouseley J

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Applications for extradition of persons with autism spectrum disorder (ASD) have the potential to raise complex issues in relation to mental health experts' evaluation of the impact of removal of a person from their own country's sources of familial support to another country's custodial environment. These issues were traversed at length in relation to the risks posed by applications for extradition of the English computer hacker, Gary McKinnon, which resulted in executive intervention to enable him to remain in the United Kingdom and in important legislative amendments, by way of the institution of a 'forum bar'. In 2018 the Court of Appeal in *Love v The Government of the United States* [2018] 1 WLR 2889; [2018] EWHC 172 (Admin) delivered a ground-breaking judgment rejecting the extradition of another computer hacker, Lauri Love, who suffered from ASD and other comorbidities. The decision is an important precedent in its interpretation of the new forum bar provisions, the way in which forensic mental health evidence was adduced in the context of ASD symptomatology and evaluated by the court, and the finding that removal of Mr Love to the United States penal system would be unacceptably oppressive.

Keywords: Asperger's syndrome; autism spectrum disorder; extradition applications; forum bar; human rights; oppression.

Introduction

The potentially criminogenic aspects of high functioning autism spectrum disorder (ASD), in the past known as Asperger's syndrome (AS), have received substantial scholarly attention.¹ It has become evident that the disorder often co-exists with other disorders, such as attention-deficit/hyperactivity disorder (ADHD), obsessive-compulsive disorder, intellectual disability, anxiety and depression, to name but some, and that certain forms of criminal conduct are over-represented amongst

those with ASD: in particular, computer offences such as hacking; stalking and harassment offences; sexual offences, arising from deficient reading of social cues and various forms of online offending; offences of violence that are impulsive or fear induced; and obsessive preoccupation offences such as arson.²

In respect of criminal prosecutions involving such persons, a source of ongoing forensic challenge for those representing defendants, and for mental health practitioners writing expert reports, has to been to identify the effect

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of the disorder upon the person's capacity to form the requisite criminal intent, support them in court proceedings³ and, more commonly, assess the extent of their moral culpability so that just sentences can be imposed that properly take into account (in the particular case) the extenuating effects of ASD. In addition, a difficulty for expert evaluation has been the ability of a person with ASD to function adequately in the custodial environment, particularly if that environment deprives them of their customary routines and pillars of support, such as those provided by family members. If a sentence of imprisonment will be significantly more burdensome for a sentenced person who has ASD, or if it will exacerbate the symptomatology of ASD, these are issues that are highly relevant for a judicial officer imposing sentence and therefore for forensic psychiatrists and psychologists seeking to assist a court.⁴

This issue of the ability of a person to sustain incarceration in a foreign country has prompted legal contests in the context of extradition, where it has been alleged that individuals with ASD should not be permitted to be extradited to the harsh and overcrowded conditions of United States prisons to face trial when they have been charged with United States computer offences. Case law from the United Kingdom has shone a spotlight not just upon the challenges of assisting courts to appreciate more informedly the broad-based impact of ASD upon those who may be removed from their national environment potentially to serve significant sentences of imprisonment in another country but upon how most effectively forensic mental health professionals can discern the authenticity and nature of the difficulties likely to be experienced by such persons as a result of extradition.

The Gary McKinnon saga

In 2002 Gary McKinnon, a Scottish system administrator, was charged with hacking into 97 United States computers over a 13-month

period, removing critical files from the United States military system, deleting weapons logs, copying data and files and leaving taunting messages. He was indicted by a federal grand jury in the Eastern District of Virginia on seven counts of computer-related crime, as well as on an indictment in the District of New Jersey. He faced a potential sentence of imprisonment for 10 years on multiple of the charges.

The United States applied to extradite Mr McKinnon in 2005 after the United Kingdom enacted the *Extradition Act 2003* (UK), which implemented the 2003 extradition treaty with the United States. In 2006 a District Court Judge in the Bow Street Magistrates' Court sent Mr McKinnon's case to the Secretary of State to determine whether he should be extradited. The decision was that he should be. Mr McKinnon appealed against the decisions of the District Judge and the Secretary of State to the High Court. He failed⁵ but Kay LJ and Goldring J certified two questions of general importance to be considered by the House of Lords,⁶ which in turn affirmed his extradition. A subsequent appeal to the European Court of Human Rights also failed, as did an application for judicial review to the High Court.⁷

The principal ground for Mr McKinnon's opposition to extradition was his symptomatology of Asperger's syndrome and the stress that it was asserted that long-term imprisonment in a supermax prison in the United States would have upon his mental state. In addition, his vulnerability in a prison environment was emphasised by his expert witnesses. The United States asserted that he would receive adequate treatment and care in its prisons.

Ultimately, after the legal processes had been exhausted, Theresa May, the Home Secretary, exercised her discretion not to extradite Mr McKinnon, stating:

Mr McKinnon is accused of serious crimes. But there is also no doubt that he is seriously ill. He has Asperger's syndrome, and suffers from depressive illness. The legal question before me is

now whether the extent of that illness is sufficient to preclude extradition. ... After careful consideration of all of the relevant material, I have concluded that Mr McKinnon's extradition would give rise to such a high risk of him ending his life that a decision to extradite would be incompatible with Mr McKinnon's human rights.⁸

She also determined to introduce a forum bar under amendments to extradition law:

This will mean that where prosecution is possible in both the UK and in another state, the British courts will be able to bar prosecution overseas if they believe it is in the interests of justice to do so.⁹

Lauri Love

The effects of the extradition bar and the legal sequelae of the previous judicial decisions in relation to Gary McKinnon fell for evaluation in litigation in relation to Lauri Love between 2016 and 2018.

Mr Love was charged on three indictments that between the period October 2012 and October 2013, he, working with others, made a series of cyber-attacks on the computer networks of private companies and United States Government agencies (including the U.S. Federal Reserve, U.S. Army, U.S. Department of Defense, Missile Defence Agency, NASA, Army Corps of Engineers, Department of Health and Human Services, U.S. Sentencing Commission and the FBI Regional Computer Forensics Laboratory) in order to steal and then publicly disseminate confidential information found on the networks.

In most of the attacks it was alleged that Mr Love gained unauthorised access by exploiting vulnerabilities in a programme the computers ran known as Adobe ColdFusion: software designed to build and administer websites and databases. Once inside the compromised computer systems, Mr Love and others, it was said, placed hidden 'shells' or 'backdoors' within the networks, allowing

them to return and steal the confidential data, which included telephone numbers, social security numbers, credit card details and salary information of employees, health care professionals, and service personnel. Thus the charges that Mr Love faced bore many similarities to those that had previously been preferred in the United States against Mr McKinnon.

Mr Love appealed against the decision of District Judge Tempia, sitting at Westminster Magistrates' Court on 16 September 2016, to send his case to the Secretary of State for the Home Department for her decision whether to order his extradition to the United States of America, under Part 2 of the *Extradition Act 2003*. On 14 November 2016, the Home Secretary ordered his extradition.

The principal issues before the Court of Appeal were:

1. whether the judge was wrong to hold that the forum bar in section 83A of the 2003 Act, introduced by the *Crime and Courts Act 2013*, did not prevent Mr Love's extradition;
2. whether his extradition would be unjust or oppressive by reason of his physical or mental condition, and so required his discharge under section 91 of the *Extradition Act 2003*; and
3. whether various rights guaranteed by the European Convention of Human Rights ['ECHR'] would be breached, notably Article 3, in the light of his health and the conditions he would face in the United States, and Article 8 in the light of those factors, his home support and treatment, and the possibility of criminal proceedings being taken against him in the United Kingdom for the offences for which his extradition was sought.

It was accepted at first instance that Mr Love, a man of 33 with both British and Finnish nationality, had Asperger's syndrome (AS), although its severity was the subject of contest. Mr Love studied at the University of Nottingham in England but dropped out in his second term after a physical and mental collapse, and then at the University of Glasgow in

Scotland, but dropped out in his second year, again for health reasons.

The evidence of Professor Baron-Cohen, Professor of Developmental Psychopathology at Cambridge University, Director of the Autism Research Centre, and an NHS consultant specialising in the diagnosis of Asperger's syndrome, was that Mr Love was high functioning and had the capacity to participate in a criminal trial and give instructions to his legal representative. His AS did not exist in conjunction with learning difficulties, attention deficit or linguistic impairments. However, his AS was very severe because it caused him to become so absorbed in his interests that he neglected important areas in his life such as his studies and his health.

Mr Love also suffered from a co-morbid condition, eczema, which was stress-related and exacerbated by his mental health issues. He also suffered from asthma. In the past he had suffered from depression, and it had become more intense during the legal proceedings. He was very reluctant to take medication or engage in psychiatric or psychological treatment.

The most important issue before the Court of Appeal was that two expert witnesses who gave evidence, Professor Baron-Cohen and Professor Kopelman, were of the view that Mr Love would attempt suicide before extradition to the United States and that his mental health was dependent on his being in England (as against in a United States prison) with his parents and not subject to indefinite detention.

The forum bar issue

The forum bar argument was based upon section 83A of the *Extradition Act 1983* (UK), which was inserted into the legislation after the refusal of the Home Secretary to order the extradition to the United States of Gary McKinnon. It provides that:

1. The extradition of a person ('D') to a Category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.

2. For the purposes of this section, the extradition would not be in the interests of justice if the judge:
 - a. decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
 - b. decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
3. These are the specified matters relating to the interests of justice:
 - a. The place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur.
 - b. The interests of any victims of the extradition offence.
 - c. Any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence.
 - d. Were D to be prosecuted in part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence is necessary to prove the offence is or could be made available in the United Kingdom.
 - e. Any delay that might result from proceeding in one jurisdiction rather than another.
 - f. The desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to:
 - i. The jurisdictions in which witnesses, co-defendants and other suspects are located; and
 - ii. The practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom.
 - g. D's connections with the United Kingdom.

The forum bar argument failed before the trial judge. On appeal the evidence from Professor Kopelman, an Emeritus Professor of Neuropsychiatry, was that there was a very high risk that Mr Love would not be fit to stand trial in the United States:

There would be a severe deterioration in both his physical and his mental state. His eczema, his asthma, gastrointestinal symptoms, and palpitations, would certainly become far worse, and he might lose his hair again (alopecia), thereby causing further deterioration in his mental state. Mr Love would not be able to cope with separation from his family and friends, nor would he cope with the likely isolation in a United States facility. His depression would become far worse, and he would be very likely to develop psychotic symptoms (as he has during past severe depressions). His suicide risk would become very high as a result of the exacerbation of his clinical depression and a deterioration in his physical health. In such circumstances, Mr Love's ability to concentrate and sustain attention would, in consequence, be severely affected. His ability to cope with the proceedings in the trial, to make rational decisions, and to give evidence in a satisfactory manner, would be severely compromised in such circumstances. In brief, if this were to occur, he would no longer be fit to plead or to stand trial in the United States.¹⁰

Burnett LCJ and Ouseley J found that this evidence could not be dismissed as conjectural, and, while not definitive, it created a significant risk factor that told against extradition being in the interests of Mr Love's victims to the extent that there was at least a significant risk that there would not be able to be a trial at all by reason of his being unfit to stand trial in the United States. They also found it to be relevant that no certificate had been provided by the English prosecutor that the United Kingdom was not the most appropriate jurisdiction in which to try Mr Love: he could also face trial for his conduct in England.¹¹ Ultimately, it was Mr Love's substantial connection with the United Kingdom that persuaded them there had been by the trial judge:

... there is a particular strength in the connection to his family and home circumstances provided by the nature of his medical conditions and the care and treatment they need. This is not just or even primarily the medical treatment he

receives, but the stability and care which his parents provide. That could not be provided abroad. His entire well-being is bound up with the presence of his parents. This may now have been enhanced by the support of his girlfriend.¹²

Thus in the particular circumstances of the case, the forum bar found in section 83A of the 2003 Act was potent in the opinion of the Court of Appeal in preventing Mr Love's extradition to the United States.¹³

The oppression issue

Sections 91(2) and (3) of the *Extradition Act 2003* (UK) required the trial judge to order the requested person's discharge (and thus the rejection of the application for extradition) if it appeared 'that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him'. While the trial judge accepted that there was a substantial risk that Mr Love would commit suicide if ordered to be extradited, she concluded that safeguards were in place to prevent his doing so in transit or in the United States – she received evidence that he would be placed on suicide watch and that this would be efficacious in protecting him. She accepted that the sentencing regime in the United States was harsher than in the United Kingdom for the relevant offences, but considered both that the American courts could depart from the sentencing range for health reasons, and that American sentencing policy was not disproportionate, even though consecutive sentences could be imposed by each District in which he was convicted.

Professor Baron-Cohen was the first to diagnose Mr Love's AS. As noted above, he classified the condition as 'a very severe disability' for Mr Love, and he expressed the view that the realisation by Mr Love that others did not share his total commitment to any given current obsession led him into severe depression, along with difficulties in social relationships. Mr Love spoke openly about feeling suicidal triggered by the threat of extradition, leading Professor Baron-Cohen to

observe that prison would be 'entirely the wrong place for a man with his disabilities and vulnerable mental health . . . because he would not cope socially, and his previously very severe depression would be highly likely to recur'.¹⁴ He noted that Mr Love appeared to have a specific and concrete method of committing suicide in mind so that the United States could not 'control my destiny'; put another way, the risk was palpable and specific.

Professor Baron-Cohen did not accept that the protocols of the United States were sufficient to support a prisoner with AS, depression and a high suicidal risk, such as Mr Love:

The programme seemed to be based on those with educational impairments, which was not Mr Love. His issues would include not being able to share a cell, sensory hyper-sensitivity, difficulties adjusting to unexpected change, risk of being bullied and obsessive interests. He needed to be in an environment which understood Asperger Syndrome. Depression in someone with Asperger Syndrome is very different from depression in someone without Asperger Syndrome. His unique combination of mental and physical conditions 'makes him much more high-risk than prisoners who only suffer from one of these conditions.' Professor Baron-Cohen also expressed concern about the effect of overcrowding and staff shortages reducing Mr Love's ability to access mental health services. There was a real risk that the BOP's suicide prevention programme would not be adequate to prevent suicide by someone with Mr Love's intellect and who had declared his suicidal intent as clearly as had Mr Love, and if suicide were prevented, the means of doing so would exacerbate his mental illnesses.¹⁵

Much of Professor Kopelman's evidence was consistent with that of Professor Baron-Cohen. He was of the view that Mr Love's depression had become less pronounced but still fell into the category of being moderately severe. He was of the opinion that there would

be a high risk of a suicide attempt were Mr Love to face extradition at the end of the proceedings, during transition to the United States as well as on arrival there. He expressed the view that Mr Love was fit to be tried in England but it was more difficult to anticipate the situation in the United States, because he expected a severe worsening of Mr Love's clinical depression there. Remand in custody in the United States, causing a severe aggravation of his depression, could affect his fitness to be tried, but would certainly affect his ability to give evidence in a satisfactory manner. Extradition itself would result in very severe psychological suffering, profound mental deterioration and a very much increased suicidal risk. He also placed emphasis on a report from Mr Love's dermatologist that his eczema was often exacerbated by stress and anxiety and that there was a 'two-way reaction', which led to an aggravation of his mental state when his eczema became more severe.

Professor Kopelman also expressed concern about the proposed suicide prevention programme in the United States, which would involve Mr Love wearing a suicide smock and being monitored for 24 hours a day, without any unapproved personal items:

That would leave Mr Love feeling extremely isolated in the absence of an internet connection and undoubtedly would have a severe adverse effect on his mental state. Social isolation was known to precipitate psychotic experiences, including psychotic depression, and increase suicidal ideas. A severe deterioration in clinical depression, a likely recurrence of psychotic ideas, a severe deterioration in his physical health with an exacerbation of eczema and asthma, should be anticipated in such circumstances. Suicidal risk would increase to 'very high' in consequence, exacerbating rather than reducing the risk of suicide. His mental condition would remove his mental capacity to resist the impulse to commit suicide. His ability to cope with the trial would be severely compromised.¹⁶

Professor Kopelman was also very troubled about the extent of Mr Love's depression, which would exacerbate his limited social interaction, which was principally caused by his Asperger's – Mr Love was already reluctant to engage with supporting psychiatric or psychological treatment in the United Kingdom, and in prison or under coercion, Mr Love would be unwilling or unable to seek treatment, particularly because of his Asperger's syndrome. In a report written close to the time of the appeal, Professor Kopelman noted that Mr Love was taking his anti-depressant medication but he did not believe that this would prevent him committing suicide if an order was made for his extradition – this would remove the last barrier to his killing himself.

Evidence was provided at first instance that on arrival in the United States, if extradited, Mr Love would be screened and that it was not unusual for inmates with mental illnesses to be received and treated. The particular series of relevant institutions, the federal Bureau of Prisons ('BOP'), had over 600 doctoral level psychologists and more than 600 mental health specialists, a wide variety of therapies and standard medications. It was said that it could provide appropriate treatment for asthma and eczema. The BOP housed inmates with Asperger's syndrome. Mr Love would be assisted to adjust to incarceration. He would be assigned a correctional counsellor, a case manager and a unit manager, and a variety of psychology service programmes were available. They would include programmes to address deficits in social skills in a specific unit, a 'modified therapeutic community'. BOP also had a 'Suicide Prevention Protocol' and 'Program Statement' to identify and manage suicidal inmates, involving supervision or suicide watch, where they would have a tear-resistant gown and blanket. Counselling was available for those at risk of suicide. Private physicians were not permitted, unless they were treating the inmate before incarceration, and permission to be treated by a specific

physician would be infrequent. Conditions of confinement could be challenged in court. Overall, it was contended by the United States that Mr Love's needs could be provided for.

Dr Kucharski, a very experienced forensic psychologist, who had worked at a BOP facility, provided evidence that no-one committed suicide while on suicide watch. However, he drew upon the evidence of Professor Kopelman, Professor Baron-Cohen and Mr Love's dermatological consultant, to conclude that, complex and difficult as Mr Love's various conditions were to treat in the community, they would be even more difficult to treat in prison, with serious adverse consequences for his well-being. The stress of incarceration would significantly worsen his eczema. His physical symptoms would lead to agitation, which would be poorly tolerated by prison authorities and would be likely to lead to his spending significant time in segregation. Time on suicide watch or on segregation would be time spent in isolation. He added in his oral evidence that suicide watch was a device to prevent suicide and not a form of treatment. Treatment would be minimal, but the international nature of his case and its notoriety would add significant pressure to keeping Mr Love on suicide watch. The authorities, he said, would place Mr Love on suicide watch immediately on arrival in United States detention. This in turn would be likely to exacerbate his depression and substantially increase the risk of suicide. Dr Kucharski concluded:

I would be very cautious given Mr Love's history, his intellectual capacity and his high profile ordering him released from suicide watch. This is likely to have a significant adverse effect on his psychological wellbeing further compounding the depression and risk of suicide.¹⁷

Evidence was also adduced from Mr Zachary Katznelson, an American lawyer (and barrister called in England and Wales) and a former Legal Director of Reprieve, on the practical experience of those with mental

health problems and Asperger's syndrome in the United States prison system. He, like Dr Kucharski, said that the actual delivery of care frequently fails to meet BOP's aspirations, and his view was that:

Asperger Syndrome, as described by Professor Baron-Cohen, would make him extremely vulnerable in prison because he could not read cues in social behaviour, or understand other people's behaviour or expectations, or conform to social norms. He would be socially naïve, obsessive, poor in decision-making so as to make it difficult for him to cope with prison hierarchies, personalities, gangs and the prison system more generally. He could not avoid interaction with other prisoners at meals or in recreation. His Asperger Syndrome would reduce the prospect of his being able to develop relationships with them. A violent reaction is more common in prison in response to those who do not conform to the expectations of other inmates, especially from a foreigner in an American gaol. He quickly would be recognised as vulnerable, not least because of his visible eczema, making him an easy target for abuse. He would face unrelenting stress. He therefore bore a greater risk of segregation whether for his own safety or for repeated breaches of prison rules, with ever more severe punishments. Protective custody prisoners were often mixed with those being disciplined. He would have no external support structure; visits from his family would be rare because of expense; telephone calls were limited and expensive, and his internet access could well be limited in view of the offences alleged or found against him.¹⁸

Burnett CJ and Ouseley J concluded that Mr Love's extradition would be oppressive by reason of his physical and mental condition. They found that the trial judge did not grapple with an important issue: she accepted the ability of the BOP to protect Mr Love from suicide, on the basis of Dr Kucharski's comment that 'no one commits suicide on suicide watch':

It was implicit that measures could be taken in America which would prevent Mr Love committing suicide even though he might be determined to do so and have the intellect to circumvent most preventative measures. The important issue which flows from that conclusion is the question whether those measures would themselves be likely to have a seriously adverse effect on his very vulnerable and unstable mental and physical wellbeing? We consider that they would, both on the evidence before the judge, and on the further evidence we have received.¹⁹

Burnett CJ and Ouseley J also concluded that the evidence adduced by the BOP as to its policies and programmes could not be treated as resolving the issue as to his medical treatment in favour of the United States, without deciding that the practical evidence on behalf of Mr Love was not worthy of any real weight, which is what the judge at first instance appeared to have decided:

We, however, judge that the evidence as to conditions and treatment in practice is rather weightier than she did, and that, in Mr Love's rather particular circumstances, what is likely to happen in practice has to be given decisive weight. Dr Kucharski's evidence was particularly important in view of his experience.²⁰

They found that the fact of extradition would bring on severe depression in Mr Love and that he would probably become determined to commit suicide before extradition or in the United States. Even if he were able to be prevented from that course in the United States, in relation to which Burnett CJ and Ouseley J had reservations, the policies and programmes could not be treated as resolving the issue of his medical treatment in favour of the United States without determining that the practical evidence adduced on behalf of Mr Love was not worthy of any real weight. They found that this was what the judge at first instance had done and that in this respect she had erred:

If he were kept on suicide watch, and reviewed every 30 days or so, he would be in segregation, with a watcher inside or outside the cell for company, and with very limited activities. All the evidence is that this would be very harmful for his difficult mental conditions, Asperger Syndrome and depression, linked as they are; and for his physical conditions, notable eczema, which would be exacerbated by stress. That in turn would add to his worsening mental condition, which in its turn would worsen his physical conditions. There is no satisfactory and sufficiently specific evidence that treatment for this combination of severe problems would be available in the sort of prisons to which he would most likely be sent. Suicide watch is not a form of treatment; there is no evidence that treatment would or could be made available on suicide watch for the very conditions which suicide watch itself exacerbates. But once removed from suicide watch, the risk of suicide as found by the judge, cannot realistically be prevented, on her findings. Were Mr Love not to be in segregation, his Asperger Syndrome and physical conditions would make him very vulnerable. He would be a likely target for bullying and intimidation by other prisoners. The response by the authorities would be segregation for his own protection, which would bring in all the problems of isolation to which we have already referred. He would have no support network available in prison in the United States. There is no basis upon which we could conclude that the severity of the problems would be brought swiftly to an end by early transfer to the United Kingdom.²¹

Although oppression as a bar to extradition requires a high threshold, not easily surmounted, Burnett CJ and Ouseley J concluded that in the particular circumstances of his case, it would be oppressive to extradite Mr Love to the United States. This meant that a prosecution against Mr Love could proceed in England. Burnett CJ and Ouseley J observed that:

If convicted and sentenced to imprisonment, Mr Fitzgerald accepted that

the experience of imprisonment in England would be significantly different for Mr Love from what he would face in the United States. The support of his family, in particular, would mean that he would be at far lower a risk of suicide in consequence. On the evidence we have seen, his mental and physical condition would survive imprisonment without such significant deterioration, though it would undoubtedly be more problematic for him than for many prisoners.²²

As of early 2020 it appears unlikely that he will be prosecuted in England.

The ramifications of the *Love* decision

Lauri Love's successful appeal has to be evaluated in light of the previous, prolonged legal saga that surrounded the attempts to extradite Gary McKinnon in comparable factual circumstances. An outcome of the McKinnon litigation was legislative – the passage of amendments to the United Kingdom extradition legislation to incorporate an forum bar enabling extradition to be declined if it is found not to be in the interests of justice.

Ultimately the decision by the High Court to decline the extradition of Lauri Love arose from its being established both that it would be contrary to the interests of justice and that it would be oppressive. Inevitably to a degree, the decision is specific to its facts. However, it constitutes a potent international precedent in relation to the forensic relevance of autism spectrum disorder/Asperger's syndrome. The case was extensively and very professionally mounted on behalf of Mr Love, and it was pursued in the glare of considerable media publicity both in the United Kingdom and in the United States. Leading mental health experts on the condition were unequivocal about of the highly deleterious impact likely to be exercised by extradition upon Mr Love, bringing into question whether he would be able to be tried at all and highlighting the adverse effect that extradition would have on his mental and physical health, including the risk that he

would commit suicide. Collateral evidence was also highly corroborative.

The expert evidence ultimately was compelling that Mr Love's suicidality, if extradited, was not exaggerated for forensic purposes, instrumental or manipulative. He was genuinely devastated about the prospect of being removed from England and was highly vulnerable by reason of his diverse symptomatology of Asperger's, suicidal depression and eczema, each of which had a potentiating effect upon the other.

It was established to the satisfaction of the High Court that Mr Love lacked the skills to cope in a United States custodial environment away from the support of his family, and that, in spite of assertions of the capacity of the United States penal system to provide him with adequate therapeutic assistance, as also had been contended in respect of Gary McKinnon, the regime of long-term suicide watch in a United States prison would be extremely harsh and counter-therapeutic, albeit necessary. It may well have been that Mr Love's arguments in relation to breach of his human rights, had they needed to be determined, would have received a favourable reception.

The Love litigation is an exemplar for how a court can be enabled by high-quality and well presented expert evidence to be informed about the ramifications of ASD for a person's custodial experience, particularly in another country. It raises the question of whether a 'forum bar' should be enacted more commonly in extradition legislation so as to protect vulnerable persons' human rights. It also places on the agenda how oppressive deprivation of supports, routines and coping mechanisms in an unwonted custodial environment can be for a person with ASD.

Ethical standards

Declaration of conflicts of interest

Ian Freckelton has declared no conflicts of interest

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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Notes

1. See, e.g., J. Barry-Walsh and P. Mullen, 'Forensic Aspects of Asperger's Syndrome' (2004) 15 *Journal of Forensic Psychiatry and Psychology* 96; M. Kristiansson and K. Sorman, 'Autism Spectrum Disorders: Legal and Forensic Psychiatric Aspects and Reflections' (2008) 5 *Clinical Neuropsychiatry* 55; I. Freckelton, 'Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts' (2013) 26 *Journal of Applied Research in Intellectual Disabilities* 420.
2. See, e.g., I. Freckelton, 'Asperger's Disorder, Criminal Responsibility and Criminal Culpability' (2009) 16 *Psychiatry, Psychology and Law* 16; I. Freckelton, 'Asperger's Disorder and the Criminal Law' (2011) 18 *Journal of Law and Medicine* 677; C.S. Allely, S. Kennedy and I. Warren, 'A Legal Analysis of Australian Criminal Cases Involving Defendants with Autism Spectrum Disorder Charged with Online Sexual Offending' (2019) 66 *International Journal of Law and Psychiatry* 66; I. Freckelton, 'Expert Evidence about Autism Spectrum Disorder' in M. Woodbury-Smith (Ed), *Handbook of Autism and the Law* (Springer 2019).
3. See D. Goldfarb and A. Gonzalez, 'Children with Autism Spectrum Disorder in the Courtroom: How Courts Handle Testimony Today and What We Can Do in the Future' in J.L. Johnson, G.S. Goodman, and P.C. Mundy (Eds.), *The Wiley Handbook of Memory, Autism Spectrum Disorder and the Law* (Wiley-Blackwell, 2018), pp. 340–357.
4. See, e.g., *R v Verdins* (2007) 16 VR 269.
5. *McKinnon v United States of America* [2007] EWHC 762 (Admin).
6. *McKinnon v Government of the United States of America* [2008] UKHL 59.

7. *McKinnon v Secretary of State for Home Affairs* [2009] EWHC 2021 (Admin)
8. See 'Gary McKinnon Extradition to US Blocked by Theresa May' *BBC* (London, 16 October 2012) <<https://www.bbc.com/news/uk-19957138>> accessed 07 February 2020.
9. See 'Gary McKinnon Extradition to US Blocked by Theresa May' *BBC* (London, 16 October 2012) <<https://www.bbc.com/news/uk-19957138>> accessed 07 February 2020.
10. *Love v The Government of the United States* [2018] 1 WLR 2889; [2018] EWHC 172 (Admin) [32].
11. 'The prosecutor is given two opportunities to affect the forum bar decision. First, it can certify under section 83B that it has decided formally that D should not be prosecuted in the United Kingdom, for certain specific reasons; if it does so certify, the forum bar cannot apply. There was no certificate here nor did the prosecutor seek an adjournment in order to consider issuing one. Secondly, it can express a belief that the United Kingdom is not the most appropriate jurisdiction in which to prosecute D for the conduct constituting the extradition offence. It expressed no such belief. In view of the fact that the CPS did not express any view adverse to the prosecution of Mr Love in the United Kingdom on any of the grounds potentially available to it, this silence is a factor which tells in favour of the forum bar, though it may readily be outweighed by other factors. A positive expression of view, one way or the other, is of much more weight': *Love v The Government of the United States* [2018] 1 WLR 2889; [2018] EWHC 172 (Admin) [34].
12. *Love v The Government of the United States* [2018] 1 WLR 2889; [2018] EWHC 172 (Admin) [43].
13. See also *Scott v United States of America* [2018] EWHC 2021 (Admin), applying the *Love* decision.
14. *Love v The Government of the United States* [2018] 1 WLR 2889; [2018] EWHC 172 (Admin) [76].
15. *Ibid.* [81].
16. *Ibid.* [87].
17. *Ibid.* [99].
18. *Ibid.* [104].
19. *Ibid.* [104].
20. *Ibid.* [104].
21. *Ibid.* 119–[120].
22. *Ibid.* [127]. In light of its decision, Burnett LCJ and Ouseley J did not find it necessary to determine that the arguments mounted on behalf of Mr McKinnon in relation to what he asserted were breaches of Articles 3 and 8 of the European Court of Human Rights, if he were extradited.