UK SUPREME COURT NARROWS TEST FOR EXTRADITION

The UK Supreme Court has delivered an important judgment in the case of *El-Khouri v Government of the United States of America*[1], clarifying the interpretation of the dual criminality rule under the Extradition Act 2003 (and in the process clarifying the territorial scope of the UK primary money laundering offences).

The effect of the judgment will be to curtail the ability of foreign governments (most often the US) to seek extradition from the UK based on acts committed in the UK with an overseas impact (in this case insider dealing). It also throws into question some prior extradition requests which the courts have previously granted.

Background

Mr El-Khouri, a dual UK/Lebanese national residing in the UK, faced extradition to the US on charges related to securities fraud, wire fraud, and insider dealing. He was accused of making substantial payments to a middleman to obtain confidential inside information about prospective mergers and acquisitions of companies listed on US stock exchanges. He allegedly used this information to trade contracts for difference (CFDs) based on anticipated movements in share prices on the Nasdaq and New York Stock Exchanges. The transactions were conducted with a broker based in the United Kingdom. The FCA had investigated Mr El-Khouri's conduct but decided there was insufficient evidence to prosecute. But on 9 September 2019 a grand jury in New York City returned an indictment charging Mr El-Khouri with seventeen offences of securities fraud, wire fraud, fraud in connection with a tender offer and conspiracy to commit such offences.

The central issue on appeal was whether the conduct alleged against Mr El-Khouri constituted an "extradition offence" under section 137 of the Extradition Act 2003, specifically concerning the rule of dual criminality.

The dual criminality test

The dual criminality test is a central feature of international extradition law, requiring that the conduct forming the basis of the extradition request must constitute a crime under the law of both the requesting and the requested state. Section 137 outlines different conditions under which a person's conduct constitutes an 'extradition offence' for the purposes of Part 2 of the Act, depending on whether the conduct occurred 'in' or 'outside' the territory of the requesting state.

1 [2025] UKSC 3

Section 137(3) applies when the conduct occurs in a category 2 territory (the requesting state).[2] The conditions are:

- The conduct must occur **in** the requesting territory.
- The conduct would constitute an offence under UK law punishable with imprisonment for a term of 12 months or more if it occurred in the UK.
- The conduct is punishable under the law of the requesting territory.

Section 137(4) applies when the conduct occurs **outside** the requesting territory. The conditions are:

- The conduct occurs outside the requesting territory.
- In corresponding circumstances, equivalent conduct would constitute an extra-territorial offence under UK law punishable with imprisonment for a term of 12 months or more.
- The conduct is punishable under the law of the requesting territory.

Section 137(3) and *Cando Armas*

The United States argued that Mr. El-Khouri's conduct occurred in the United States for the purposes of section 137(3), despite most acts taking place in the UK, because of the intended effects of these acts on US markets.

In making that argument the United States relied on the House of Lords decision in *Office of the King's Prosecutor, Brussels v. Cando Armas*.[3] In that case, Lord Hope made obiter comments that conduct could be considered to occur in a territory if its intended effects were felt there, even if the acts themselves occurred elsewhere.

In *El-Khouri* the Supreme Court revisited and rejected those obiter comments. It concluded that such an expansive interpretation of "conduct" was incorrect for three reasons: it did not accord with the statutory language; it rendered unworkable the distinction between the mutually exclusive categories in sections 137(3) and 137(4); and it was based on an unjustified assumption that the extradition scheme must be construed in the context of the common law rules governing territorial jurisdiction in criminal cases.

The Supreme Court emphasised that the courts should determine where the acts physically occurred, not where their effects were felt, to classify whether the conduct falls under subsection 137(3) or 137(4). The Court found that all the relevant conduct of Mr El-Khouri occurred outside the United States, thus falling under subsection 137(4).

2 The United States is designated as a category 2 territory under section 69 of the Extradition Act 2003. Extradition to category 2 territories is governed by Part 2 of the 2003 Act.
3 [2005] UKHL 67

Section 137(4)

Although the United States did not initially seek to rely on section 137(4), it later attempted to argue that, if subsection 137(4) were applicable, the conduct would still constitute an extradition offence under UK law.

It was agreed by the parties the conduct alleged against Mr El-Khouri could, if proven at trial in the United Kingdom, amount to insider dealing contrary to section 52 of the Criminal Justice Act 1993 ("the CJA 1993").

But section 137(4) required the court to consider whether in hypothetical corresponding circumstances, "equivalent conduct" would constitute an extra-territorial offence under UK law. In other words, if Mr El-Khouri were located in the US and traded CFDs with a US counterparty relating to UK listed securities, would that amount to an offence in the UK?

The Supreme Court held that it was "plain" that under section 137(4) the dual criminality test could not be satisfied in relation to insider dealing under section 52(1) CJA 1993. Section 62 of the CJA 1993 specifies that an individual is not guilty of insider dealing unless one of three conditions is met: the act occurs within the UK, the dealing occurs on a market regulated in the UK, or the professional intermediary involved is within the UK at the time of the dealing.

The Supreme Court found that on the transposed facts, none of these conditions would be met. Mr El-Khouri would not have been in the UK; he would not have been dealing on a UK regulated market; and the professional intermediary allegedly relied on by Mr El-Khouri would not have been in the UK.

Rogers

The United States further attempted to argue that, even if the conduct of Mr El-Khouri did not meet the criteria for insider dealing under UK law when transposed to an extra-territorial context, it could still constitute an offence under section 329 of the Proceeds of Crime Act 2002.

The United States' argument was based on section 340(11) of the Proceeds of Crime Act, which defines "money laundering" and includes acts that would constitute an offence under sections 327, 328, or 329 if done in the UK. It suggested that this implied extra-territorial jurisdiction, allowing for the prosecution of money laundering acts performed outside the UK. In making this argument the United States relied on the decision in *R v Rogers*[4], which had been taken as authority for the proposition that sections 327 to 329 have extra-territorial effect. The Supreme Court rejected that argument. It clarified that section 340(11) merely defined "money laundering" and does not extend the extra-territorial scope of sections 327 to 329. Rogers was wrongly decided.

Comment

El-Khouri is of obvious importance in potentially limiting the ability of foreign governments to obtain extradition of those who are alleged to have committed criminal conduct here, with impact felt overseas. But its impact should not be overstated.

4 [2014] EWCA Crim 1680

Many cases will not be so clear-cut. Where there is conduct occurring across jurisdictions it will still be open to the requesting state to argue that the conduct occurred there and to rely on section 137(3). Equally where the relevant UK offence would have extraterritorial effect in transposed circumstances, section 137(4) will apply.

In relation to criminal market manipulation offences, for example, section 90(10) of the Financial Services Act 2012 provides that a UK offence may be committed from overseas if a false or misleading impression is created here. So if US authorities were seeking extradition of a UK national for manipulation of US markets where the acts occurred here but the manipulative effects were felt in the US, they should be able to rely on section 137(4) in contrast to the position in *El-Khouri*.

In that regard, the case also raises questions about the territorial scope of the UK insider dealing offence.

Having decided that section 137(4) should apply, the Court found that it was “plain” that equivalent conduct would not constitute an extra-territorial offence of insider dealing under section 52(1) of the CJA 1993.

In reaching that conclusion the Court reached the apparently straightforward conclusion that if Mr El-Khouri had been in the US and traded CFDs with a US counterparty relating to UK listed stock, Mr El-Khouri would not have been “dealing on a UK regulated market” within the meaning of section 62 of the CJA 1993.

In the High Court judgment being appealed, the Court had accepted Mr El-Khouri’s argument that dealing in CFDs did not amount to dealing on a regulated market, in reliance on *Patel v Mirza*[5]. In that case the court was concerned with spread betting on listed shares and held that bets placed with a spread betting company are not themselves dealing on a regulated market within the meaning of section 55 of the CJA 1993. The Supreme Court appears to have accepted that reasoning.

Interestingly, however, in civil market manipulation cases relating to the trading of CFDs via Direct Market Access (DMA) providers, the courts and tribunals have held that trading in CFDs does amount to trading “on” an exchange where that trading leads to automatic hedging transactions on the exchange by the DMA provider. For example, in *Swift Trade*[6] the Court of Appeal held that a person entering into CFDs was “effecting orders” on the exchange for this reason. It is not clear whether the Supreme Court considered these authorities in reaching their conclusion in *El-Khouri*. Finally, *El-Khouri* may call into question some previously decided cases. For example, in June 2024, the High Court upheld a decision to order the extradition of a London based investment banker to the US in respect of his alleged involvement in the payment of bribes to individuals within the Ghanaian government. In that case, the alleged conduct occurred outside the US and would, if proven, principally have caused harm in Ghana. The Court decided that the deleterious effects of the conduct, namely the misuse of the US banking system and the potential for reputational damage to a US based financial institution, meant that extradition was nonetheless justified[7].

5 [2013] 2 P & CR DG23
6 *7722656 Canada Inc (formerly carrying on business as Swift Trade Inc, Peter Beck v Financial Conduct Authority [2013] EWCA Civ 1662*
7 Berko v United States [2024] EWHC 1292 (Admin) (per Bourne J at paragraph 92)

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