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White Collar Defense and Investigations

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One Manhattan West
New York, NY 10001
212.735.3000

22 Bishopsgate
London EC2N 4BQ
44.20.7519.7000

El-Khouri: Is UK-US Extradition on Its Way To Becoming an Ex-Tradition?

On 12 February 2025, the UK Supreme Court handed down its decision in *El-Khouri v Government of the United States of America* (*El-Khouri*), declining to extradite Joseph El-Khouri to the US. The ruling marks a pivotal moment in the interpretation of the "double criminality" test under the UK Extradition Act 2003 (2003 Act) and the territorial scope of the primary money laundering offences under the Proceeds of Crime Act 2002 (POCA). The decision is notable in that the UK refused extradition to the US in circumstances where the UK Supreme Court viewed the US nexus to be tenuous.

Background

On 9 September 2019, a grand jury in the Southern District of New York (SDNY) indicted Mr El-Khouri, a dual UK and Lebanese national living in the UK, on 17 charges of securities fraud, wire fraud, fraud in connection with a tender offer and conspiracy to commit such offences.

The insider dealing scheme described by the US prosecutors also involved four other alleged co-conspirators (anonymised in the indictment):

- CC-1, an analyst in the London office of a global investment bank.
- CC-2, with whom CC-1 cohabitated and was in a romantic relationship, who was an analyst in the London office of a global investment banking advisory firm.
- CC-3, a close friend of Mr El-Khouri, CC-1, and CC-2.
- CC-4, CC-3's brother, who also acted as a middleman for passing of confidential information.

The insider dealing scheme outlined in the indictment involved CC-1 passing confidential information relating to merger negotiations involving at least six companies, which CC-1 obtained from internal files at work, to CC-2. CC-2 would share the information with CC-3 and CC-4, who would ultimately pass them onto Mr El-Khouri. Mr El-Khouri would then trade on this information using contracts for difference (CFDs) based on anticipated movements in the prices on the Nasdaq and the New York Stock Exchange of the companies concerned. The transactions were executed using a UK-based broker.

The indictment alleged that Mr El-Khouri obtained in excess of $2 million through the scheme. In return, Mr El-Khouri allegedly provided cash and gifts, including sponsoring travel and hotel stays, to the co-conspirators.

A warrant was issued in New York for Mr El-Khouri's arrest, and the US submitted a request to the UK for extradition. Mr El-Khouri voluntarily surrendered himself to the UK authorities. Between 2016 and 2018, the UK Financial Conduct Authority

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conducted its own investigation into Mr El-Khouri and concluded that there was insufficient evidence to prosecute.

Legal Proceedings

Extradition requests between the UK and US are governed by an extradition treaty signed in 2003, which is reflected in the 2003 Act. Extradition to "category 2 territories", which include the US, is governed by Part 2 of the 2003 Act.[1] For a person to be extradited from the UK, their conduct must constitute an "extradition offence". Extradition requires "double criminality" — in other words, the conduct for which extradition is sought must be criminal in both countries involved.

The 2003 Act details the conditions that must be satisfied for conduct to fall within the scope of an "extradition offence", and different tests apply depending on whether the offence took place in or outside the requesting state.[2] Throughout the proceedings, the US argued that Mr El-Khouri's criminal conduct took place in the US, because his actions were likely to have had an impact on US markets. The US relied on non-binding statements in the House of Lords decision, *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1 (*Cando Armas*), to the effect that a defendant need not be physically present in a territory for the relevant conduct to occur there, provided that the effects of the actions were intentionally felt in said territory.

At first instance and on appeal to the High Court, the judges agreed with the US. However, as the Supreme Court pointed out, the substance of the alleged criminality occurred entirely in the UK.[3] On the facts, Mr El-Khouri obtained the confidential information in the UK and traded the CFDs in the UK through UK brokers.

In its unanimous decision, the Supreme Court found that the remarks in *Cando Armas* (1) were *obiter dicta* and therefore not law, and (2) were in any event mistaken and thus overruled.[4] The Supreme Court did not however question the holding in *Cando Armas* that criminal conduct need not occur *exclusively* within the state requesting extradition for it to be considered as occurring in that state.[5] The Supreme Court clarified that "conduct" here is concerned "solely with where the physical acts alleged were done and not with where any effects of those acts (intentionally or otherwise) were felt."[6] The Court therefore corrected the "muddle" created by *Cando Armas*, and found that for conduct to occur within the territory of the state seeking extradition, the defendant must be within that territory at the time of the alleged criminal conduct.[7]

The Court thus held that, contrary to the argument put forward by the US, in Mr El-Khouri's case, the criminal conduct took place outside of the US. This meant that, in order to show that an "extradition offence" had been committed, the US had to prove that "in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom" of the required gravity.[8]

The Supreme Court considered it "plain" that this requirement was not satisfied: The UK offence of insider dealing under section 52(1) of the Criminal Justice Act 1993 is not an extra-territorial offence by virtue of section 62(1) of the 1993 Act, which specifically states that an individual is not guilty of the offence unless they were within the UK at the time of the alleged conduct *and* the regulated market on which the dealing is said to have taken place is regulated in the UK.[9]

Hence, in relation to the offence of insider dealing, none of the requirements of the extraterritorial limb of the test under the 2003 Act were satisfied. Thus, there was no "extradition offence", and no grounds for extradition.

Money Laundering

In response, the US argued that Mr El-Khouri committed other offences, namely fraud and money laundering under section 329 of POCA (the offence of acquiring, using or possessing criminal property), which could be extraterritorial (and therefore potentially an extradition offence).

The offence under section 329 requires the defendant to acquire, use or possess "criminal property". Property is "criminal property" under POCA where it constitutes a person's benefit from "criminal conduct" and the defendant knows or suspects that it constitutes such a benefit. Importantly, "criminal conduct" includes not only conduct which occurred in the UK but also conduct which "would constitute an offence in any part of the United Kingdom, if it occurred there."

Since the relevant conduct occurred outside of the US, again the relevant test for an "extradition offence" under the 2003 Act required the US to demonstrate that the alleged money laundering "would constitute an extra-territorial offence" under UK

[1] Extradition Act 2003, s. 69(1).

[2] Extradition Act 2003, s. 137(3), (4).

[3] *El-Khouri*, para 66.

[4] *El-Khouri*, paras 49-50.

[5] *El-Khouri*, para 65.

[6] *El-Khouri*, para 56.

[7] *El-Khouri*, paras 63-64.

[8] Extradition Act 2003, s. 137(4)(b).

[9] *El-Khouri*, para 70.

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law.[10] The US therefore was compelled to argue that the offence under section 329 of POCA was an extraterritorial offence.[11]

The Supreme Court rejected this argument.[12] In a major reversal from the previous line of cases, the Court denied POCA would have such an extraterritorial effect, holding that, for a criminal offence under section 329 to occur, the acquisition, use or possession of the criminal property must happen in the UK. As the justices put it, accepting the US's argument would amount to finding that acquiring, using or possessing criminal property abroad, which was derived from criminal conduct also committed abroad, was a criminal offence under UK law. This, the Court said, would be "a truly exorbitant extraterritorial jurisdiction for the United Kingdom to assert", one not borne out by the language of POCA.[13]

In this regard, the Supreme Court overruled *R v Rogers* [2014] EWCA Crim 1680, where the Court of Appeal upheld a conviction of a UK citizen living in Spain who permitted criminal proceeds of fraud occurring in the UK to be paid into and then withdrawn from his Spanish bank account. In *Rogers*, the defendant argued that the UK courts had no jurisdiction because the relevant acts occurred entirely in Spain. The Court of Appeal rejected the argument, holding that the definition of money laundering in section 340(11)(d) of POCA, which defines "money laundering" as conduct which would constitute a money laundering offence under POCA "if done in the United Kingdom", was sufficient to establish extraterritorial jurisdiction.

In *El-Khouri*, the Supreme Court noted that the Court of Appeal in *Rogers* "failed to recognise that section 340(11)(d) merely defines 'money laundering' and does not either create an offence itself or extend the territorial scope of the offences" under POCA.[14] Rather, the Supreme Court held, the effect of section 340(11)(d) is more limited, namely:

1. It brings an act equivalent to a UK primary offence under POCA[15] within the statutory definition of "money laundering" even if such an act is done outside the UK and does not constitute an offence under POCA.
2. It therefore enables an offence of failing to disclose money laundering under POCA to be committed even though the act of money laundering which the person fails to disclose is not itself an offence under UK law, provided it would constitute an offence under section 327, 328 or 329 of POCA, if done in the UK.[16]

In relation to the US's argument, the Supreme Court found it was not "seriously arguable" that acquiring, using or possessing money in the US which represents the proceeds of crime committed in the US would be an offence in the UK under section 329 POCA.[17]

Since the US government failed to establish an "extradition offence" under either insider dealing or money laundering frameworks, the Supreme Court allowed the appeal, ordered the discharge of Mr El-Khouri and quashed the order for his extradition to the US.

Significance of the Case

The decision in *El-Khouri* provides much-needed clarity on the scope of an "extradition offence" and the application of the "double criminality" test under the 2003 Act to criminal offences physically taking place outside of the state seeking extradition.

The Supreme Court corrected the confusion introduced by *Cando Armas*, which applied questions of extraterritoriality to determine whether the relevant conduct occurred inside or outside the state seeking extradition. On the new approach endorsed by the Supreme Court, exterritoriality only becomes relevant if it is decided, solely by reference to where the acts occurred, not where their effects were felt, that the conduct occurred outside the state seeking extradition. This simplifies the process of allocating cases to the correct test under the 2003 Act, therefore making the UK extradition regime more straightforward.

The case has also reversed the long-standing position that the primary money laundering offences (sections 327 to 329) under POCA have extraterritorial effect. This may impact whether it is necessary for companies to make an advance disclosure (known as a Defence Against Money Laundering or DAML) to the UK's National Crime Agency in the context of their transactions.

It is important to note, however, that overseas criminal conduct can still give rise to criminal property, which could constitute a primary money laundering offence if any part of the offence takes place in the UK, and, for businesses in the regulated sector, the failure to disclose offences are unaffected.

[10] Extradition Act 2003, s. 137(4); *El-Khouri*, para 72.

[11] *El-Khouri*, paras 72-73.

[12] *El-Khouri*, para 72.

[13] *El-Khouri*, para 75.

[14] *El-Khouri*, para 81.

[15] Primary money laundering offences under POCA include concealing criminal property (s. 327), entering or becoming concerned in arrangements which facilitate the acquisition, retention, use or control of criminal property by or on behalf of another (s. 328), and acquiring, using or possessing criminal property (s. 329).

[16] *El-Khouri*, paras 77-78.

[17] *El-Khouri*, para 82.

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Many in the UK received the Supreme Court's judgment in *El-Khouri* as a curb on the "overreach" of the US justice system, which may hinder the US's ability to pursue suspects based in the UK. Whether this decision will force the US Department of Justice to reconsider making future extradition requests, or prosecutors will instead find a new way to frame extradition requests within the confines of the new legal regime, remains an open question.

Contacts

Andrew M. Good
Partner / London
44.20.7519.7247
andrew.good@skadden.com

Ryan D. Junck
Partner / London
44.20.7519.7006
ryan.junck@skadden.com

Jonathan Benson
Counsel / London
44.20.7519.7218
jonathan.benson@skadden.com

Jason Williamson
European Counsel / London
44.20.7519.7093
jason.williamson@skadden.com

Frank Lech
Trainee Solicitor / London
44.20.7519.7077
Franciszek.Lech@skadden.com