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Crime brief

In two places at once? David Walbank KC considers requests for extradition & the double criminality rule

IN BRIEF

- US indictment for insider dealing.
- Conduct in UK.
- Double criminality rule.

The Supreme Court has recently re-examined the double criminality rule in a judgment that is reckoned to have caused consternation within the US Department of Justice: *El-Khouri v Government of the United States of America* [2025] UKSC 3.

The facts of the case

Joseph El-Khouri was a dual United Kingdom/Lebanese national resident in the UK. He was suspected of insider dealing. The Financial Conduct Authority had conducted a criminal investigation, but decided there was insufficient evidence to charge. However, US prosecutors took a different view. A New York grand jury returned an indictment charging Mr El-Khouri with 17 offences, including securities fraud, wire fraud and conspiracy, and a request was made for his extradition to the US.

The facts alleged in the extradition request were that he had solicited 'material non-public information' in respect of ongoing negotiations for mergers and acquisitions involving a number of companies headquartered in the US with shares listed on the Nasdaq and New York stock exchanges. According to US prosecutors, he used that inside information to trade, through a UK-based broker, in 'contracts for difference' (CFDs) relating to future share price movements. The inside information was said to have originated with two investment analysts, romantically linked and each working for different London banks, and been leaked by them to two middlemen, brothers based mainly in London and Paris. El-Khouri allegedly agreed to pay the investment analysts for their information and to share with the middlemen a proportion of his illicit profits in cash and benefits-in-kind, including €100,000 for a Greek yacht charter, €10,000 for a French ski chalet and $13,000 for stays at a luxury New York hotel. His own gains from insider trading were put at nearly $2m.

The district judge sent the case to the home secretary, who ordered Mr El-Khouri's extradition. The Divisional Court dismissed his appeal, but he appealed to the Supreme Court. Their judgment focused on s 137, Extradition Act 2003 (EA 2003) which, for category 2 territories such as the US, enshrines the double criminality rule, whereby the conduct forming the basis of the extradition request must constitute a crime under the laws of both the requesting state and the requested state. Specifically, the case turned on the interplay between ss 137(3) & (4), EA 2003, the material parts of which read as follows:

> '(3) The conditions in this subsection are that—(a) the conduct occurs in the category 2 territory; (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom… (4) The conditions in this subsection are that—(a) the conduct occurs outside the category 2 territory; (b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom…'

The court's reasoning

There are two striking aspects of the Supreme Court's reasoning. The first is that the conduct alleged to constitute an extradition offence has to be allocated at the outset either to s 137(3) (conduct occurring within the requesting state) or to s 137(4) (conduct occurring outside the requesting state). Crucially, the Supreme Court said, these subsections are mutually exclusive, and the alleged conduct must come within one or the other. It cannot come within both.

The second is that, in determining where the alleged conduct occurred, the court is interested only in actual acts carried out by the requested person and their physical location. It is not concerned with the effect of those acts and their consequences or where their effect and consequences were felt. On this issue, the court disapproved the obiter dicta of Lord Hope in *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2006] 2 AC 1.

Applying that approach to the instant case, the court was emphatic in its conclusion that the conduct alleged in the extradition request had occurred outside the US and, therefore, fell to be dealt with under s 137(4):

> 'If one focuses simply on where the acts of Mr El-Khouri specified in the extradition request occurred and leaves aside any consideration of their intended effects, almost none of those acts occurred in the United States. Almost all occurred in the United Kingdom. Thus, Mr El-Khouri allegedly received in the United Kingdom inside information obtained by co-conspirators through their work in the London offices of investment banks. He allegedly used this information to buy and sell for profit CFDs relying on a professional intermediary who was in the United Kingdom. Mr El-Khouri is not alleged to have dealt in any securities in the United States. The only act complained of which he is said to have done in the United States was to pay for a hotel room in New York… as part of the payments which he allegedly made… in exchange for the inside information.'

In these circumstances, the court said, s 137(4)(b), EA 2003 (set out above) provides a safeguard against a requesting state's exorbitant claim of extra-territorial jurisdiction by permitting extradition only if the UK would itself claim jurisdiction in corresponding circumstances. The court was dismissive of the US government's suggestion that the conduct alleged in this case, if occurring outside the UK, might have given rise to extra-territorial insider dealing or money laundering offences.

The appeal was allowed, the decision of the Divisional Court was reversed, the extradition order was quashed and Mr El-Khouri was discharged. NLJ

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