



Neutral Citation Number: [2021] EWHC 3324 (Admin)

CO/429/2021

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/12/2021

**Before:**

**LADY JUSTICE NICOLA DAVIES**  
**MR JUSTICE JAY**

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**Between:**

**MARCIN TOMASZ ROGALA**

**Appellant**

**- and -**

**THE CIRCUIT COURT IN LUBLIN, POLAND**

**Respondent**

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**Helen Malcolm QC and Jonathan Swain (instructed by Lawrence & Co Solicitors) for the**  
**Appellant**

**David Perry QC and Julia Farrant (instructed by CPS Extradition Unit) for the Respondent**

Hearing date: 17<sup>th</sup> November 2021  
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**Approved Judgment**

**This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 8<sup>th</sup> December 2021 at 10.00am.**

## MR JUSTICE JAY:

### *Introduction*

1. Marcin Rogala (“the Appellant”) appeals against the Order of District Judge Snow made on 1<sup>st</sup> February 2021 pursuant to s. 21(3) of the Extradition Act 2003 (“the 2003 Act”) to surrender him to Poland. Permission to appeal was granted by Cutts J on the sole ground that the offences specified in the Part 1 warrant were not extradition offences (see s. 10). As was then the practice in all Polish cases, the ground that the European Arrest Warrant (“EAW”) was not issued by a judicial authority (see s. 2) was stayed pending the determination of the issue by this Court in *Wozniak* and *Chlabicz*. Judgment in that case was handed down on 23<sup>rd</sup> September 2021 ([2021] EWHC 2557 (Admin)), and the parties agree that we should make the standard order that is being made in all Polish cases pending the determination of the application for permission to appeal to the Supreme Court.
2. The appeal is brought under s. 26 of the 2003 Act. The combined effect of s. 27(2) and (3) is that an appeal may be allowed if the District Judge ought to have decided a question before him at the extradition hearing differently and, had he decided the question in the way he ought to have done, he would have been required to order the person’s discharge. It follows, as Mr David Perry QC pointed out, that if District Judge Snow’s decision is defensible on a basis not relied on by him, the appeal must be dismissed.

### *Essential Factual Background*

3. The EAW in this case was issued on 26<sup>th</sup> February 2019 and certified by the National Crime Agency on 15<sup>th</sup> September 2020. It is a conviction warrant, based on the decision of the Provincial Court of Lublin made on 2<sup>nd</sup> February 2011, which imposed a sentence of one year and four months’ custody. The Appellant was not present on the occasion of his conviction although nothing turns on this. What was initially a suspended sentence was later activated. All but one or two days of the sentence remain to be served.
4. The sentence was imposed in respect of two offences set out in Box E of the EAW as follows:

“I. In June 2007 in Chelm and in other towns in Poland and Italy, acting with other identified and not identified persons [the Appellant] participated in an organised group having for its purpose the commission of an offence that is passing counterfeit notes. (“the first offence”)

II. In June 2007, dates not exactly established, in Italy, in short time intervals with the prior intention, acting with other identified and not identified persons, within fixed distribution of roles, and repeatedly participating in an organised group [the Appellant] passed not less than 50 counterfeit notes of 100 Euro each.” (“the second offence”)

5. Under Polish law the first offence was charged as an offence of public order contrary to article 258 para 1 of the Penal Code (on the basis that a conspiracy to perform criminal acts is an offence undermining public order in the widest sense of that term), and the second offence was charged as an offence against the circulation of money and securities contrary to article 310 para 2 of the Penal Code, in connection with article 65 para 1.
6. In Box E.1 of the EAW, the offence of “forgery of means of payment other than the money” was ticked, whereas under the rubric “full description of offence(s) not covered by section E.1 above”, one sees “as in section E”.
7. The CPS then sought further information from the Polish Judicial Authority, and on 3<sup>rd</sup> December 2020 the following clarification was provided:

“[The Appellant] participated in the organised criminal group, that was acting in the territory of Chelm, other locations in Poland and in Italy and other states of the European Union that dealt with placing into circulation of the counterfeit euro notes.

The proceedings conducted in the case ... provided the basis to establish that most of the persons covered by the investigation belonged to a criminal group that organised and controlled distribution of counterfeit cash in the territory of the European Union states. The purpose of acting in the group was committing the offences, both regular as well as depending on available opportunity. Its participants committed the offences in different personal arrangements. The group leaders were: a national of Poland, residing in the territory of Italy and a woman of Romanian nationality, who had a direct access to illegal counterfeit money manufacture ... ***Recruitment of people who were to be engaged in distribution of counterfeit notes was carried out in the territory of Chelm and nearby localities.*** Persons recruited in such way committed the offences connected with placing into circulation the counterfeit 50 and 100 euro notes in the area of Italy (mainly in cities: Pescara, Aquila, Ancona, Chieti, San Benedetto, Rome, Sylva), where most of the activities of the group had focused, but also in France, Spain and The Netherlands. Efficient placing into circulation of counterfeit 100 euro note, resulted in receiving by a distributor from 30 to 40 euro, whereas placing into circulation of notes at face-value 50 euro – from 20 to 25 euro.

One of the persons recruited was [the Appellant] who in the period from June 2007 in the territory of Italy, had repeatedly placed into circulation not fewer than 50 counterfeit notes at face-value 100 euro, in such a way that he paid with counterfeit notes for products if this value, changing counterfeit money in such way.

The evidence material gathered in the course of proceedings allowed to present the charges to 96 persons. Due to excluding

some material to separate proceedings it is not possible to indicate a total value of counterfeit notes. Nevertheless it should be indicated that ... 23 persons were accused together with [the Appellant], who had placed into circulation not fewer than 10.505 notes at face-value 100 euro and not fewer than 4830 notes at face value 50 euro.

At the same time I inform that charges included in paragraph I and II refer to conspiracy of the same organised criminal group.”  
(emphasis supplied)

8. There is an obvious interrelation between the two offences. The final sentence cited above makes that crystal-clear. It appears that the Polish prosecutor has charged the conspiracy as “count 1” and the substantive offence as “count 2”, whereas the CPS in this jurisdiction would either have charged just one offence – the conspiracy (with the overt acts perpetrated as being in furtherance of it) – or, by way of alternative, would have charged the substantive offence of passing etc. counterfeit notes and coins, contrary to s. 15 of the Forgery and Counterfeiting Act 1981, as “count 2”.
9. Ms Helen Malcolm QC sensibly focuses on the second offence. It is reasonably clear from the EAW and the further information provided that the Appellant was in Italy when he committed the substantive offences. If she is correct in submitting that the criminal courts in England and Wales would not accept jurisdiction in comparable circumstances (because a defendant in like case to this Appellant was not in this jurisdiction at the material time), that would be sufficient for her purposes and she would not need to assail the first offence. In relation to that offence, the further information is not as clear as it might be although Ms Malcolm accepted in oral argument that she would have difficulty in challenging an interpretation of the further information that what was being alleged, and was subsequently proved, was that the principal conspirators recruited those lower down the chain, including the Appellant, in Poland (see the highlighted passage). In my view, the fact that the Appellant committed the relevant overt acts in Italy in the same month is not inconsistent with his travelling from Poland to Italy, and the fact that one of the principal conspirators was based in Italy does not generate the inference that the Appellant must have been recruited there.
10. The sentence of one year four months’ custody did not differentiate between the two offences. Mr Perry submitted that the sentence would have been the same even had the Appellant not been charged with offence 2. That may be right, but I cannot be sure to the requisite standard that it is so. However, it is at least a further pointer that the Polish authorities were indicting one continuous criminal activity.

### ***The Statutory Framework***

11. Poland is a category 1 territory for the purpose of the 2003 Act and it follows that the Appellant’s case is governed by the legislative scheme contained in Part 1 of the Act (ss. 1 to 68A).
12. S. 10 of the 2003 Act provides that the District Judge must decide whether the offence specified in an EAW is an “extradition offence”. If it is not, he must order the defendant’s discharge.

13. The definition of an extradition offence in the context of a conviction EAW is found in s. 65 of the 2003 Act, which so far as it applies to the Appellant's case (being a pre-Brexit case) provides as follows:

**“65 Extradition offences: person sentenced for offence**

(1) This section sets out whether a person's conduct constitutes an “extradition offence” for the purposes of this Part in a case where the person —

(a) has been convicted in a category 1 territory of an offence constituted by the conduct, and

(b) has been sentenced for the offence.

(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3), (4) or (5) are satisfied.

(3) The conditions in this subsection are that —

(a) the conduct occurs in the category 1 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;

(c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.

(4) The conditions in this subsection are that —

(a) the conduct occurs outside the category 1 territory;

(b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom;

(c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.

(5) The conditions in this subsection are that —

(a) the conduct occurs in the category 1 territory;

(b) no part of the conduct occurs in the United Kingdom;

(c) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list;

(d) the certificate shows that a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.”

14. The effect of the Extradition Act 2003 (Multiple Offences) Order 2003 (2003 SI No 3150) is that any reference in the 2003 Act to an offence, including extradition offence, shall be construed as reference to offences.
15. It may be seen that s. 65(3) and (5) are matching provisions, save that in the second the judicial authority issues a certificate. There is authority for the proposition that they are not mutually exclusive. The 2003 Act as a whole was enacted to give effect to the Framework Directive (i.e. Council Framework Directive of 13<sup>th</sup> June 2002, 2002/585/JHA), and s. 65(5) gives effect to article 2(2). The certificate, i.e. the ticking of a box in section E.1 of the EAW, is conclusive proof that the double criminality rule has been satisfied. This is because the 32 offences listed in article 2(2) constitute criminal offences throughout the EU, albeit not necessarily with the same nomenclature. However, there is a lack of clarity about the certificate in this case, and in order to avoid unnecessary debate about this it is better to focus on the matching provision, s. 65(3). At the end of this judgment, and in deference to Mr Perry’s alternative submission on s. 65(5), the issue will briefly be considered.
16. Given what has already been said in relation to the first offence, no difficulty arises for the purposes of s. 65 of the 2003 Act because s. 65(3) is clearly applicable. The domestic analogue to the public order offence in Poland is an offence under s. 1 of the Criminal Law Act 1977 (it is unnecessary to comment on whether these facts might also give rise to a conspiracy at common law). The focus of the hearing has been the application of s. 65(4) and/or s. 65(3) to the second offence.

### ***The Decision of the District Judge***

17. District Judge Snow interpreted the EAW and further information as stating that the Appellant was recruited to the conspiracy in Poland. On that footing, the first offence generated no difficulty. Although he preferred to locate the first offence within s. 65(5), despite the lack of clarity in Box E.1 that has been mentioned, the same outcome would be achieved under s. 65(3).
18. As for the second offence, his reasons were brief: he held that the domestic analogue was an offence contrary to s. 327 of the Proceeds of Crime Act 2002. He said that he was bound by the decision of the Court of Appeal, Criminal Division in *R v Rogers* [2014] EWCA Crim 1680, [2015] 1 WLR 1017. On this basis, therefore, the second offence was caught by s. 65(4), and no issue arose under s. 65(3).

### ***Rogers***

19. The decision in *Rogers* is also binding on the Divisional Court.
20. In that case the Defendant, who lived and worked in Spain, was alleged to have been involved in frauds in which the victims in the United Kingdom were persuaded to pay money into bank accounts here on false promises. The defendant’s role was permitting a large amount of money perpetrated by the frauds to be received into his Spanish bank

accounts and then withdrawn from them by another. The issue on appeal was whether the fact that Rogers' criminal activity was all committed in Spain constituted a jurisdictional bar to the indictment.

21. There were two bases for the Court of Appeal's decision dismissing the appeal against conviction. The first was that the Proceeds of Crime Act 2002 read as a whole conferred extra-territorial jurisdiction on the courts of England and Wales in respect *inter alia* of an offence contrary to s. 327. The second was that:

“55. The criminal acts which led to the property in this case becoming criminal property for the purposes of the Act plainly took place in and had an impact upon victims in the UK. The laundering of the proceeds by this appellant in Spain is directly linked to those acts in the UK by virtue of the fact that the property is criminal property. This is not a case where the conversion of criminal property relates to the mechanics of a fraud which took place in Spain and which impacted upon Spanish victims. In those circumstances our courts would not claim jurisdiction. But in this case when the significant part of the criminality underlying the case took place in England, including the continued deprivation of the victims of their monies, there is no reasonable basis for withholding jurisdiction, as is explained in *Smith (No 4)*. This is not an offence in which the Spanish authorities would have an interest.”

### ***The Respondent's Submissions***

22. For reasons which will become apparent, it is convenient to begin with the Respondent's submissions.
23. Mr Perry developed these with his usual economy, precision and erudition. In reducing his submissions to three propositions, the assistance that he gave the Court is not being underplayed.
24. The first submission was that this Court is bound by *Rogers*. The second submission was that the position at common law is that it is sufficient to found jurisdiction for a substantial part of the offence to have been committed within England and Wales even if the last constituent act took place abroad. The second offence was carried out as part of the conspiracy that formed the basis of the first offence. In this way, the second offence should be envisaged, for the purposes of the double criminality rule, as the last constituent act which took place abroad, with the formation of the conspiracy occurring within the jurisdiction. Thus, and by analogy, had the conspiracy been formed in the United Kingdom to commit a counterfeiting offence anywhere in the European Union, the domestic courts would accept jurisdiction: see *Smith (Wallace Duncan) (No 4)*. The fact that the Polish prosecutor has chosen to “indict” a substantive offence does not alter the position, not least because of the principle of mutual recognition and respect but also because form must not be elevated over substance. The third submission is that one may arrive at the same result by an accurate application of the provisions of the Criminal Justice Act 1993.

### ***The Appellants' Submissions***

25. Much of Ms Malcolm's written argument was devoted to the proposition that *Rogers* was wrongly decided, and/or could and should be interpreted as a decision on the alternative basis alone. In her oral argument, which was characteristically clear and helpful, Ms Malcolm realistically accepted that it was not open to this Court to correct or circumvent *Rogers*, and that the first basis for the decision was free-standing. She modified her core argument to this extent: if Mr Perry could not persuade us that District Judge Snow's decision was defensible on at least one of the alternative bases that he was advancing, the correct course would be to certify a point of law of general public importance for determination by the Supreme Court. In her reply, she accepted that if District Judge Snow's decision could be separately justified as Mr Perry submitted it could be, the effect of s. 32 of the 2003 Act was that there should no certification.
26. Ms Malcolm's essential submission was that her client was separately "indicted", and convicted, of the substantive offence which would receive its analogue in England and Wales as an offence contrary to s. 15 of the 1981 Act. The Polish prosecutor's choice to proceed by charging two offences cannot be ignored, not least because it is well established in the authorities that each extradition offence must be considered separately. It also follows that there is no "relevant event" occurring in Poland for the purposes of the Criminal Justice Act 1993. By parity of reasoning, no substantial part of the offence was committed in Poland and the common law principle set out (or, more accurately, repeated) in *Smith (Wallace Duncan) (No 4)* cannot be invoked.

### **Discussion**

27. If the second offence should be segregated and kept apart from the first offence for the purposes of the double criminality rule, Ms Malcolm's submission as summarised under para 26 above would be right. It is quite correct that the second offence, as set out and described in the EAW, is concerned only with overt acts committed in Italy. The Appellant was charged under two discrete provisions of the Polish criminal code. Furthermore, if there were no nexus between these two offences, the necessary bridge which Mr Perry has sought to construct would be lacking. Subject always to the point that the first *ratio* of *Rogers* is binding on us, it would follow that the criminality alleged under the heading of the first offence could not be recruited, as Mr Perry would have it, for any of the purposes of s. 65 of the 2003 Act.
28. The problem with Ms Malcolm's argument is not with the conclusions which flow but with its underlying premise. There *is* a necessary link between the first and the second offences which cannot be ignored. The existence of that link flows from the application of the case law, but Mr Perry was also correct in submitting that it is the policy of the courts in extradition cases to support rather than hinder arrangements designed to encourage international comity. It is no answer to say that the Polish authorities have created the difficulty by the charging decisions they have made. Mutual respect and recognition does not demand that a requesting state be hoist by its own petard unless - and this important caveat should be added - it is clear from an examination of the EAW and any further information that as a matter of substance it would not be possible to say that just one offence has been committed.
29. The facts of *Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418 fall to be considered. This was not an extradition case but, like *Rogers*, a decision of the Court of Appeal, Criminal Division. The matter was before that Court on a reference from the CCRC, but nothing turns on that. The issue was whether the trial court lacked



jurisdiction for the purposes of s. 15 of the Theft Act 1968 in circumstances where the relevant property was obtained by deception in New York (the deception took place in London). Lord Woolf CJ, giving the judgment of the Court, held that a court had jurisdiction to try an offence of obtaining services by deception where the obtaining took place outside the jurisdiction but a substantial part of the deception occurred within the jurisdiction. In so holding, he affirmed the “conduct” test stated by an earlier division of the Court of Appeal, Criminal Division (per Rose LJ presiding, in *R v Smith (No 1)* [1996] 2 Cr App R 1) and rejected the “last act” test set out by a different constitution in *R v Manning* [1999] QB 980.

30. The same underlying philosophy has been applied in an extradition context by the highest authority.
31. It is a well-established principle that conduct will occur “in” a category 1 territory for the purpose of section 65(3)(a) (and what was then s. 65(2)(a) and is now 65(5)(a)) as long as “some of the conduct complained of or relied on occurred in the category 1 territory”: see *Office of the King’s Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, per Lord Bingham of Cornhill, para 17 and Lord Hope of Craighead, para 40.
32. It is correct that the context in which this issue was decided in *Cando Armas* was somewhat different from the present case. *Cando Armas* was not an authority on what is now s. 65(4) of the 2003 Act. The problem there was that some of the relevant conduct in a case involving people trafficking had occurred in the United Kingdom (see the then wording of s.65(2)), and that raised an additional question. It was held (see Lord Bingham at para 16) that if any of the conduct took place in the United Kingdom, that sub-section could not be satisfied. However, the facts of *Cando Armas* could also be accommodated within s. 65(3) (the wording then was the same as it is now), and for that purpose it was sufficient that *some* of the conduct took place in the category 1 territory. The House of Lords made clear that s. 65 of the 2003 Act created various categories that were not mutually exclusive, and that it was sufficient that the case could be brought within s. 65(3) even if s. 65(2) was inapplicable. Furthermore, in my judgment there is no real difference between the formulation in *Cando Armas* and Lord Woolf’s language in *Smith (Wallace Duncan) (No 4)*. “Some” and “substantial part” may be regarded as synonyms in this context.
33. The defendant in *Cando Armas* was not being sought in Belgium on conspiracy charges, although the nature of his offending suggests he might have been. Lord Hope touched on this topic at paras 37-39 of his speech in the context of the Lockerbie bombing. There, the Scottish court accepted jurisdiction because the final act of the conspiracy took place within its jurisdiction. Lord Hope observed that the position would be the same in England and Wales.
34. Mr Perry drew our attention to *DPP v Doot* [1973] AC 870 which was referred to by Lord Hope. In that case the defendants were charged with conspiracy to import dangerous drugs. The conspiracy was formed abroad and the intention was that the drugs, having been shipped from Morocco to the United Kingdom, would then be exported to the United States. An objection to jurisdiction was taken on the footing that the conspiracy was formed elsewhere. The House of Lords held that, although the offence of conspiracy was complete as a crime when the agreement was made, it continued in existence so long as there were two or more parties to it intending to carry

out its design. It followed that it was sufficient that part of the conspiracy was performed in the United Kingdom.

35. As Lord Pearson explained (at page 827C-E), a conspiracy covers its (1) making or formation, (2) performance or implementation, and (3) discharge or termination. Provided that part of the implementation of the conspiracy occurs within the United Kingdom, our courts have jurisdiction to try the defendant. Conversely, if the making or formation of the conspiracy takes place here, and it is performed or implemented elsewhere, the reasoning of the House of Lords shows that there could be no problem. There is, in any case, no reason in logic or policy to differentiate between Lord Pearson's items (1) and (2). That, to my mind, disposes of Ms Malcolm's additional objection that it is necessary for the last act of the conspiracy to have taken place in the United Kingdom (transposing this to the facts of the instant case, the conspiracy was formed in Poland but its last act took place, as regards her client, in Italy). It is correct that Lord Hope had referred to the "final act" but that was in the context of the case he was examining.
36. The correctness of Mr Perry's submissions up to this point in the analysis are not dispositive of this appeal, and he did not submit that they were. The nexus between the first offence and the second offence is not yet complete, and two further issues remain to be resolved.
37. The first of these issues, although it was not really contested by Ms Malcolm, is that the Appellant is to be treated as if everything that was done by his co-conspirators in furtherance of the conspiracy had been done by him personally: see *The Government of the United States of America v McCaffery* [1984] 1 WLR 867, per Lord Diplock at 872C-D. Mr Perry's written argument reminded us of this principle in the context of his submission on the Criminal Justice Act 1993, read in conjunction with s. 1A of the Criminal Law Act 1977, but it applies equally to the common law analysis. It reinforces the point that these offences are inextricably linked, and that the Appellant is bound up in both.
38. The second of these issues is that there is a general principle of extradition law that each offence must be considered separately (see, for a stark application of that principle, the decision of this Court in *Lewicki v Italy* [2018] EWHC 1160 (Admin)), and this lends some superficial support to Ms Malcolm's contention that the second offence, alleging as it does a substantive rather than an inchoate offence, is entirely free-standing.
39. Even so, a conclusive answer to Ms Malcolm's submission is to be found in the decision of this Court (Hooper LJ and Cranston J) in *Tappin v The Government of the United States of America* [2012] EWHC 22 (Admin). The facts of that case were somewhat complex and involved conspiracy to export-controlled defence articles to Iran. Tappin and others were indicted by a Grand Jury charging them with three offences, namely two conspiracies and one offence of attempt. Hooper LJ raised a point during oral argument which the parties had not considered, namely that two of the offences might not constitute the offence of conspiracy to defraud in this jurisdiction.
40. Cranston J, giving the sole reasoned judgment of the Court, dealt with this point in the following way:

“44. Three principles emerge from *Norris* [2008] UKHL 16; [2008] 1 AC 920 relevant to this case. First, each offence in a request needs to be considered separately; secondly, each offence in a request need not be assigned a reciprocal offence under English law; and thirdly, where the alleged conduct relevant to a number of the offences in a request is closely interconnected, it matters not that it would not be charged here in the same manner as in the requesting state. Thus in *Norris* count 1, price fixing, was considered separately from counts 2 – 4. However – the second principle — the conduct regarding counts 2 – 4 did not have to translate into three reciprocal offences in English law. It was sufficient that it would have constituted obstructing justice. As to the third principle, the conduct leading to counts 2 – 4 was closely interconnected. It related to obstructing the investigation into price fixing in the carbon products industry and it was not fatal to the request that in English law that conduct would not be charged in the same manner it was under United States law.

45. That to my mind is the essence of the decision in *Islam v Paphos District Court of Cyprus* [2009] EWHC 2786, although the appellant submitted that it supported his case. There the European Arrest Warrant contained seven accusations. The offences listed were conspiracy to commit a felony, stealing, attempt of stealing, credit card forgery, uttering a false document, offences against the Act on personal data and money laundering. In a later section of the warrant, the definition of each of those offences was set out. Under the Cypriot law the definition of the money laundering offences was very broad. While the warrant specified seven different offences under the law of Cyprus, the appellant in that case submitted that it did not set out which of those offences related to each of the 20 individual incidents Particulars had to be supplied, it was said, in relation to each of the incidents as to which offence had been committed. This court held that it was sufficient that the conduct would constitute an offence of conspiracy in our law: [15], [19]-[20]. On my reading this court adopted the same approach in the earlier decision, *Boudhiba v Central Examining Court No.5 of the National Court of Justice Madrid, Spain* [2006] EWHC 167 Admin.

46. Here all the behaviour behind the three counts alleged in the request ”concerns the same criminal enterprise, the conspiracy to export the Hawk missile batteries. As a whole that conduct is closely interconnected. ***The three counts in the Grand Jury indictment relate to the one overall allegation. Therefore it matters not that count 2 in that indictment focuses on a substantive offence of attempt and count 3, on the financial aspects of the conspiracy. In considering double criminality we are not limited to the elements of the United States offences or***

*the wording of the indictment. Nor are we concerned with whether, as well as conspiracy, the conduct could be charged here as an attempt and as a money laundering offence.* If it be the case, it is also irrelevant that the export of these specific Hawk missile batteries to Iran (as opposed to controlled single use military equipment) would not be an offence under our law. In this jurisdiction the conduct would found an offence or offences of conspiracy to defraud and that is sufficient for the purposes of section 137(2)(b) of the Extradition Act 2003.” (emphasis supplied)

41. I agree with Mr Perry that these passages, in particular the sentences that have been highlighted, defeat Ms Malcolm’s submission. The fact that the Polish authorities have chosen to charge the Appellant with a substantive offence does not create a difficulty. It is quite clear that the offences, taken together, constitute criminality arising out of one conspiracy. In this jurisdiction, the point has already been made that this offending would probably find its way into an indictment charging one sole offence: conspiracy to pass or tender as genuine counterfeit notes. That is sufficient to satisfy the requirements of s. 65. Substance has prevailed over legal technicality.
42. It is necessary to be clear as to exactly how the requirements of s. 65 have been satisfied in these circumstances. The application of the first *ratio* of *Rogers* brings the second offence neatly within s. 65(4). This is because, although the relevant conduct for the purposes of the second offence occurred outside the category 1 territory, s. 327 of POCA 2002 has extra-territorial effect. However, on the alternative analysis that is being considered, the applicable sub-section is not s. 65(4) but s. 65(3). This is because the first and second offences are agglomerated and envisaged as one conspiracy for the purposes of the law of England and Wales. That conspiracy, on corresponding facts, would be indictable in this jurisdiction provided that some of the relevant conduct occurred here. Given that some of the relevant conduct occurred in Poland (the first offence), and that there is a bridge between the first and second offences, all the requirements of s. 65(3) have been fulfilled. This conclusion, facilitated by the reasoning in *Tappin* that regard must be had to substance and not form, arises from a synthesis of *Smith (Wallace Duncan) (No 4)*, *Cando Armas*, and the second *ratio* of *Rogers*.
43. Next, it is necessary to address Mr Perry’s alternative submission on the Criminal Justice Act 1993. Ultimately, however, it does not raise a separate point.
44. The structure of this Act is that a distinction falls to be made between “Group A offences”, which are substantive offences, and “Group B offences”, which are inchoate offences including conspiracies. The relevant Group A offence falls under s. 1(2)(c), namely an offence contrary s. 15 of the Forgery and Counterfeiting Act 1981. The matching Group B offence falls under s. 1(3)(a), namely a conspiracy to commit a Group A offence.
45. Section 2 sets out the jurisdictional condition in relation to Group A offences. Under s. 2(1) and (3):

“(1) For the purposes of this Part, “relevant event”, in relation to any Group A offence, means (subject to subsection 1A) any act

or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.

(3) A person may be guilty of a Group A offence if any of the events which are relevant events in relation to the offence occurred in England and Wales.”

46. Ms Malcolm was therefore right to submit that, given that the “relevant events” in respect of the second offence occurred in Italy, the double criminality rule could not be satisfied if that offence fell to be treated as a substantive offence on a basis that was self-contained.
47. Mr Perry’s riposte was that the second offence would be charged in this jurisdiction as a conspiracy to commit a Group A offence contrary to s. 1 of the Criminal Law Act 1977. Here, s. 1A, introduced into the 1977 Act by the provisions of the Criminal Justice Terrorism and Conspiracy Act 1998, is relevant (see, in particular, s. 3(5) of the 1993 Act). It provides, insofar as is material:

**“1A Conspiracy to commit offences outside the United Kingdom**

(1) Where each of the following conditions is satisfied in the case of an agreement, this Part of this Act has effect in relation to the agreement as it has effect in relation to an agreement falling within section 1(1).

...

(5) The fourth condition is that –

(a) a party to the agreement, or a party’s agent, did anything in England and Wales in relation to the agreement before its formation, or

(b) a party to the agreement became a party in England and Wales (by joining it either in person or through an agent), or

(c) a party to the agreement, or a party’s agent, did or omitted anything in England and Wales in pursuance of the agreement.”

48. This was the wording in 2007 when the Appellant’s offending occurred. Subsequent amendments substituted “England and Wales” for “the United Kingdom”. The first, second and third conditions have not been set out because they are clearly fulfilled. But it is also completely clear that one or more of the fourth conditions is satisfied in the present case because the Appellant is fixed with the criminality of his co-conspirators.
49. It follows that, apart from the position at common law, the effect of these statutory provisions is that the second offence satisfies the double-criminality requirements of ss. 10 and 65 of the 2003 Act because the Appellant was party to a conspiracy to commit offences contrary to s. 15 of the Forgery and Counterfeiting Act 1981. That, however, is not a complete answer to Ms Malcolm’s technical argument that the Polish authorities

charged the substantive offence and not a conspiracy. The fact remains that Mr Perry requires the analysis of Cranston J in *Tappin* to bring him home on the statutory route as much as he did on the application of common law principles.

***Section 65(5)***

50. In the circumstances, it is unnecessary to say much about Mr Perry’s further alternative submission that s. 65(5) of the 2003 Act applies. Para 35 of his skeleton argument was not developed orally, and the issue was only lightly addressed by both counsel.
51. Ms Malcolm’s submission was that the correct interpretation of Box E.1 in this case is that “forgery of means of payment other than money” applies to the first offence and not the second. As has been pointed out, District Judge Snow deployed s. 65(5) in the context of the second offence, but the point has already been made that s. 65(5) and s 65(3) draw attention to the same underlying factual matters.
52. Mr Perry’s submission was that Box E.1 applies to both offences. However, the manner in which the judicial authority completed Box E.1 as a whole indicates it thought that only one offence fell within the framework list.
53. There are other difficulties with the certificate. First, it is not clear why the judicial authority did not rely on the provision in article 2(2), “counterfeiting currency, including of the euro”. That more exactly covers the underlying criminality in this case; “forgery of means of payment other than money”, which does not in fact reflect the precise language of article 2(2), is somewhat vague. Secondly, the judicial authority’s certification that part of the relevant offending is *not* covered by Box E.1 (viz. “as in section E”) does not make it clear which offence is within the framework list. The correct interpretation of the entirety of Box E.1 as completed by the judicial authority is therefore open to debate, not least because whereas the first offence more clearly satisfies the double-criminality principle and the terms of s. 65(5) than the second (the relevant acts took place in Poland), the wording of the relevant section of Box E.1 (“forgery of means of payment other than money”) more comfortably fits the second offence rather than the first.
54. If the certificate should be interpreted as covering the second offence, that would be a straightforward basis for dismissing the appeal. It may be no accident that Mr Perry did not begin with this argument. For the reasons which have been explained, it is preferable not to decide this appeal on the basis of Mr Perry’s further alternative submission on s. 65(5).

***Conclusion***

55. This appeal must be dismissed.

**NICOLA DAVIES LJ**

56. I agree.

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**ORDER**

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UPON HEARING **Helen Malcolm QC and Jonathan Swain** (instructed by **Lawrence & Co Solicitors**) for the **Appellant**, and **David Perry QC and Julia Farrant** (instructed by **CPS Extradition Unit**) for the **Respondent**

**IT IS ORDERED THAT**

- 1) Permission to appeal be refused in relation to the ground pursuant to section 2 of the Extradition Act 2003;
- 2) The appeal be dismissed;
- 3) The Appellant's publicly funded costs be assessed.

**DATED this 8<sup>th</sup> day of December 2021**