



Neutral Citation Number: [2023] EWHC 2235 (Admin)

Case No: CO/3554/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2023

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

Between :

Szilard BELLENCIS
- and -
HUNGARY

Appellant

Respondent

Mark Smith (instructed by **Taylor Rose MW**) for the **Appellant**
Hannah Burton (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 19 July 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 11 September by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HEATHER WILLIAMS

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Introduction

1. This is an appeal pursuant to section 26 of the Extradition Act 2003 (“the 2003 Act”) from the decision of District Judge Ezzat (“the DJ”) handed down on 13 October 2021 to order the extradition of the Appellant to Hungary.
2. The Appellant’s extradition is sought in relation to two European Arrest Warrants (“AW”) as follows:
 - i) A conviction AW issued on 19 November 2018 and certified on 7 December 2018 in relation to 48 offences committed between March 2010 and February 2013 (“AW1”); and
 - ii) A conviction AW issued on 28 October 2019 and certified on 12 October 2021 in relation to eight offences committed between August 2012 and August 2013 (“AW2”).
3. This appeal is only concerned with five of the offences listed in AW1, namely offences 14, 15b, 16b, 17b and 26, in relation to which the Appellant was convicted by the District Court of Siófok. On 15 December 2022 Swift J granted permission to appeal at a renewed permission hearing on the sole ground that these offences are not extradition offences within the meaning of sections 10 and 65 of the 2003 Act. The Appellant argues that the conduct in question would not constitute an offence under domestic law, so that the dual criminality requirement is not satisfied. Permission to appeal on all other proposed grounds was refused by Swift J.
4. As I set out in further detail below, the issue in respect of offences 14, 15b, 16b and 17b (“the forgery offences”) is whether the conduct described in AW1 and in the Respondent’s Further Information would constitute offences under sections 1 and/or 3 of the Forgery and Counterfeiting Act 1981 (“the 1981 Act”); and the issue in respect of offence 26 (“the copyright offence”) is whether the conduct described in those documents would constitute an offence under section 1 of the Computer Misuse Act 1990 (“the 1990 Act”).
5. The dual criminality issue was not raised at the extradition hearing, where the Appellant was unrepresented. The Respondent has not objected to the issue being raised for the first time in this appeal.
6. The structure of this judgment is as follows:
 - i) The material circumstances: paras 7 – 19;
 - ii) The legal framework: paras 20 – 51;
 - iii) Dual criminality and the forgery offences: discussion and conclusions: paras 52 – 63;

- iv) Dual criminality and the copyright offence: discussion and conclusions: paras 64 – 82;
- v) Overall conclusions and outcome: paras 83 – 84.

The material circumstances

The arrest warrant

7. AW1 was issued by the Law Court of Veszprem in Hungary on 19 November 2018. It is a conviction warrant, based upon decisions of the District Court in Veszprem (no.6.B.924/2013/16), the Regional Court of Veszprem (no. 2.Bf.476/2015/6), the District Court of Siófok (no. 5.B.235/2012/61) and the Regional Court of Tatabanya (no. 3Bk.531/2012/2) in relation to 48 offences. In total, the Appellant is wanted to serve 4 years and 4 months imprisonment. The term of imprisonment imposed in respect of the 26 Siófok offences was 1 year and 6 months.
8. As I indicated in the Introduction, this appeal is concerned with offences 14, 15b, 16b, 17b and 26 of the Siófok offences. The convictions referred to as 15b, 16b and 17b are part of a pair of offences. I will set out the corresponding limb “a” offences as well, as this assists in understanding the nature of the Appellant’s conduct. The relevant offences as specified in Box E of AW1 are as follows:

“I/14.

At 13:52 on 15 July 2010, 1st defendant Szilárd Bellénes was posting a parcel to be paid by cash on delivery at the Dombóvár Office no 1 of Magyar Posta Zrt. The parcel was addressed to Mrs Pál Tolnai. 1st defendant Szilárd Bellénes fraudulently indicated himself as Ákos Éves Falusi as sender of the parcel and Dombóvár, Zrinyi u. 5. as his address on the receipt of the recorded mail. The 1st defendant Szilard Bellenes used the receipt of the recorded mail at the Dombóvár Office no 1 of Magyar Pasta Zrt.

I/15. a)

On 23 July 2010, Richárd Németh, the aggrieved party, a resident of Bonyhád and 1st defendant Szilárd Bellénes agreed that the latter would sell a LP GT 500 mobile phone worth HUF 16,000 (plus postage) to the aggrieved party. The parcel to be paid by cash on delivery sent by the defendant was received by the aggrieved party on 28 July 2010. However, there were only two old useless long-play cassettes in the parcel.

The financial loss in an amount of HUF 17,000 had not been recovered. The aggrieved party has filed a civil action.

b)

While posting the parcel to be paid in cash on delivery to the aggrieved party, 1st defendant Szilárd Bellénes used the name Ákos Falusi as the name of the sender and 7200 Dombóvár, Dombó Pál u. 17. fsz.2. as the sender's address on the return receipt of the recorded mail. The 1st defendant Szilárd Bellénes used the receipt of the recorded mail at the Dombóvár Office no 1 of Magyar Posta Zrt on 27 July 2010.

1/16. a)

István Plecskó, the aggrieved party, a resident of Zalaegerszeg and 1st defendant Szilárd Bellénes agreed that the aggrieved party would purchase a computer processor for HUF 17,500 from the 1st defendant. However, the aggrieved party received an empty audio cassette sent by 1st defendant in a parcel to be paid in cash on delivery on 29 July 2010.

The financial loss caused by the 1st defendant in an amount of HUF 17,500 had not been recovered. The aggrieved party has filed a civil action for collection.

b)

While posting the parcel to be paid in cash on delivery to the aggrieved party, 1st defendant Szilárd Bellénes used the name Ákos Falusi as the name of the sender and 7200 Dombóvár, Dombó Pál u. 17. fsz.2. as the sender's address on the return receipt of the recorded mail. The 1st defendant Szilárd Bellénes used the receipt of the recorded mail at the Dombóvár Office no 1 of Magyar Posta Zrt on 27 July 2010.

1/17. a)

In June 2010, Csaba Tóth, the aggrieved party, a resident of Alattyán and 1st defendant Szilárd Bellénes agreed that the aggrieved party would purchase a computer and a monitor worth HUF 17,000 from the 1st defendant. On 27 June 2010, Csaba Tóth received a parcel to be paid in cash on delivery from the defendant. His wife paid the purchase price, i.e. HUF 17,000 plus HUF 1,650 in postage. Contrary to the agreement, the parcel contained an old useless typewriter.

The financial loss in an amount of HUF 18,650 had not been recovered. Csaba Tóth has filed a civil action.

b)

While posting the parcel to be paid in cash on delivery to the aggrieved party, 1st defendant Szilárd Bellénes used the name Ákos Falusi as the name of the sender and 7200 Dombóvár, Dombó Pál u. 17. fsz.2. as the sender's address on the return receipt of the recorded mail. The 1st defendant Szilárd Bellénes used the receipt of the recorded mail at the Dombóvár Office no 1 of Magyar Posta Zrt on 27 July 2010.

I/26.

1st defendant Szilárd Bellénes has an Acer notebook. Between 19 July 2010 and 1 August 2010 he used various copyrighted programmes that he had copied illegally on a WD 1200BEVS 120 Gbyte hard disc. As a result he incurred damage in the amount of HUF 437 600 to the distributors ../ITT JON EGY TÁBLÁZATOS FELSOROLÁST. AMELYET A KONVERTER MÉG ANNYIRA SEM TUDOTT KEZELNI. MINT A SZÖVEGET listed below, which could not recover their losses.

Alexander Roshal – 1 - HUF 8,400

Axhampoo Development GmbHCo.KG – 1 - HUF 10,500

Atomix Productions – 2 - HUF 89,900

Digital 1 Media, Inc – 1 - HUF 41,800

ESET - 2 -HUF 31,000 (?)

Microsoft Corporation – 3 - HUF 118,000

Native Instruments GmbH – 2 - HUF 111,000

Nero AG – 1 – HUF 7,800

Nullsoft Inc – 1 – HUF 4,200

Scawen Roberts, Eric Bailex, Victor van Vlardinggen – 1 - HUF 8,000

Uniblue Systems Limited – 1 – HUF 7,000.”

Further Information

9. Further Information dated 18 February 2023 was provided in relation to these offences as follows:
- i) In relation to offence 14, the Appellant “tried to disguise his identity” and he “imagined a new identity as to be hidden from the victim”. He acted dishonestly as he “filled and signed a postal delivery note as a non-existing person” and “[b]y that conduct he committed the misdemeanour of using a forged private document”. No loss was caused. The conduct “cannot be linked with fraud, but a use of [a] forged private document”;
 - ii) In relation to offence 15(b), the Appellant “tried to disguise his identity” and he “imagined a new identity as to be hidden from the victim”. He acted dishonestly as he “filled and signed a postal delivery note as a non-existing person” and “[b]y that conduct he committed the misdemeanour of using a forged private document”. No loss was caused. The conduct “cannot be linked with fraud, but a use of [a] forged private document”;
 - iii) In relation to offence 16(b) the Appellant “tried to disguise his identity” and he “imagined a new identity as to be hidden from the victim”. He acted dishonestly as he “filled and signed a postal delivery note as a non-existing person” and “[b]y that conduct he committed the misdemeanour of using a forged private document”. No loss was caused. The conduct “cannot be linked with fraud, but a use of [a] forged private document”;
 - iv) In relation to offence 17(b) the Appellant “tried to disguise his identity” and he “imagined a new identity as to be hidden from the victim”. He acted dishonestly as he “filled and signed a postal delivery note as a non-existing person” and “[b]y that conduct he committed the misdemeanour of using a forged private document”. No loss was caused. The conduct “cannot be linked with fraud, but a use of [a] forged private document”;
 - v) In relation to offence 26, the offence occurred in Hungary. The purpose of copying the material “was to use those files without paying royalty”. The Appellant intended to use the copied material “for private use”. Damage was caused to the listed companies as the files “stood under copyright protection and royalty needed to be paid”. There is no information about where the listed companies were located.

The District Judge’s judgment

10. It is unnecessary to refer to the detail of the DJ’s judgment. As I have already indicated, no issue in respect of section 10 of the 2003 Act was raised at the extradition hearing. The judgment notes that the requested person had not engaged with the proceedings. The DJ concluded that AW1 was valid and that there were no bars to extradition or human rights issues. Accordingly, the Appellant’s extradition to Hungary was ordered pursuant to section 21(3) of the 2003 Act.

The conduct comprising the forgery offences

11. An issue was raised during the appeal hearing as to the nature of the conduct described in the forgery offences. Mr Smith submitted that it entailed the Appellant dropping off the relevant parcel at the specified post office and during this attendance obtaining a receipt prepared by a post office worker which gave the false name and the address he had provided and then him returning to the post office subsequently and using the receipt to obtain the cash paid by the recipient of the parcel. In the alternative, he submitted that the level of particularity was insufficient to meet the requirements of section 2 of the 2003 Act, as it was unclear whether the conduct was as he suggested, or concerned a single attendance at the post office as envisaged by Ms Burton.
12. In my judgement, the description provided of the Appellant's conduct is sufficiently clear and related to a single attendance, as I explain in the paragraphs that follow.
13. It is necessary to consider the wording that is used in its context. The offences at 15a, 16a and 17a identify offences of fraud. In short, the Appellant agreed to sell a mobile phone or computer equipment to the aggrieved party in return for an agreed sum to be paid in cash on delivery of the parcel; the sum was duly paid but the parcel was subsequently found to contain a worthless item and the aggrieved parties lost the sums identified. It is, of course, accepted that the dual criminality test is satisfied in respect of this conduct.
14. The conduct described in offences 15b, 16b and 17b, read with the Further Information, is that the Appellant provided a return receipt to the specified post office containing fictitious information as to his name and address in relation to the recorded delivery parcel (described in the limb "a" offence) that he was posting; and this was done to conceal his identity from the recipients of the parcels. For the reasons I identify in the next paragraph, it is sufficiently clear that the conduct identified related to the time when the parcel was posted.
15. Firstly, the wording of offences 15b, 16b and 17b all begin with the phrase "While posting the parcel to be paid in cash..." (emphasis added). Secondly, there is no reference in either AW1 or the Further Information to the Appellant making a second visit to the post office and then using the return receipt as the means of recovering the cash paid by the parcel recipient. Thirdly, in relation to offences 15b and 16b the dates provided make it quite apparent that the Appellant's "use" of the return receipt pre-dated the delivery of the parcel to the aggrieved. Offence 15a says that the parcel was received on 28 July 2010, whereas the conduct relied on in limb 15b is said to have occurred on 27 July 2010. In relation to offence 16, the equivalent dates are 29 July 2010 and 27 July 2010. Looking at the text in isolation, the position in relation to offence 17 is less clear, as the description of the limb "a" offence in AW1 says that the parcel was received by the complainant on 27 June 2010, but the wording of 17b gives a date of 27 July 2010. However, as the Appellant's conduct is said to have occurred "[w]hile posting the parcel to be paid in cash on delivery" it would make no sense for the parcel to have been posted a month after it was received by the aggrieved. Bearing this in mind, along with the structure and content of the companion offences at 15 and 16, I consider it can safely be concluded that there is a typographical error (which appears in the untranslated version of AW1 too) in relation

to either the month that is specified in offence 17a or 17b (so that both should read either 27 June or 27 July 2010).

16. I record for completeness that Mr Smith put forward a range of possible reasons why the position was, or might be, other than as I have just set out. He suggested that the delivery date given in limb “a”. as to when the parcel was received could be a deemed delivery date, later than actual receipt and/or that the money could have been payable to the post office (and held in an account for the Appellant) before the parcel was received by the aggrieved person. However, this is simply speculation and it is not what AW1 says, it refers to the payment of “cash on delivery” and there is no indication that the date specified for the receipt of the parcel is a deemed one, later than the actual time of receipt.
17. As I have noted earlier, offence 14 relates to a single offence, with no equivalent to the offences at 15a, 16a and 17a. Accordingly, it is not said in relation to this parcel that the recipient paid money on its delivery and thereby sustained financial loss. However, as with offences 15b, 16b and 17b, the specified conduct relates to the posting of the item: “At 13:52 of 15 July 2010... [the Appellant]... was positing a parcel to be paid by cash...”; and there is no reference to the receipt containing the false details being used on a subsequent attendance at the post office.
18. Mr Smith raised a further point, namely that it was unclear whether it was said that the Appellant himself had completed the fictitious details on the return receipt, or that he had caused a worker at the post office to do so. However, as the Further Information states in terms that the Appellant “filled and signed a postal delivery note as a non-existing person”, I do not consider that there is any ambiguity in that regard.
19. Mr Smith also suggested that it was unclear whether it was only the name provided by the Appellant that was fictitious, or the address as well. Offence 14 spells out in terms that the address given on the return receipt was a fraudulent indication. As regards Offences 15b, 16b and 17b, I consider that the phrase employed, namely that the Appellant “used the name Akos Falusi as the name of the sender and 7200 Dombovar, Dombo Pal u. 17. Fsz.2 as the sender’s address”, read in context, indicates that both the names and addresses that were provided were fictitious. I also note that the address which the Appellant gave in relation to these offences was a different address to that specified in respect of Offence 14; and also that the address given for the Appellant in the particulars at section (a) in AW1 is in some respects different to the address referred to in relation to these offences.

The legal framework

Test for allowing an appeal

20. As I have indicated earlier, the Appellant does not challenge the DJ’s conclusions in respect of the limited issues that were raised at the extradition hearing, but he now relies upon section 10 of the 2003 Act in respect of the offences that I have identified. Accordingly, pursuant to section 27(2) of the 2003 Act, the court may only allow the appeal if the conditions specified in subsection (4) are satisfied, as follows:

“(4) The conditions are that –

- (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
- (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
- (c) if he had decided the question in that way, he would have been required to order the person's discharge."

Dual criminality

21. The effect of section 10(2) and (3) of the 2003 Act, is that the extradition hearing judge must decide whether the offence specified in the Part 1 warrant is "an extradition offence"; and if that question is decided in the negative the judge must order the person's discharge. Section 65 of the 2003 Act sets out whether a person's conduct constitutes an "extradition offence" where a person has been convicted in a category 1 territory of an offence constituted by the conduct and he has been sentenced for that offence. The parties were agreed that section 65 therefore applied in this instance.
22. Section 65(2) provides that the conduct constitutes an extradition offence if the conditions set out in either subsection (3) or (4) are satisfied. Subsection (3) is the relevant subsection where, as here, the conduct occurred in the category 1 territory. The other relevant conditions are:
 - "(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."
23. No issue is raised in relation to section 65(3)(c) in this instance, the only question for the court to resolve is whether the dual criminality condition in section 65(3)(b) is satisfied. The onus lies on the Respondent to establish this.
24. As explained by the House of Lords in *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920, in determining whether the section 65(3)(b) test is satisfied, the court must examine the conduct particularised in the AW, rather than the elements of the offence(s) of which the requested person has been convicted:
 - "65. ... it is useful to stand back from the detail and recognise the essential choice that the legislature makes in deciding just what the double criminality principle requires. It is possible to define the crimes for which extradition is to be

sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. That is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that there is no mismatch between it and the supposedly corresponding domestic offence. If, however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found.

.....

91. The committee has reached the conclusion that the wider construction should prevail. In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Part 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence..."

25. In *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) at para 57, the then President of the Queen's Bench Division, Sir John Thomas, explained that the facts set out in the AW must not merely enable the inference to be drawn that the requested person did the acts in question with the necessary mens rea for the domestic offence, rather they must be such as to "impel the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged". This applies where, as in this case, an essential ingredient of the English offence is missing from the foreign offence (*Cleveland v USA* [2019] EWHC 619 (Admin)).
26. Whether as a matter of practice the conduct in question would be charged and prosecuted as a particular offence in this jurisdiction does not matter for the purposes of assessing whether the requirement for dual criminality has been met: *Balaz v Slovenia* [2021] EWHC 1862 (Admin) at paras 15 – 16. Mr Justice William Davis J (as he then was) observed that to "go beyond the simple equivalence of conduct and UK offence would involve an investigation wholly outside the requirements of the extradition process. There is no justification for reading down any additional passage into the statutory provisions. They are clear as set out in the statute."

Statutory interpretation: the principles

27. Issues of statutory interpretation arise in relation to the copyright offence. The principles were summarised by Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2002] 2 WLR 343, as follows:

“29. The courts in conducting statutory interpretation are ‘seeking the meaning of words which Parliament used’: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.’ (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained...

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity...

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:

‘The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an

objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation.....”

28. As is well known, reference to Parliamentary material as an aid to statutory construction is only permitted where the pre-conditions identified in *Pepper v Hart* [1993] AC 593 are met, namely that: (i) the legislation is ambiguous, obscure or would lead to absurdity; (ii) the material relied upon consists of one or more statements by a minister or other promoter of the Bill, together with such Parliamentary material as is necessary to understand such statements and their effect; and (iii) the statement relied upon is clear (1061E-F).

The Forgery and Counterfeiting Act 1981

29. The Respondent submits that if it was prosecuted domestically, the conduct described in the forgery offences would in each instance constitute an offence under section 1 of the 1981 Act. Section 1 provides that:

“A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person’s prejudice.”

30. Ms Burton submits that if the Appellant did not “make” the forged instrument, then in any event, he committed the offence contained in section 3 of the 1981 Act:

“It is an offence for a person to use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not do some act to his own or any other person’s prejudice.”

31. Any document, whether formal or informal in character, will amount to an “instrument” for these purposes (section 8, 1981 Act). Mr Smith accepts that the “receipt” referred to in relation to the forgery offences would meet this definition.

A “false” instrument

32. Section 9 of the 1981 Act identifies the circumstances in which an instrument is “false” for these purposes. Ms Burton confirmed she relies upon the circumstances identified in limb (1)(g). However, it is useful to set out subsection (1) in full, in order to see this in context:

“(1) An instrument is false for the purposes of this Part of this Act-

- (a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or

- (b) if it purports to have been made in the form in which it was made on the authority of a person who did not in fact authorise its making in that form; or
- (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
- (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or
- (e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or
- (f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
- (g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
- (h) if it purports to have been made or altered by an existing person but he did not in fact exist.”

(Emphasis added.)

33. It is common ground that a document will not be “false” simply because it contains an untrue statement. As Lord Ackner explained in *R v More* [1987] 1 WLR 1578 (“*More*”) at 1585A, the word “purports” in each of limbs (a) to (h) of section 9(1) imports a requirement that “for an instrument to be false it must tell a lie about itself”. In *Attorney General’s Reference (No 1 of 2000)* [2001] 1 WLR 331 at para 22, Lord Woolf CJ cited the following passage from Laws J’s (as he then was) judgment in *R v Warneford* [1994] Crim LR 753 CA (“*Warneford*”) as explaining this requirement in relation to the (1)(g) limb:

“The expression ‘otherwise in the circumstances in which it was not in fact made’ must, in our judgment, refer to the circumstances of the making of the document just as surely as the references in the sub-paragraph to date and place concern the date and place on or at which the document was made. If, for example, the document on its face purports to have been made in the presence of certain named individuals who in fact were not present at all, it would fall within the sub-paragraph. Likewise, a document whose words purported to have been dictated by a particular person, when it was in fact entirely the work of the writer, would come within the definition. So would a document purporting to have been made at a different time of

the day from its actual making. Other examples may suggest themselves. But in every case the lie in the document must relate to the actual circumstances of the document's making. A lie about other facts, extraneous to the document, does not suffice; such a lie may go in proof of other offences (notably under the Theft Act), but cannot establish forgery. The offences which, under the 1981 Act, require proof of forgery within section 9 are exclusively concerned with the document itself.” (Emphasis added.)

34. Whilst the forgery offences refer to the Appellant using a false name and address on the return receipt, Ms Burton indicated that she did not rely upon limb (1)(h) in light of the House of Lord's decision in *More*. Nonetheless, it is useful to consider their Lordships' reasoning. In that case a cheque drawn in favour of “M.R. Jessell” had come into the defendant's possession. He opened a bank account in the name “Mark Richard Jessell” and paid the cheque into it. He then withdrew a cheque in the sum of £5,000 payable to “M.R. Jessell”, signing the withdrawal form “M.R. Jessell”. The House of Lords allowed his appeal in relation to his conviction for forgery. The withdrawal form was signed by a real person (the defendant), and purported to be signed by the person who had opened and was the holder of the account (also the defendant). The withdrawal form did not purport to have been made by Mr Jessell in whose name the cheque had been drawn to open the account; it made no mention of the cheque. Accordingly, the document had not told a lie about itself and the defendant was not guilty of forgery under section 9(1)(h) (1585E-G).
35. Although the requirement that the document must tell a lie about itself is well-established, the *application* of the test is not always straight forward. A number of the earlier authorities were reviewed by Lord Woolf in *Attorney General's Reference (No 1 of 2000)*. It is necessary to consider this analysis in determining whether the conduct described in the forgery offences is within limb (1)(g).
36. *R v Donnelly (Ian)* [1984] 1 WLR 1017 (“*Donnelly*”) concerned a written valuation of scheduled items of jewellery prepared by the defendant. It contained a statement that the defendant had examined the jewellery and the figures given represented their insurance value. He signed the document and stamped the owner's name and address below his signature. There was no jewellery to be valued and the document was intended to defraud an insurance company. The Court of Appeal upheld the conviction under the “otherwise in circumstances in which it was not made...” limb of section 9(1)(g). At page 1019 Lawton LJ explained that the valuation purported to be made after the defendant had examined the items of jewellery set out in the schedule, when he had not in fact done so as such items did not exist. Lord Woolf analysed this decision at para 15 of his judgment in *Attorney General's Reference (No 1 of 2000)* as follows:
- “...we are mindful of the fact that forgery is unique among fraud offences in that the offence consists in creating the forged instrument...the approach in *Donnelly* can be adopted without going so far as to make *any* instrument which tells a lie about some alleged past fact a forgery. It is of the essence of a valuation that the articles, the subject of the valuation, have been examined. This is because a bona fide valuation requires

some examination of what is the subject of the valuation. The lie in *Donnelly* therefore related to an event which must have occurred before a genuine valuation could be made.” (Emphasis by underlining added.)

37. At paras 18 – 19 of his judgment, Lord Woolf discussed *R v Jeraj* [1994] Crim LR 595, CA (“*Jeraj*”), in which the defendant bank officer wrote a note on the bank’s notepaper saying he had received a letter of credit and had endorsed it. In fact he had neither seen nor endorsed the letter of credit. The note was presented to third parties, who relied upon it in advancing money. Lord Taylor CJ concluded that the circumstances of *Jeraj* were analogous to those in *Donnelly*, which he considered to have been correctly decided; the document purported to say that the writer had received a credit note and given it his endorsement, when there was in fact no credit note and thus he could not have seen it nor endorsed it.
38. Lord Woolf also considered *Warneford*. The case involved a mortgage fraud and the document in question was a letter purporting to be from the employer of the mortgage applicant, confirming that Warneford was employed by this company. In fact he was not so employed. The company was real, but the letter was not signed by anyone who worked there, but by Maloney, a friend of Warneford’s. Lord Woolf noted that the prosecution did not rely on the fact that the document was signed by Maloney using a false name, but on the fact that he was not the defendant’s employer (para 20). The prosecution had argued that this was a “circumstance” in which the document on its face purported to be made, but the Court of Appeal allowed the appeal. Although he endorsed Laws J’s summary of the applicable principle (para 33 above), Lord Woolf disagreed with this application of it, which he attributed to the court being unaware of the decision in *Jeraj* and the court’s endorsement of *Donnelly* therein (paras 21 and 23).
39. Having reviewed these authorities, Lord Woolf summarised the position. At para 24 he said:

“In view of the decision of this court in *Jeraj*...we have come to the conclusion that the decision of *Donnelly*...is still binding upon us. Both *Donnelly* and *Jeraj* should however be restricted in their application so that they only apply where circumstances need to exist before the document can be properly made or altered. If those circumstances do not exist there will then be a false instrument for the purposes of section 9(1)(g). If the circumstances do not exist the document is telling a lie about itself because it is saying it was made in circumstances which do not exist. It follows that *Warneford*...must be regarded as coming to the wrong conclusion on the facts, though we are in agreement with certain of Laws J’s remarks, to which we referred earlier. In each case where we would hold the instrument to be false it could not have been made honestly if the circumstances which we have identified did not exist. Thus in *Donnelly* you could not make a valuation without having seen the jewellery which you purport to have valued. In *Jeraj* there had to be a letter of credit which could be endorsed. In *Warneford* there had to have

been the relationship of master and servant before you could make a reference as an employer relating to an employee. The need for the existence of these circumstances prior to the making of the instrument explains why if the circumstances did not exist the document is telling a lie about itself." (Emphasis by underlining added.)

40. The circumstances in *Attorney General's Reference (No 1 of 2000)* involved a coach driver who had operated the tachograph to show that he had been having a prescribed break and that the coach was being driven by a second driver, when in fact he had continued to drive the vehicle during this period. The trial judge ruled that the defendant's conduct could not amount to an offence under section 9 of the 1981 Act. However, the Court of Appeal held that the tachograph sheet was a false instrument. In order for it to show that a second driver was driving, there had to have been a second driver at the time; and as there was no second driver the record purported to be made in circumstances in which it was not in fact made (para 25).

"Prejudice"

41. The meaning of "prejudice" in sections 1 and 3, is addressed by section 10 of the 1981 Act. As relevant, subsection (1) provides:

"(1) ...for the purposes of this Part of this Act an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs-

(a) will result-

(i) in his temporary or permanent loss of property; or

(ii) in his being deprived of an opportunity to earn remuneration or greater remuneration; or

(iii) in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or

(b) will result in somebody being given an opportunity-

(i) to earn remuneration or greater remuneration from him; or

(ii) to gain a financial advantage from him otherwise than by way of remuneration; or

(c) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty."

42. Subsection (5) provides that “loss” includes “not getting what one might get as well as parting with what one has”.

The Computer Misuse Act 1990

43. The Respondent submits that if it was prosecuted domestically, the Appellant’s conduct described in the copyright offence would constitute an offence under section 1 of the 1990 Act. Section 1(1) provides:

- “(1) A person is guilty of an offence if-
- (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured;
 - (b) the access he intends to secure, or to enable to be secured, is unauthorised; and
 - (c) he knows at the time when he causes the computer to perform the function that that is the case.”

44. Section 17 of the 1990 Act addresses what is meant by “secure access” and by “unauthorised”:

- “(2) A person secures access to any program or data held in a computer if by causing a computer to perform any function he-
- (a) alters or erases the program or data;
 - (b) copies or moves it to any storage medium other than that in which it is held or to a different location in the storage medium in which it is held;
 - (c) uses it; or
 - (d) has it output from the computer in which it is held...
- and references to access to a program or data (and to an intent to secure such access or to enable such access to be secured) shall be read accordingly.

.....

- (5) Access of any kind by any person to any program or data held in a computer is unauthorised if-
- (a) he is not himself entitled to control access of the kind in question to the program or data; and

(b) he does not have consent to access by him of the kind in question to the program or data from any person who is so entitled...”

“Unauthorised” access

45. Mr Smith accepts that section 1(1)(a) is satisfied in relation to the conduct identified in offence 26, in that it entailed the Appellant causing a computer to perform a function with intent to secure access to a program or data. The key question for present purposes is whether the access that the Appellant intended to secure was “unauthorised” within the meaning of subsection (1)(b).
46. Although his earlier written materials had raised the point, at the appeal hearing, Mr Smith accepted that in light of the authorities that I had drawn to counsel’s attention to in advance of the hearing, the section 1 offence is not confined to what is commonly referred to as hacking. Mr Smith acknowledged that it was not necessary for the unauthorised access to relate to another person’s computer and he accepted that the offence could arise in circumstances where a person obtained unauthorised access to a program or data held on their own computer.
47. In *Attorney General’s Reference (No.1 of 1991)* [1993] QB 94 the defendant had keyed commands into a computer and thereby obtained via the same computer, a discount to which he was not entitled, on goods being purchased at a supplier. The Court of Appeal rejected a submission that “held in any computer” in section 1(1)(a) of the 1990 Act should, in effect, be read as “held in any other computer” or as “held in any computer except the computer which has performed the function”. Giving the judgment of the court, Lord Taylor CJ said (at 99H – 100G):

“To read those words in that way, in our judgment, would be to give them a meaning quite different from their plain and natural meaning. It is a trite observation, when considering the construction of statutes, that one does not imply or introduce words which are not there when the plain and natural meaning is clear. In our judgment there are no grounds whatsoever for implying, or importing the word ‘other’ between ‘any’ and ‘computer’, or excepting the computer which is actually used by the offender from the phrase ‘any computer’ at the end of the subsection (1)(a).

Mr Lassman sought to suggest that this offence was aimed solely at hacking, and hacking, which is a word that finds no place in the Act, he says, means using one computer to access another. He submits that the true purpose of this Act was to meet the mischief of hacking as he defines it...

.....

However...we are satisfied that the plain natural meaning of section 1(1) was that contended for by the Attorney-General. In support of that Mr. Moses pointed to the surprising, and indeed unlikely, lacunae which this Act would have left in the field of

interference with computers if the construction for which Mr Lassman contends were correct. He pointed out that there would be nothing in the Act to meet what is itself a mischief frequently encountered today, namely, industrial espionage or obtaining information as to security details or other confidential information which may be stored on a company's computer. In none of those cases could it be said that, if one entered the premises and caused a computer to exercise a function so as to reveal information, there had been access via one computer into another. Accordingly, if Mr Lassman is correct, that kind of activity going straight to the in-house computer and extracting confidential information from it could be committed with impunity so far as the three offences in this Act are concerned.

We find that a persuasive argument, should we need any further persuasion beyond the plain wording of the Act.”

48. In *R v Bow Street Metropolitan Stipendary Magistrate ex parte Government of the United States of America* [2000] 2 AC 216 (“*Bow Street*”) the accused’s extradition was sought in relation to allegations that he had conspired to obtain account information with an employee of a charge card company, who was authorised to access its computer records solely for the purposes of her employment, but the accused had used this information to encode forged credit cards, so as to draw sums of money from automatic teller machines. The House of Lords reversed the decision that the conduct of the employee (the alleged co-conspirator) did not amount to an offence under section 1(1) of the 1990 Act. Giving the leading speech, Lord Hobhouse indicated (at 223E-F) that the conduct of the employee came “fairly and squarely” within the provisions of section 1(1).
49. At 225E-F and 2266F, Lord Hobhouse explained that the Divisional Court had fallen into error in treating the concept of controlling access in section 17(5)(a) as relating to whether there was access at a particular “level”, rather than to whether there was access to the particular program or data; and in confining section 1 to situations involving the “hacking” of computer systems “as opposed to the use of a computer to secure unauthorised access to programs or data”. He observed that the court had failed to give effect to the plain words of section 1 which were “clear and unambiguous”.
50. In arriving at these conclusions, Lord Hobhouse rejected a submission based on the Law Commission’s Working Paper No. 110 on “Computer Misuse” and its subsequent report, “Computer Misuse” (Law Com. No. 186) (1989) (Cm. 819), saying at 227B:

“Read as a whole, the report makes it clear that the term ‘hacking’ is used conveniently to refer to all forms of unauthorised access whether by insiders or outsiders and that the problem of misuse by insiders is as serious as that by outsiders: paragraph 3.5. The offence should cover a person who causes the computer to perform a function when he ‘should know that that access is unauthorised’: paragraph 3.33 (emphasis added)...

...The consideration of the mischief which the Act was designed to meet confirms and does not contradict the clear meaning of section 1 of the Act and the equally clear purpose of section 17(2) and (5).”

51. When addressing the elements of section 17(5) and the concept of “unauthorised”, Lord Hobhouse noted that the subsection laid down two cumulative requirements. At 224B-E he said:

“The first is the requirement that the relevant person be not the person entitled to control the relevant kind of access. The word ‘control’ in this context clearly means authorise and forbid. If the relevant person is so entitled, there it would be unrealistic to treat his access as being unauthorised. The second is that the relevant person does not have the consent to secure the relevant kind of access from a person entitled to control, i.e. authorise, that access.

Subsection (5)...also makes clear that the authority must relate not simply to the data or programme but also to the actual kind of access secured. Similarly, it is plainly not using the word ‘control’ in a physical sense of an ability to operate or manipulate the computer and that is not derogating from the requirement that for access to be authorised it must be authorised to the relevant data or relevant programme or part of a programme...”

Dual criminality and the forgery offences: discussion and conclusions

The parties’ submissions

52. Although permission had not been granted on this ground, Mr Smith suggested that the forgery offences were insufficiently particularised in light of the issue about the nature of the conduct which arose at the appeal hearing. I have already explained why I reject that contention (see paras 11 – 19 above).
53. As regards the dual criminality issue, the Respondent contends that the conduct described in respect of the forgery offences would constitute domestic offences under section 1 and/or section 3 of the 1981 Act, on the basis that the receipts provided by the Appellant in relation to the parcels were false instruments within the meaning of section 9(1)(g), as they purported to be made in circumstances in which they was not made, namely that the sender was the person who’s name and address was set out in the receipts, when those details were fictitious. Ms Burton said that in completing the receipts with these fictitious details the Appellant indicated that this was the person and the place that the parcels could be returned to (in the event that they were not accepted by the respective addressees or there were difficulties with delivery).
54. In terms of the other elements of the 1981 Act statutory definitions, Ms Burton submitted that the conduct described involved the Appellant intending that the receipts be used to induce the addressees of the parcels to accept them and in so doing to act to their prejudice as the fictitious details meant that they would be unable to

return the parcels upon discovering their worthless contents. She suggested in the alternative, that the domestic offence was made out via the same prejudice, if the post office workers who accepted the parcels for onward delivery, were regarded as the persons who the Appellant intended to induce to accept the receipts as genuine.

55. For the Appellant, Mr Smith disputed that the receipts told a lie about themselves and thus were false instruments within the meaning of the 1981 Act. He submitted that the circumstances did not fall within the test identified in *Attorney General's Reference (No 1 of 2000)*. Before the receipts could be made, there needed to be the parcels and a sender, both of which did in fact exist, so that there was no lie told in these respects. In contrast, the sender's name and address (the fictitious details on the receipts), did not have to exist for those documents to come into being. The receipts attested to the sending of the parcel, not to the name of the person who did so. In addition, Mr Smith emphasised the Respondent's acceptance that section 1(1)(h) would not apply to these circumstances and that in *Warneford* the prosecution did not seek to rely upon the fact that the instrument had been signed in a false name, in seeking to show that the circumstances of that case were within section 1(1)(g) (para 38above).
56. As regards the other elements of the domestic offence, Mr Smith disputed that the Appellant's conduct involved an intention to induce action that would be to another person's "prejudice". He said that the definition of "prejudice" in section 10 of the 1981 Act confined the concept to circumstances involving loss of property or the opportunity to earn remuneration or to gain a financial advantage, and the inability to return a worthless parcel did not come within this concept. He emphasised that the losses occasioned by the frauds themselves were the subject of the separate offences numbered 15a, 16a and 17a and that those losses would still have arisen whether or not correct details of the sender were provided on the receipts. No additional loss was sustained as a result of the recipients being unable to return the parcels to the Appellant.

Conclusions

57. In my judgement, the Respondent has not established that the conduct described in the forgery offences would constitute offences under sections 1 or 3 of the 1981 Act. I have identified the relevant conduct at paras 12 – 19 above. As I explained at that stage, I draw no material distinction between the conduct described in respect of offences 14, 15b, 16b and 17b. I reiterate that it is accepted that the dual criminality test is satisfied in respect of the related fraud offences (offences 15a, 16a and 17a of AW1), whereby the Appellant secured payment from the aggrieved parties for the purchase of mobile phones or computer equipment but sent them parcels of worthless items. I am solely concerned with the conduct described in the forgery offences in respect of the Appellant's use of false particulars on the recorded delivery receipts.
58. I accept the Appellant's submissions that the Respondent has failed to show both that: (i) the receipts in question were false instruments within the meaning of the 1981 Act; and (ii) he intended to use the receipts to induce their acceptance as genuine and thereby cause another to act, or not act, to their prejudice or to the prejudice of another. The Respondent would have to establish both of these elements of the statutory definition to show that an offence under domestic law would arise. I will address them in turn. Before doing so, I indicate for completeness, that whilst I have decided that the conduct in question involved the Appellant providing the receipts

(para 18 above), my conclusions would apply equally if the correct provision to consider is section 3, rather than section 1, of the 1981 Act, on the basis that the Appellant used receipts prepared and provided by the post office workers (from details that he had given).

No false instrument

59. I have summarised the case law and the applicable test for whether an instrument is “false” within the meaning of section 9(1) of the 1981 Act at paras 33 – 40 above. In light of the clear conclusion I have reached in respect of the Appellant’s described conduct, it is unnecessary for me to resolve Mr Smith’s broader suggestion that where the alleged falsity relates to the instrument purportedly having been made by an existing person who did not in fact exist, the circumstances must come within section 9(1)(h), if they are to come within section 9(1) at all, so that section 9(1)(g) cannot be used as a means of circumventing the effect of the House of Lords’ decision in *More* (para 34 above). There may well be force in this point; I note from 1580E-F that the second point of law of general public importance that was before their Lordships was not confined to section 9(1)(h) and was expressed in the following terms:

“If a defendant has opened an account with a stolen cheque, in a name he has adopted for that purpose because it matches the name shown on that cheque as that of its lawful payee, does he make a ‘false instrument’ as defined in section 9 of the Forgery and Counterfeiting Act 1981 by signing that same name on a document authorising the removal of money from the account which he has opened and if so under which paragraph of section 9(1)?”

In addition to considering the applicability of subsection (1)(h), Lord Ackner observed that the Court of Appeal had rightly held that the withdrawal form did not come within either subsection (1)(a) or (1)(c) (at 1585C). It does not appear that section 9(1)(g) was suggested or discussed as a candidate.

60. In any event, on the *assumption* that it could potentially apply in circumstances where Ms Burton concedes that section 1(1)(h) does not, it is apparent that the requirements of section 9(1)(g) are not met in this instance.
61. As Mr Smith submitted, whilst on the conduct described, the receipts contained false information about extraneous matters (the sender’s name and address), these documents did not tell a lie about themselves, that is to say a lie about the circumstances of their making. Accordingly, the requirements identified in *Warneford* and in *Attorney General’s Reference (No 1 of 2000)* (paras 33 and 39 above) are not met. As the latter case explained, for the purposes of section 9(1)(g), the statutory definition is met where circumstances need to exist before the document can be made and the document itself tells a lie about the existence of those circumstances. This was the case in relation to the non-existent jewellery for the valuation in *Donnelly* (para 36 above) and for the note in *Jeraj* given the defendant had never in fact seen or endorsed a letter of credit. In other words the existence of these circumstances, which were falsely stated in the instrument to exist, was a pre-condition to the making of the relevant instrument. The conduct of the Appellant in respect of the forgery offences is not analogous. As Mr Smith submitted, there needed to be a parcel and a sender for

the receipt of recorded delivery to come into existence, but both did in fact exist. However, the sender's particular name and address were not matters that needed to exist before the receipts were made. In short, whilst the receipts contained false information about those details, they did not tell a lie about their making.

Absence of the requisite intention

62. The second, and free-standing, reason why the Respondent's dual criminality argument fails, is that I am not satisfied that the Appellant's conduct as described in the forgery offences in AW1 and the Further Information shows that he intended that the receipt be used to induce somebody to accept it as genuine and thereby do or not do an act to their own or another person's prejudice. As I have already noted, the description of the conduct in question must be such as to impel the inference that the necessary *mens rea* for the domestic offence exists (para 25 above). That is not the case here.
63. The Further Information refers to the Appellant's intention in providing the fictitious information to thereby disguise his identity and to hide from his victims (para 9 above). However, this really says no more than that he gave false particulars in order to try and avoid detection for the frauds he committed in sending worthless items in the parcels. There is no clear articulation of an intention that satisfies the domestic statutory definition or of circumstances that impel an inference to that effect. Furthermore, I accept Mr Smith's submissions, which I have already set out at para 56 above and do not need to repeat, that an intention to avoid the recipients being able to return the parcels does not in these circumstances in itself constitute "prejudice" to those individuals within the meaning of the definition of this concept in section 10.

Dual criminality and the copyright offence: discussion and conclusions

The parties' submissions

64. Ms Burton submitted that the conduct described in offence 26 of AW1 and the related Further Information amounted to an offence under section 1 of the 1981 Act. She said that the conduct involved the Appellant using his own computer (the Acer notebook) to obtain unauthorised access to the specified copyrighted material which he had copied illegally onto the hard disc. Therefore, in the words of section 1, he had used his computer to "secure access to any program or data held in any computer". Further, that this access was "unauthorised" within the meaning of sections 1(1)(b) and 17(5) because the material had been copied illegally; and that by the nature of these actions, the Appellant must have been aware that this was the case at the time. She emphasised that offence 26 stated he had copied the programs "illegally", and the indication in the Further Information that the files stood under copyright protection and the Appellant had not paid the necessary royalties. Ms Burton submitted that the circumstances therefore came within the natural and ordinary meaning of the words used in section 17(5); the Appellant did not control access to the copyrighted programmes and he did not have consent to access them from those who did.
65. I have already noted that Mr Smith did not maintain the submission advanced in his skeleton argument that "unauthorised" access for these purposes was confined to hacking (para 46 above). However, he submitted that the Respondent had failed to prove to the criminal standard that the Appellant's access was "unauthorised", as it

was not clear that the absence of authority from the owner of the copyright in a program, as opposed to the owner of the program, amounted to a lack of consent from a person who was entitled to control access to the program within the meaning of section 17(5). He gave the example of a friend who had purchased the relevant programs and then permitted the Appellant to copy them. He suggested that the statutory wording was ambiguous and that in these circumstances it was necessary to consider the purpose of the legislation and the mischief that it was aimed at addressing. In this regard he relied upon a number of materials which I consider in turn from para 72 below. The central thrust of his argument was that the extent to which Parliament intended to criminalise the use of computer software in breach of copyright protection was addressed in the Copyright, Designs and Patents Act 1988 (“the 1988 Act”) and as copying for the purposes of non-commercial private viewing of copyrighted material was not made an offence under that legislation, Parliament cannot have intended such activities to have been criminalised by section 1 of the 1990 Act.

66. Ms Burton submitted by way of response to Mr Smith’s central point that the fact that certain conduct was not made an offence under an earlier statute, did not in itself preclude it from constituting an offence under subsequent legislation.

Conclusions

67. I conclude that the Respondent has failed to establish that the conduct described in offence 26 of AW1 and in the related Further Information would constitute an offence domestically under section 1 of the 1990 Act.
68. As I indicated earlier, the Appellant accepts that the copying of the specified copyrighted programs onto the hard disc of his Acer notebook and/or then using the programs on this computer amounted to causing a computer “to perform any function with intent to secure access to any program or data held in any computer” within the meaning of section 1(1)(a), and he no longer maintains that the domestic offence is confined to hacking (paras 45 – 47 above). The question for me is whether the Respondent has shown beyond reasonable doubt that the access he intended to secure was “unauthorised” within the meaning of section 1(1)(b) and that the Appellant knew this at the time, as required by section 1(1)(c). I have already set out the statutory provisions and summarised the material case law. To establish that access is “unauthorised” two cumulative requirements must be satisfied, as the House of Lords explained in *Bow Street* (para 51 above). Mr Smith suggested that neither of these requirements was satisfied.
69. As regards section 17(5)(a), Mr Smith submitted that as the Appellant was both legally and physically in possession of his computer and was able to open it and physically control access to it, he was “entitled to control access of the kind in question to the program”. However, I do consider that this aspect of his submission is precluded by the House of Lords’ analysis in *Bow Street*, which I have set out earlier. As Lord Hobhouse explained, the word “control” is not used in the physical sense of an ability to operate or manipulate the relevant computer; and it requires the existence of an authority not simply in relation to the data or program, but to the actual kind of access secured (para 51 above). The employee in *Bow Street* was physically able to access the customer’s accounts but, crucially, she did not have permission from her employer to do so. The Appellant does not suggest that he had “control” in the sense

explained by Lord Hobhouse of having an entitlement to authorise or forbid copying or use of the specified programs.

70. Mr Smith's submissions focused more upon the section 17(5)(b) requirement. He submitted that none of the decided appellate authorities had determined or even suggested that the owner of the copyright in a computer program was a person who was "entitled to control access" to the copying or use of it in the sense used in this provision. In *Bow Street* the person regarded as entitled to control access was the owner of the program and/or the data in question. This was also the case in the examples discussed by Lord Taylor in *Attorney General's Reference (No 1 of 1991)* (para 47 above). Ms Burton submitted that it was sufficient that the Appellant had obtained the programs in question "illegally", however, in my view this does not resolve the question of whether the owner of the copyright in such a program is someone who was "entitled to control" the Appellant's access to it via his computer. Furthermore, there is force in Mr Smith's point that the circumstances in which the Appellant came to copy the programs are unknown. If, for example, he was permitted to copy them by a friend who had purchased the programs legitimately, it could be said that the friend was someone who was "entitled to control access of the kind in question to the program" and had given his consent.
71. As I have already touched on, Mr Smith relied upon a number of materials which he said illuminated the purpose of the legislation and, thus, the meaning of the words used in section 17(5). I will refer to these in turn. I mention for completeness that at the appeal hearing Mr Smith indicated that he no longer relied upon a document from the House of Commons library, the Westminster Debate Pack on the Computer Misuse Act dated 14 April 2022, which was included in the authorities bundle.
72. Mr Smith referred to Hansard in relation to the debate in the House of Lords on 15 May 1990 where Viscount Colville of Culross moved that the Computer Misuse Bill be read a second time. However, I do not consider that this material satisfies the *Pepper v Hart* criteria (para 28 above). Viscount Colville referred to the objective of clause 1 (now section 1) as being to deter deliberate, unauthorised access or attempts to gain access to computers. He indicated that: "[t]o some extent that is hacking but it may also include those insiders who are authorised to use some parts of the computer system but who go beyond their remit", if the conduct was intentional. However, it is apparent from what was said, both in this passage and from the speech more generally, that this was not an attempt to give an exhaustive description of the conduct that was caught by clause 1, as opposed to a fairly brief summary. Moreover, the specific issue regarding breach of copyright was not explicitly addressed. In the circumstances, this material does not satisfy the third *Pepper v Hart* requirement of clarity in respect of the point in issue.
73. Mr Smith also relied upon the Law Commission's Working Paper No. 110, "Computer Misuse". As confirmed by Lord Hodge in *R (O) v Secretary of State for the Home Department* such a document may disclose the background to the statute, provide context and assist the court in identifying the mischief which the statute addresses and the purpose of the legislation (para 27 above). I have therefore had regard to this document. However, I have found it affords limited assistance to the matter under consideration.

74. I have already explained that the House of Lords in *Bow Street* did not find that the Working Paper supported the accused's submission that the section 1 offence was, in effect, confined to hacking (para 50 above). I appreciate that Mr Smith raises a different point, which, as refined, is focused upon the extent to which, if at all, the statutory offence applies to accessing a computer program in breach of copyright. However, I do not consider that the sole passage he drew attention to, namely para 3.41, takes matters very much further. Under the heading "Unauthorised Copying of Data or Software" the document briefly notes that the unauthorised copying of computer programs is before Parliament in connection with reform of copyright law in the Copyright, Designs and Patents Bill 1988, which, will, if enacted, "provide a complete new code to deal with rights in computer software". However, the Working Paper was completed on 11 August 1988 and page 2 of the document indicates that it does not represent the final views of the Law Commission, expressed therein in advance of consultation. Mr Smith did not rely upon the subsequent 1989 Law Commission report on "Computer Misuse" which was also before their Lordships in *Bow Street*. Nor did he draw my attention to any other materials relating to the enactment of the 1988 Act.
75. I turn to the 1988 Act itself. As I have already noted, Mr Smith submits that if and to the extent that Parliament intended to criminalise the use of computer software in breach of copyright protections, the offending conduct would be covered by this statute. In this regard he notes that section 107 of the 1988 Act imposes criminal liability for infringing copyright where this is done for sale or hire or in the course of a business, whereas the Further Information accepts that the Appellant authorised the programs in question "for private use".
76. In terms of the 1988 Act offences, section 107(1) provides:
- “(1) A person commits an offence who, without the licence of the copyright owner –
- (a) makes for sale or hire; or
 - (b) imports into the United Kingdom or otherwise than for his private and domestic use, or
 - (c) possesses in the course of a business with a view to committing any act infringing the copyright, or
 - (d) in the course of a business –
 - (i) sells or lets for hire, or
 - (ii) offers or exposes for sale or hire, or
 - (iii) exhibits in public, or
 - (iv) distributes, or
 - (e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,

an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work.”

77. In addition, section 107(2) provides for offences relating to articles designed or adapted for making copies of a copyrighted work that is to be used for making copies for sale or hire or for use in the course of a business. Section 107(2A) creates an offence of infringing copyright by communicating the work to the public for the purposes of making a gain or knowing it will cause loss to the owner of the copyright.
78. I accept that the terms of the 1988 Act and, in particular, what it does and does not criminalise are relevant to the issue before me as to whether access to a computer program in breach of copyright is unauthorised access for the purposes of the 1990 Act, in that it provides context, which may in turn shed light on the purpose of the later legislation and might point to there being ambiguity or uncertainty (as envisaged by Lord Hodge in the passages I have already cited). I also note that at para 24.5 of *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition), the authors indicate that: “[i]n order to understand the meaning and effect of a provision in an Act it is essential to take into account the state of the previous law and, on occasion, its evolution”.
79. However, the degree of assistance that this can provide is limited in circumstances where I have no material regarding the 1988 Act other than the Act itself and thus I am not, for example, aware of any potentially admissible contemporaneous material which may shed light upon why breach of copyright for private purposes was not in general criminalised by this Act or the extent to which specific consideration was given to the position in relation to accessing copyrighted computer programs. Furthermore, an understanding of the position at the time when the 1988 legislation was enacted would not in itself preclude a change of view on the part of Parliament by the time that the 1990 Act was passed.
80. I therefore return to the 1990 Act itself, reminding myself of the primacy that is to be accorded to the words of the statute itself. Whilst I accept that whether as a matter of practice the conduct in question would in fact be charged as a crime in this jurisdiction does not matter for the purposes of assessing whether the dual criminality test is satisfied (para 26 above), it is striking that the Respondent’s case in relation to the conduct described in offence 26, if accepted, would involve what appears to be a very substantial extension to the way that the scope of the offence in section 1 of the Act has been understood thus far. The Respondent is unable to point to any earlier case law, judicial observation or academic commentary which indicates that the section 1 offence encompasses accessing a computer program in breach of copyright. Furthermore, in light of the observations I have set out in para 70 above, I do not consider that it is clear from the wording of section 17(5) itself whether it was Parliament’s intention (objectively assessed) that the holder of the copyright in a computer program is a person who is “entitled to control access” to the copying and/or use of that program and who is able to give (or withhold) consent to the access, in particular in circumstances where the lawful owner of the program may themselves have consented to the access in question.
81. Accordingly, I am not satisfied that the Respondent has shown beyond reasonable doubt that the conduct described in offence 26 of AW1, read with the Further Information, involves the Appellant intending to secure “unauthorised” access to the

programs within the meaning of section 1(1)(b) of the 1990 Act. In addition, it follows from this that I am not satisfied that the Respondent has established the additional requirement contained in section 1(1)(c), namely that the Appellant knew at the relevant time that his access was unauthorised. Whilst I accept that the Appellant must have known that he had copied the programs without paying for them, it does not follow from this that it can safely be inferred that he must have known that his access was “unauthorised” in the sense that I have just discussed, in particular in circumstances where it is not known from the stated facts whether or not the owner of those programs afforded him access.

82. For the avoidance of doubt, I have not expressed a definitive view on the question of whether in certain circumstances the owner of the copyright in a computer program could be regarded as “entitled to control access” to the program within the meaning of section 17(5) of the 1990 Act. It is sufficient for present purposes that the Respondent has not satisfied me that the conduct described in the copyright offence would constitute a criminal offence under domestic law.

Overall conclusion and outcome

83. For the reasons that I have explained above, the Respondent has not satisfied the requirements of section 65(3)(b) of the 2003 Act in that it has not been established that the Appellant’s conduct described in the forgery offences or his conduct described in the copyright offence would constitute criminal offences under domestic law. In the circumstances, the appeal is allowed; the offences numbered 14, 15b, 16b, 17b and 26 in AW1 are not “extradition offences” and the Appellant is entitled to be discharged in respect of these offences. It is accepted that the Appellant will be extradited in relation to his other convictions that were not the subject of this appeal.
84. Counsel will have an opportunity to consider the appropriate terms of an order after circulation of the judgment in draft.