Press Summary

12 February 2025

El-Khouri (Appellant) v Government of the United States of America (Respondent)

[2025] UKSC 3

On appeal from [2023] EWHC 1878

Justices: Lord Reed (President), Lord Lloyd-Jones, Lord Briggs, Lord Leggatt and Lord Stephens

Background to the Appeal

This appeal arises out of a request from the United States of America to extradite Mr El-Khouri, a dual UK / Lebanese national living in the United Kingdom. The extradition request in essence accuses Mr El-Khouri of insider dealing. He is alleged to have made substantial payments to a middleman to obtain confidential inside information about prospective mergers and acquisitions of companies listed on US stock exchanges and then used this information to trade in contracts for difference for profit. The middleman, who was also based outside the United States, is alleged to have obtained the information from two analysts, each working in the London office of an investment bank. Mr El-Khouri allegedly paid the middleman in cash and benefits, including payment for a yacht in Greece, a chalet in France and on two occasions a hotel room in New York. He is alleged to have entered into the contracts for difference with a broker in the United Kingdom. Although their value was tied to movements in the prices of shares in US companies, those contracts did not involve ownership of the underlying shares and were not traded in the United States.

It is accepted that if the conduct alleged against Mr El-Khouri were proved in a trial in the United Kingdom, it could amount to insider dealing contrary to the Criminal Justice Act 1993 ("**the CJA 1993**"). At his extradition hearing, however, Mr El-Khouri argued that the alleged conduct did not constitute an offence for which he could be extradited because it failed to satisfy the requirement of double criminality in section 137 of the Extradition Act 2003 ("**the 2003 Act**"). Broadly stated, the double criminality rule requires the conduct alleged in the extradition request to constitute a crime under the law of both the requesting and the requested state. The District Judge rejected his argument, finding that the double criminality test in section 137(3)(b) was satisfied. The High Court dismissed Mr El-Khouri's appeal. It nonetheless certified the following point of law of general public importance: "Was the High Court's approach to whether the Appellant's alleged conduct constituted an 'extradition

offence' correct, having regard to the requirements of section 137(3)(b) of the Extradition Act 2003?" Mr El-Khouri appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal, orders the discharge of Mr El-Khouri and quashes the order for his extradition. The correct test of double criminality to apply to the conduct alleged in the United States' extradition request is section 137(4)(b) of the 2003 Act, not section 137(3)(b), because all the relevant conduct occurred outside the United States. Applying that test, in corresponding circumstances Mr El-Khouri's conduct would fall outside the territorial scope of the offence of insider dealing under the CJA 1993 (and any other relevant domestic law offence). Lord Lloyd-Jones and Lord Leggatt give the judgment, with which the other Justices agree.

Reasons for the Judgment

Section 137 of the 2003 Act determines whether a person's conduct constitutes an extradition offence. It gives effect to the double criminality rule by way of separate tests depending on whether the conduct occurs *in* the requesting state's territory (section 137(3)) or *outside* the requesting state's territory (section 137(4)). Given this binary distinction, sections 137(3) and 137(4) are clearly intended to be mutually exclusive categories. It is necessary to allocate each case to one or the other **[23]-[24], [83]**.

In *Cando Armas* [2005] UKHL 67, the House of Lords considered how to allocate cases where the conduct alleged in the extradition request occurs across national borders. The leading judgment held that, in relation to a provision materially identical to section 137(3)(a), it is not a requirement that the relevant conduct occur exclusively in the territory of the requesting state **[25]-[28], [83]**. Lord Hope, however, additionally considered whether a person must be within the territory of the requesting state at the time of the conduct which he is alleged to have committed. In his view, which he based on the common law rules governing territorial jurisdiction in criminal cases, conduct occurs "in" the requesting state even if the person is not physically present in the territory, provided that effects of their conduct are intentionally felt there. These observations did not form part of the necessary reasoning in *Cando Armas* and appear not to have been based on any argument made by the parties in that case **[29]-[31]**.

Relying on Lord Hope's observations in *Cando Armas*, the United States has argued in these proceedings that, as effects of Mr El-Khouri's actions were likely to have been felt on US markets, the alleged conduct occurred "in" the United States and therefore came within section 137(3). The lower courts accepted that premise and found that the test of double criminality in section 137(3)(b) was satisfied **[34]-[36]**. That test asks whether the conduct specified in the extradition request would constitute an offence under UK law if it occurred in the United Kingdom. It requires transposing all the acts done in the territory of the requesting state to the United Kingdom and considering whether, in that situation, there would be an offence under domestic law. In the present case, no transposition would be necessary because almost all the alleged acts in fact occurred in the United Kingdom. The lower courts were correct to reject the argument that, for the purposes of section 137(3)(b), all acts that occur outside the requesting state must be treated as occurring outside the United Kingdom. The language of section 137(3)(b) cannot be read as permitting any transposition in the opposite direction **[37]-[40], [48]**. If the allocation of this case to section 137(3) was correct, the conduct would satisfy the conditions for an extradition offence **[38]**.

However, the reliance on section 137(3) was flawed from the outset. The interpretation of section 137(3)(a) as extending to conduct that occurs outside the requesting state's territory so long as its intended effects are felt within the territory is mistaken for three reasons: it does not

accord with the statutory language; it renders unworkable the distinction between the mutually exclusive categories in sections 137(3) and 137(4); and it is based on an unjustified assumption that the extradition scheme must be construed in the context of the common law rules governing territorial jurisdiction in criminal cases **[49]-[64]**. The only way to make sense of the binary categories in sections 137(3) and 137(4) is to follow the normal and natural meaning of the word "conduct", which is concerned solely with where the physical acts were done and not with where any effects of those acts (intended or otherwise) were felt **[56]**. For this purpose, conduct occurs in the requesting state's territory if the requested person physically carries out the acts in that territory, ignoring mere narrative background and focusing on the substance of the alleged criminality **[51], [64], [83]**.

In this case, the substance of Mr El-Khouri's alleged criminality occurred in the United Kingdom **[32]-[33], [66]**. The only act which allegedly occurred in the United States was payment for the middleman's hotel room in New York, but the places where the various benefits were enjoyed are purely incidental details **[66]**. The case is therefore properly allocated to section 137(4)(a), conduct that occurs outside the requesting territory **[67]**.

In contrast with the test of double criminality in section 137(3)(b), the language of "corresponding circumstances" in section 137(4)(b) does require transposition in both directions, that is, conduct which occurred in the United Kingdom must be transposed outside the United Kingdom to construct a mirror image of what in fact occurred **[41]**. The more demanding test for this category of cases is a necessary safeguard against exorbitant claims where the requesting state seeks to exercise extra-territorial jurisdiction **[43]**. Treating all the acts that occurred outside the United States in this case as having occurred outside the United Kingdom, the conduct would not constitute the offence of insider dealing under the CJA 1993. The territorial scope of that offence is confined to circumstances where the dealing, the regulated market on which the dealing occurs or the intermediary were within the United Kingdom, none of which is satisfied on the facts **[69]-[71]**.

The Supreme Court also rejects alternative arguments made by the United States that the conduct alleged in the extradition request would amount either to an offence of fraud or to an offence of money laundering under section 329 of the Proceeds of Crime Act 2002. The transposed facts fall outside the territorial scope of both offences. In relation to the latter, the decision in *R v Rogers* [2014] EWCA Crim 1680 failed to recognise that section 340(11) of that Act neither creates an offence itself nor changes the territorial scope of the offence in section 329, but simply provides a definition of "money laundering" for the purposes of separate disclosure offences. That case was wrongly decided **[72]-[82]**.

References in square brackets are to paragraphs in the judgment.

NOTE:
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: Decided cases - The Supreme Court