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CLIENT ALERT

U.K. Supreme Court limits the extra-territorial reach of substantive money laundering offences

May 15, 2025

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In an important judgment handed down on 12 February 2025, the U.K. Supreme Court has redefined the territorial scope of the primary money laundering offences under sections 327 to 329 of the Proceeds of Crime Act 2002 ("POCA"). Overturning longstanding (and controversial) Court of Appeal authority, the Supreme Court decided in *El-Khouri v Government of the United States of America*[1] that the substantive money laundering offences do not have extra-territorial effect. Now, money laundering has to take place in the U.K. to be prosecuted in the English courts.

[1] [2025] UKSC 3.

BACKGROUND

The substantive money laundering offences in ss.327-329 POCA comprise:

- concealing, disguising, converting and transferring criminal property, and removing criminal property from England and Wales, Scotland or Northern Ireland (s.327);
- entering into or becoming concerned in an arrangement known or suspected to facilitate the acquisition, retention, use or control of criminal property by or on behalf of another person (s.328); and
- acquiring, using and having possession of criminal property (s.329).

"Criminal property" is property that constitutes or represents a benefit from criminal conduct, where the alleged offender knows or suspects that it constitutes or represents such a benefit. "Criminal conduct" is conduct which constitutes an offence in any part of the U.K. or would constitute an offence in any part of the U.K. if it occurred there. The underlying ("predicate") offence giving rise to criminal property therefore does not need to have taken place in the U.K. POCA does not, however, specify the jurisdictional reach of the ss.327-329 offences.

Extra-territoriality prior to *El-Khouri*

For the past decade, the leading authority on the territorial scope of ss.327-329 POCA was the Court of Appeal's decision in *R v Rogers*[2].

Mr Rogers, a U.K. citizen living in Spain, had allowed money that had been obtained from defrauding people in the U.K. to be paid into and then withdrawn from his Spanish bank account. Although all the relevant acts constituting money laundering had taken place in Spain, and in relation to a Spanish bank account, he was convicted of "converting" criminal proceeds under s.327 POCA.

The Court of Appeal concluded that the English courts had jurisdiction to convict Mr Rogers of money laundering on the basis, in particular, of another provision of POCA: s.340(11). That provision defines "money laundering" as acts which: (a) constitute an offence under ss.327-329; (b) constitute an attempt, conspiracy or incitement to commit such an offence; (c) constitute aiding, abetting, counselling or procuring the commission of such an offence; or (d) "*would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom*." The Court of Appeal held that s.340(11)(d) "appears to admit of no other construction than that Parliament intended extra-territorial effect to this legislation."

The *Rogers* judgment has received considerable criticism even while it was followed in a series of High Court decisions. It created significant uncertainty about the scope of the jurisdictional nexus required in money laundering cases and (as explained below) was based on an error in the law. In a 2019 review, the Law Commission suggested that either *Rogers* should be overturned or POCA should be amended to clarify the position.

[2] [2014] EWCA Crim 1680.

The decision in El-Khouri

Fortunately, the Supreme Court has had the opportunity to reassess this issue, siding with the critics of Rogers. The acts constituting money laundering now have to take place in the U.K. for an English law offence to be formed.

As regards s.340(11)(d), the Supreme Court held that this provision "*merely defines* "*money laundering*" *and does not create an offence itself or extend the territorial scope of the offences created by sections 327, 328 and 329 to acts done abroad." Rather, "the only extra-territorial effect of section 340(11) is to bring within the scope of the offences created by sections 327, 328 and 329 relevant acts of dealing in the United Kingdom with criminal property that represents the proceeds of criminal conduct committed abroad… it does not extend the scope of those provisions to acts of dealing with criminal property which occurred abroad*." The Court of Appeal in Rogers had therefore, according to the Supreme Court, reached its decision on the basis of a misreading of the law.

In *El-Khouri*, Mr El-Khouri, a dual U.K.-Lebanese national living in the U.K., was accused in the U.S. of insider dealing while in the U.K. in relation to companies listed on U.S. stock exchanges. The U.K.'s Financial Conduct Authority investigated and concluded that there was insufficient evidence to prosecute (notably, Mr El-Khouri was not even interviewed). In the U.S., however, a grand jury in New York returned an indictment charging Mr El-Khouri with 17 offences of securities fraud, wire fraud and related offences under U.S. Federal law. The U.S. submitted a request to the U.K. for Mr El-Khouri's extradition to stand trial before the U.S. District Court for the Southern District of New York.

Mr El-Khouri resisted extradition, in particular, on the ground that the request did not meet the requirement of "double criminality" in section 137(4) of the Extradition Act 2003 ("EA 2003"). This provision requires that: "(a) the conduct occurs outside the category 2 territory [here, the U.S.A.]; (b) *in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment; and (c) the conduct is so punishable under the law of the category 2 territory*."

The Supreme Court was required to consider whether this requirement applied to money laundering because the U.S. Government argued that, in addition to insider dealing, the facts alleged in the request disclosed a money laundering offence under s.329 POCA. However, on the basis of the Court's finding that s.329 POCA was not an "*extra-territorial offence*" (as required by s.137(4)(b) EA 2003), Mr El-Khouri could not be extradited to the U.S. on that ground.

As the Supreme Court concluded: "*We do not think it seriously arguable that acquiring, using or possessing in the United States money which represents the proceeds of a crime in the United States can constitute an offence under section 329 of the Proceeds of Crime Act 2002*."

What this means

The Supreme Court's judgment is a welcome development, bringing needed clarity to a hitherto uncertain area of the law. Businesses involved in cross-border transactions can now have greater confidence in the territorial ambit

of the money laundering regime under POCA. In particular, even where criminal conduct is suspected, the ss.327-329 POCA offences are not engaged where none of the acts that may constitute money laundering take place in the U.K.

It should be noted that POCA retains extra-territorial effect insofar as an English law money laundering offence can still be committed where the predicate conduct occurs outside the U.K., provided that the relevant 'dealing' in criminal property takes place in the U.K. In *El-Khouri*, the Supreme Court offered the following illustration of how that aspect of extra-territoriality under s.329 POCA could arise: "*… a person who (with the relevant knowledge) acquires, uses or has possession of a benefit in the form of money from conduct occurring in the United States which would constitute an offence in England if it occurred there commits an offence under section 329.*"

This decision also does not impact the disclosure requirement for individuals and businesses in the U.K. regulated sector to report suspected money laundering. A disclosure would therefore still need to be made even if the criminal conduct which gave rise to the suspected money laundering, and/or the suspected money laundering itself, took place outside the U.K., as long as it would have been a money laundering offence if it had occurred in the U.K. and it is also unlawful (or is not reasonably believed to be lawful) in the country where it occurred. This could arise, for example, if a U.K. regulated bank obtains information from a customer indicating that a third party may be trying to deposit into a U.S. bank account funds that were obtained through a fraud perpetrated in the U.S. Here, the alleged criminal conduct and the alleged money laundering have all taken place in the U.S., but (provided that the fraud was unlawful in the U.S.) the U.K. bank will likely need to report the suspicion of money laundering.

Taking the facts in *Rogers* as an example, whilst Mr Rogers could not now be convicted of money laundering under English law, if a U.K. bank became aware that he had dealt with criminal property in Spain in such a way as would be an offence under s.327 POCA if it had occurred in the U.K., the U.K. bank would likely be required to file a suspicious activity report ("SAR") disclosing that information to the U.K. National Crime Agency ("NCA").

The *El-Khouri* judgment does clarify and simplify the application of ss.327-329 POCA, which should also lead to fewer SARs and requests for a "defence against money laundering" being filed with the NCA. The judgment will also have an impact on extradition cases, as extradition will not be granted on the basis of alleged money laundering overseas pursuant to 137(4) EA 2003, because money laundering is not an "*extra-territorial offence*" under POCA.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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