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Abstract

The purpose of this Essay is to examine the machinery for providing evidence to defendants in foreign proceedings and the extent to which there is equality of arms and opportunity between the prosecutor and defendant when obtaining evidence from abroad in U.K. proceedings. This Essay will also identify the new problems that are starting to emerge when such equality is threatened. To do so, it explores the mechanism by which mutual assistance is governed in the United Kingdom - the Criminal Justice (International Co-operation) Act of 1990.

DEFENSE REQUESTS FOR INTERNATIONAL JUDICIAL ASSISTANCE: THE U.K. PERSPECTIVE

*Christopher Murray**

Toward the end of the last century, U.S. boxing promoter Don King was charged before a U.S. court with wire fraud. On a re-trial, at the request of the defense, the trial judge sent a letter rogatory to the United Kingdom for the production of documents, comprising of contingency/non-appearance policies issued by a Lloyds syndicate after January 1, 1985. The relevance of these policies concerned an allegation that Don King had fraudulently made claims under insurance policies when a participant in a boxing match, promoted by him, had sustained injury in the course of training and had thus been unable to appear at the scheduled fight.

The U.S. prosecutor had produced evidence as to the interpretation of a specific term within the policy, and Don King's U.S. lawyers sought to obtain evidence to contradict the asserted interpretation. Accordingly, they wished to look at all previous policies brokered by the same broker in order to discover whether, in previous policies, different definitions had been adopted. Ultimately, the U.S. defense attorneys hoped to find that, in relation to claims under policies, the appropriate term had been interpreted contrary to the assertions of the prosecution witnesses.

The defense request, made by the U.S. judge, was exceedingly broad. It was transmitted, however, to the United Kingdom to deal with under its Criminal Justice (International Co-operation) Act of 1990 (or "1990 Act").[1] In due course, the U.K. Secretary of State nominated Bow Street Magistrates' Court to process the request and, as the U.K. statute requires, "to receive such of the evidence to which the request relates as may appear to the court to be appropriate for the purpose of giving event to the request."[2]

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1. Criminal Justice (International Co-operation) Act, 1990, [hereinafter 1990 Act].

2. *Id.* § 4(2).

The existence of such judicial machinery underlines the importance of international judicial assistance in criminal matters as a relatively recent phenomenon. As little as half a century ago, when a crime was committed, the resultant investigation was nearly always confined within the jurisdiction where the crime had occurred. For the most part, investigative trails, however complex, could be followed without needing to look outside the country for evidence. This was as true for the defense lawyer as for the prosecutor or investigator.

In the past, those who committed offenses neither leave the jurisdiction themselves, nor did they leave any evidential trail beyond the limits of their own country. An international dimension for criminal investigations was predominately unnecessary. To leave the immediate area of the commission of the offense would have been, in many cases, as far as the potential defendant would have had to go to ensure that detection would at least be difficult.

International travel fifty years ago was relatively uncommon and certainly less accessible than today. Journeys that were then almost unimaginable are accepted today as routine. Not only is international travel itself easier today but, in addition, the formalities also required to cross national boundaries are constantly being reduced. Border crossing points and visa controls were at one time able to provide, at least in part, a trail of movements, but these are now at a minimum in many countries. Within the domain of the European Union, Article 2(1) of the 1990 Convention implementing the Schengen Agreement of June 14, 1985 (or "1990 Convention"), states that, "[i]nternal borders may be crossed at any point without any checks on persons being carried out."[3] For the thirteen Member States to which the 1990 Convention applies (all Member States of the European Union, with the exception of the United Kingdom and Ireland), its effect is to create an almost frontierless zone.

If this is the case for the movement of people, then the same can also be said about the movements of money and financial transactions. While international trade and commercial activity have been long established, the means by which they now transpire are much less laborious than previously done, and, as a result, much faster. The development of international comput-

3. Convention for Implementation of the Schengen Agreement, 1990, art. 2(1).

erized transactions and electronic transfers of funds have revolutionized the concept of international trade and finance. Transactions that formerly were accomplished in days, or even weeks, now take seconds. Funds move from country to country and continent to continent at the press of a button. The development of the Internet as a global communication system has also had its effect. Increases in the rate of its use and in the diversity of purposes for which it is used similarly affect international commercial transactions.

The average citizen may hardly be aware of the effects these developments have had on his or her everyday life, but the criminal has adapted techniques to take advantage of them. The criminal knows that a transaction that takes seconds to perform—moving funds from one jurisdiction to another—will take investigators months, if not years, to unravel. A multinational conspiracy, with participants and witnesses from several different states, will increase the complexity for the investigator.

Informal police cooperation is almost as old as individual police forces. However, formal judicial cooperation, which will usually be necessary to obtain evidence in admissible form, is a relatively recent phenomenon and is unable to keep up with the activities it seeks to investigate. For modern criminal investigations to be effective and expeditious, it is essential that, as far as possible, international boundaries cause as few problems for investigators as they do for criminals. National boundaries still create a natural limit to the territorial activities of national law enforcement forces, although the provisions of the 1990 Convention authorize police officers of Member States with limited powers of hot pursuit of criminal suspects across international borders.[4]

International cooperation in criminal investigations has become increasingly important for practitioners—both for prosecutors and defense lawyers. It is not just in complex cases that there is a need for effective cooperation. Even the most apparently simple case involving, for instance, a minor road traffic accident, may involve witnesses or accused persons from a jurisdiction other than the one in which the accident occurred. Witnesses from abroad may need to be summoned to court, official papers will need to be served, the evidence concerning witnesses

4. *Id.* art. 41.

may need to be obtained. In more complex cases, where, for example, there is a need to unravel a complex trail of financial dealings across many countries and perhaps several continents, an effective system of mutual legal assistance is essential for expeditious and effective investigation and prosecution of cases. In all such cases, the defense also may wish to obtain evidence from another jurisdiction in order to present their case properly.

If the system of international judicial cooperation either fails to operate effectively, or is perceived to operate ineffectively, then not only will international criminal activity continue unchecked, but the system of criminal justice in that country will also be brought into disrepute. Already, organized international criminal activity operates on a scale that dwarfs the economic output of some countries. Governments must urgently take what steps they can to enable effective international cooperative efforts to battle this threat.

The growth of international crime and the recognition of the threat it poses to civilized society, particularly in its organized form, is seen as one of the most important items on the current international political agenda. There is a danger that this need for increased collaboration is perceived only to be a prosecutorial necessity. It is equally important, however, that the rights of the defendant are similarly recognized. Adequate and efficient judicial cooperation must be equally available to an accused.

Many of those reading this Essay will be familiar with the film *In the Name of the Father*[5] and the miscarriage of justice with which it was concerned. It was, unhappily, only one of several prosecutions conducted in the United Kingdom in the 1970s, many of them linked to terrorism (but not solely), where evidence of crucial value to defendants, which had been collected by the police during the course of the investigation, was deliberately withheld. In one dramatic example, a man was wrongly convicted of a sexual murder of a young girl and sentenced to life imprisonment. The police had deliberately withheld evidence that the defendant was physically incapable of producing semen. The prosecution relied on the presence of semen on the body as proof of his guilt.

This threw into sharp relief the need for U.K. officials to

5. IN THE NAME OF THE FATHER (Gabriel Byrne 1993).

examine the whole question of the duty of the prosecution to make disclosures. A Royal Commission was appointed to do so. Fundamental to the problem was the unavoidable inequality of arms in any investigation; the police, particularly in the high profile cases, have enormous investigative resources available to them. Only in relatively few cases will the defendant be sufficiently wealthy to match such resources. A thorough investigation will turn up evidence of assistance to a suspect; sometimes that evidence will indicate or even confirm innocence. Without effective duties on the prosecutor to disclose, the inequality of arms will widen.

Steps, albeit inadequate (as evidenced by the recent concern expressed by our Director of Public Prosecutions), have been taken to seek to ensure that proper disclosure does occur. In a sense, the investigative resources of the police are made available (to a very limited degree) to the defendant. Of more practical importance, the prosecutor now has a duty to pursue all reasonable lines of inquiry, whether they point towards or away from the accused.

The purpose of this Essay is to examine the machinery for providing evidence to defendants in foreign proceedings and the extent to which there is equality of arms and opportunity between the prosecutor and defendant when obtaining evidence from abroad in U.K. proceedings. This Essay will also identify the new problems that are starting to emerge when such equality is threatened. To do so, one must explore the mechanism by which mutual assistance is governed in the United Kingdom—the Criminal Justice (International Co-operation) Act of 1990.[6]

I. *INCOMING REQUESTS TO THE UNITED KINGDOM FOR EVIDENCE*

Section 4 of the 1990 Act governs the applications by non-domestic authorities for evidence to be obtained in the United Kingdom.[7] For a request to be executed under this Section, it must be received by the Home Secretary from a court or tribunal exercising criminal jurisdiction in the requesting State, or a prosecuting authority in that State or from any other authority in that State which appears to the Secretary of State to have the

6. 1990 Act, *supra* note 1.
7. *Id.* § 4.

function of making requests of the kind to which Section 4 applies.[8] It is the responsibility of the Mutual Legal Assistance Section in the U.K. Home Office to ensure that this precondition is fulfilled.

The Home Secretary must also be satisfied:

(i) that *an offense under the law of the requesting State has been committed or that there are reasonable grounds for suspecting that such an offense has been committed*; and

(ii) that *proceedings in respect of that offense have been instituted in the requesting State or that an investigation into that offense is being carried on there.*

Having satisfied himself of the matters contained in Section 4(2), the Secretary of State thereafter has discretion. If he thinks fit, then he may by notice in writing nominate a court to receive any evidence that the court deems relevant and appropriate to fulfill the request.

If the evidence is particularly complicated or appears to involve complex questions of law, then the U.K. Home Secretary may nominate a Crown Court or the High Court to hear the evidence requested. When a court has been nominated by the U.K. Secretary of State, it will be the responsibility of that court to execute the request. This will usually involve cooperation with the court police liaison officer, who will make inquiries as to the whereabouts of the witnesses and arrange for their appearance in court. If a witness is willing, then a witness summons (subpoena) will not be necessary. If the witness is unwilling, or if he or she requires a court order, for example to produce business records or other confidential material, then a witness summons may be issued by the court under Paragraph 1 of Schedule 1 of the 1990 Act to secure his attendance at court.[9]

Where the witness is willing and cooperative, the police may be able to agree with the witness, before the court hearing, to take a statement setting out the main matters to be dealt with in his or her statement. Therefore, the court hearing may involve no more than a formal adoption in court under oath of the police statement. Provision is made under Paragraph 2 of Schedule 1 of the 1990 Act for the proceedings in the court to be

8. *Id.*
9. *Id.* Schedule 1(2).

under oath.[10]

II. *PROCEEDINGS BEFORE THE NOMINATED COURT*

Proceedings before the nominated court are regulated by rules,[11] which provide that the court may, if it thinks necessary in the interest of justice, direct that the public be excluded from the court. The rules also provide that the power to exclude the public supplements and that it is without prejudice to any other powers of the court to hear proceedings *in camera.*

If the letter of request has included an entreaty that representatives of the requesting authority or representatives of the defense from the requesting state be present during the taking of the witness's evidence, then this request will be acceded to, so far as possible, in the execution of the request. If, however, it is impossible to arrange a court hearing for the witness at a time that suits the international representatives, then the hearing may need to proceed in the absence of those representatives. Under such circumstances, it would be made clear to the requesting authorities that their request could not be executed in full. The court rules under the 1990 Act impose a duty on the clerk of the court to make a note of the proceedings, and in particular, to record:

i) which persons with an interest in the proceedings were present;
ii) which of the said persons were represented and by whom;
iii) whether any of the said persons were denied the opportunity to cross examine a witness as to any part of his or her testimony.[12]

The Home Secretary is entitled to request a copy of this record of proceedings.

In *R v. Bow Street Magistrates' Court, ex parte Zardari*[13] (which related to Benizir Bhutto's husband), Justice Latham indicated that the court's discretion is, as set out in Section 4(2)(b) of the

10. *Id.* Schedule 2(1).

11. The Magistrates Courts (Criminal Justice (International Co-operation)) S.R. & O. 1991; Crown Court Amendment S.R. & O. 1991.

12. *Id.*

13. R v. Bow Street Magistrates' Court, ex parte Zardari, Unreported CO/1593/98 (Q.B. 1998).

1990 Act, to receive such of the evidence to which the request relates "as may appear to the court to be appropriate."[14] Justice Latham added that, "the statute does not envisage the court having any other discretion than that identified in the subsection."[15] Thus, in the *Zardari* case, the question of whether the assertions made by the requesting state (Pakistan) were fraudulent is not a matter for the discretion of the nominated court, but rather for the Home Secretary. The court in *Zardari* thereby rejected a claim that the proceedings had been brought as an abuse of its process.

Paragraph 1 of Schedule 1 of the 1990 Act empowers the court to compel witnesses to attend court or to produce documents in the same way as for other proceedings before the court. Furthermore, under Paragraph 2, the court may admit evidence given under oath during the proceedings.

International requests for evidence are often made under the 1959 European Convention on Mutual Assistance in Criminal Matters.[16] Under Article 3, however, the United Kingdom reserved the right not to hear the evidence of witnesses or require the production of records and other documents when U.K. law recognized an exemption from giving evidence. Examples of such exemptions include privilege and non-compellability.

The non-compellability of witnesses with respect to evidence that they may be called on to give before nominated courts is covered by Paragraph 4 of Schedule 1 to the 1990 Act. This paragraph provides that:

> (1) A person shall not be compelled to give in the proceedings any evidence which he could not be compelled to give—
>
> (a) in criminal proceedings in the part of the United Kingdom in which the nominated court exercises jurisdiction; or
>
> (b) subject to subparagraph (2) below, in criminal proceedings in the country or territory from which the request for the evidence has come.[17]

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14. *Id.*

15. *Id.*

16. European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, 472 U.N.T.S. 185

17. 1990 Act, *supra* note 1, Schedule 1(4).

The normal heads of non-compellability will apply—including the privileges against self-incrimination and disclosure of communications between professional legal advisers and their clients (legal professional privilege), double jeopardy, and the privilege of sovereign/diplomatic immunity. I was involved in an interesting Italian defense request in which the Central Criminal Court (the Old Bailey) was nominated[18] and which turned upon at least three heads of non-compellability! D, a Jersey resident, had plead guilty in Jersey to various offenses some years previously, including one charge of forgery. In the course of his police interview by the Jersey Fraud Squad, D implicated P, a Swiss citizen in the forgery offense. The forged documents, which were manufactured by D in Jersey, had allegedly been presented before an Italian court as part of the defense of a defendant in one of the Banco Ambrosiano trials. An Italian examining magistrate brought proceedings in Italy against D, P, and others responsible for introducing the allegedly forged documents into the earlier proceedings. D was in fact serving a sentence of imprisonment for the Jersey offenses (including that of forgery) in the United Kingdom. In its defense request, the Italian magistrate sought to have D provide evidence to the Central Criminal Court for use in the Italian proceedings to which D was also a party. P wished to cross examine D upon his assertions. D was allowed by the Central Criminal Court to refuse to give evidence, on the grounds of *autrefois convict* (*ne bis in idem*), that answers given by him might tend to incriminate him, and finally, that as a co-defendant he was thereby non-compellable.

While these heads may present anticipated practical obstacles for the defendant making a mutual assistance request to clear, the most common hurdle will be that which confronted Don King—the unwilling witness. While one can take a horse to water, one cannot make him drink. Without care the horse may stumble at the last fence—the requirement of admissibility. The standard procedure whereby nominated courts obtain the evidence sought under Section 4 of the 1990 Act is (in the absence of voluntary testimony) to issue a witness summons or subpoena directed to a third party.

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18. Application under the Criminal Justice (International Cooperation) Act 1990 re Christopher Delaney, Central Criminal Court 1 October 1996 - unreported.

III. *THE MEANING OF "EVIDENCE"*

The proper approach to be followed when considering an application for the production of documents from a third party to criminal proceedings is most conveniently set out in the judgement of Simon Brown, LJ (as approved subsequently by the House of Lords) in *R v. Reading Justices ex parte Berkshire County Council.*[19] After reviewing the authorities, Simon Brown, LJ asserted that:

> The central principles to be derived from those authorities are as follows:
>
> (i) To be material evidence, documents must be not only relevant to the issues arising in the criminal proceedings, but also documents admissible as such in evidence;
>
> (ii) Documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence and, thus, are not material for the purposes of s 97;
>
> (iii) Whoever seeks production of documents must satisfy the justices with some material that the documents are 'likely to be material' in the sense indicated, likelihood for this purpose involving a real possibility, although not necessarily a probability;
>
> (iv) It is not sufficient that the applicant merely wants to find out whether or not the third party has such material documents. This procedure must not be used as a disguised attempt to obtain discovery.[20]

While these principles apply to documentary evidence, the relevant sections in the legislation refer to "giving material evidence" or producing documents "likely to be material evidence." "Materiality" is clearly common to both, and thus oral evidence must be subject to the same principles.

The principles of the *Reading Justices* case in relation to a mutual assistance request were tested in the case of *R v. Bow Street Magistrates' Court ex parte King and Another,*[21] the Don King case, the facts of which were recited at the start of this Essay. In

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19. R v. Reading Justices *ex parte* Berkshire County Council, 1 Crim. App. Rep. 239, 247 (Q.B. 1996).

20. *Id.*

21. R v. Bow Street Magistrates Court *ex parte* King and Another, Unreported CO/3489/97 (Q.B. 1997).

the case itself, the magistrate declined to give effect to the letter of request. The decision was challenged by the applicants through judicial review in the High Court.

After considering the facts of the Don King case and reciting the relevant provisions of Schedule 1 of the 1990 Act, the High Court Judge, Collins J, stated:

> It is clear from those provisions that the English court (the Stipendiary Magistrate in this case) has to consider, when faced with an application which involves the production of documents, any claim made by a person that he does not have to produce the documents as if the proceedings were domestic English criminal proceedings. Thus, English law and English considerations must apply.
>
> . . .
>
> . . . it seems to me quite unarguable that even in para. 4(1)(a) proceedings the court has to consider the admissibility or the compellability, to put it in its precise terms, of the material in the foreign proceedings . . .
>
> The Stipendiary Magistrate was, in my judgment, clearly correct to approach this matter on the basis of what English law would have allowed. That means, as was the case here, that in certain circumstances a request made by a foreign court may not be met, but that stems from the form in which this particular legislation is enacted. The English court can only, of course, apply the law as laid down by Parliament in this particular Act.[22]

The judge then drew attention to the principles set out by Simon Brown, LJ in *R v. Reading Justices ex parte Berkshire County Council*[23] and proceeded to apply those rules of admissibility to the request:

> As I say, I am wholly satisfied that if this were English law, those documents could not be admissible for the purpose of construing the contract or for the purpose of discovering what the relevant words meant.
>
> . . .
>
> I appreciate that the law in the United States appears to be different. It may be, although objections, of course, have been made . . . and I assume for the moment that that evidence will be admitted before the jury for the purpose of es-

22. *Id.*

23. *ex parte Berkshire County Council*, 1 Crim. App. Rep. 239.

> tablishing what the prosecution say is the true meaning of this expression. One can well understand the Applicants' concern that this is potentially unfair because they are not able to get their hands, they say, on material which could show that what the witnesses said is not right. That is a matter, I am afraid, which I cannot take into account in deciding upon admissibility and, more importantly, it is a matter which the Magistrate could not take into account.[24]

While the judge ruled that it was not a matter that he had to decide in terms, he indicated that, were he sitting at first instance on the material before him, he would have found it difficult to be persuaded *prima facie* that the exercise was nothing more than disguised discovery. Accordingly, leave to move for judicial review was refused.

Despite such practical problems, the defendant in foreign proceedings who requests assistance from the United Kingdom has to clear the same hurdles as a foreign prosecutor, whom paradoxically are treated better than prosecutors from the United Kingdom.

Section 4 of the 1990 Act introduces for the first time into the English criminal process the concept of a U.K. court undertaking an investigatory function. The court is being used to collect evidence, a concept more familiar in civil than in common law jurisdictions. This anomaly provides international investigators (and defendants) requesting evidence from the United Kingdom with powers which, in some circumstances, exceed those available to U.K. officers in domestic investigations. A practical example in relation to foreign investigators will serve to illustrate.

If a foreign agency (for example, the U.S. Federal Bureau of Investigation (or "FBI")) is investigating allegations of dishonesty by its citizens and has information that funds have been transferred by a suspect to an account held by a third party in the United Kingdom, the agency will seek to trace the funds. The third party, however, may have passed all the papers relating to the transaction to his accountant to sort out his tax position. The FBI will initially seek informal access to the accountant's records, but this may be resisted. In those circumstances, a formal letter of request can be issued by the U.S. authorities. In

24. *ex parte King and Another, supra* note 21.

due course, a court will be nominated under Section 4 of the 1990 Act (most usually a magistrates court), and the accountant will be subpoenaed to the court to produce his files and give related evidence.

In a domestic investigation, the situation is entirely different, and obtaining the evidence of the accountant is far more complicated. At the investigation stage, no U.K. court has authority to compel a person to give evidence or to produce evidence (other than by such coercive measures as search warrants, in which event safeguards exist). There are, after all, no proceedings. The investigators must therefore rely upon their search and seizure powers.

The accountant's papers are "special procedure material"[25] and in normal circumstances only a senior judge in the Crown Court (not a magistrate as in the example given above) can order production of the papers, and only:

(a) after an inter partes hearing (unless it is suggested that the accountant may seek to destroy the file); and
(b) upon being satisfied that the material is likely to be
    (i) of substantial value (whether by itself or together with other material) to the investigation;
    (ii) relevant; and
    (iii) in the public interest having regard to the benefit likely to accrue to the investigation and to the circumstances under which the person in possession of the material holds it; and
(c) if one or other of the access conditions has been satisfied.[26]

There is a heavy burden placed upon the police to submit to the Crown Court judge detailed information that is as precise and complete as possible, in order to enable him to perform the balancing process properly.

Earl Ferrers argued about these procedures to the House of Lords during the Bill stage of the 1990 Act. He stated that however much the Government wished to assist other countries, it could not allow Parliament to make greater powers available on behalf of overseas authorities than are available to U.K. police or

25. *See* Police & Criminal Evidence Act (PACE), 1984, ch. 60 §14 (defining "special procedure material").

26. *Id.* Schedule 1.

prosecuting authorities in domestic cases.[27] These were lofty but, eventually, empty sentiments.

IV. *OUTGOING REQUESTS FROM THE UNITED KINGDOM FOR EVIDENCE*

Section 3 of the 1990 Act covers the general application procedure that U.K. authorities must follow to obtain evidence from abroad. The relevant parts of Section 3 of the 1990 Act are as follows:

> 3(1) Where on an application made in accordance with subsection (2) below it appears to a justice of peace or a judge—
>
> (a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and
>
> (b) that proceedings in respect of the offence have been instituted or that the offence is being investigated, he may issue a letter ("a letter of request") requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the proceedings or investigation.
>
> (2) An application under subsection (1) above may be made by a prosecuting authority or, *if proceedings have been instituted, by the person charged in those proceedings.*
>
> (3) A prosecuting authority which is for the time being designated for the purposes of this section by an order made by the Secretary of State by statutory instrument may itself issue a letter of request if
>
> (a) it is satisfied as to the matters mentioned in subsection (1)(a) above; and
>
> (b) the offence in question is being investigated or the authority has instituted proceedings in respect of it.
>
> (4) Subject to subsection (5) below, a letter of request shall be sent to the Secretary of State for transmission either—
>
> (a) to a court or tribunal specified in the letter and exercising jurisdiction in the place where the evidence is to be obtained; or
>
> (b) to any authority recognized by the government of the country or territory in question as the appropri-

27. 513 PARL. DEB., H.L. (Official Rep.) 1217 (1989).

ate authority for receiving requests for assistance of the kind to which this section applies.

(5) In cases of urgency a letter of request may be sent direct to such a court or tribunal as is mentioned in subsection (4)(a) above.

(6) In this section "evidence" includes documents and other articles.

(7) Evidence obtained by virtue of a letter of request shall not without the consent of such authority as is mentioned in subsection (4)(b) above be used for any purpose other than that specified in the letter; and when any document or other article obtained pursuant to a letter of request is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to such an authority unless that authority indicates that the document or article need not be returned.

(8) In exercising the discretion conferred by section 25 of the Criminal Justice Act 1988 (exclusion of evidence otherwise admissible) in relation to a statement contained in evidence taken pursuant to a letter of request the court shall have regard

(a) to whether it was possible to challenge the statement by questioning the person who made it; and

(b) if proceedings have been instituted, to whether the local law allowed the parties to the proceedings to be legally represented when the evidence was taken.[28]

The first three subsections make it clear that there are two categories of people entitled to issue a letter of request for evidence to be obtained from abroad. The first, under subsection (1), is a judge. A judge makes the request on application by either the prosecuting authority, or, if proceedings have been instituted, *the person charged in those proceedings.* The second category (under sub-section (3)) is that of "a prosecuting authority which is for the time being designated for the purposes of this sub-section" who is entitled to issue the letter of request himself.

A Designation Order[29] has been made in respect to various prosecutors, including the Attorney General for England &

28. 1990 Act, *supra* note 1, § 3 (emphasis added).

29. *See id* at Schedule 2 § 3(3) (Designation of Prosecuting Authorities) (1991) (implementing effectively Declaration 3 of U.K. Government in accordance with Article 24 of European Convention of Mutual Assistance of 1959).

Wales, the Director of Public Prosecutions and any Crown Prosecutor, the Director of the Serious Fraud Office, any person designated under Section 1(7) of The Criminal Justice Act of 1987, and the Secretary of State for Trade & Industry.[30] All of these individuals or groups of individuals are, therefore, entitled to make requests. Requests by designated prosecuting authorities are by far the most common type of requests made.

V. *DEFENSE REQUEST TO THE COURT FOR THE ISSUE OF A REQUEST UNDER SECTION 3(1): "THE PERSON CHARGED"*

An application may be made by a person "charged in those proceedings," according to Section 3(2).[31] Thus, a defendant may make an application via the court for a letter of request to be issued, but only after proceedings have been instituted against him or her. He or she may make such an application at any stage of the proceedings after charge. In particular, he or she may make an application during the trial process itself. The procedure is thus not available to a potential defendant, who may be seeking to dissuade a prosecuting authority from commencing proceedings. Further, it follows from the statutory provisions detailed above, that the defendant cannot issue himself or herself a letter of request in the same way that the designated prosecuting authority is able to do.

Applications by or on behalf of the person charged are not yet frequently made, but it is an important facility that the defense has, and should not be overlooked. If, following an application made on behalf of the person charged to a justice of the peace or judge, the justice of the peace or judge refuses to issue a letter of request, then the defense may appeal this decision. There is no statutory provision for such procedure, but the matter would, it is submitted, be subject to appeal in the same way as any other ruling.

VI. *HOW ARE U.K. DEFENDANTS FARING IN THEIR EFFORTS TO OBTAIN EVIDENCE ABROAD?*

In the case of *Forsyth*,[32] there was an application under Sec-

30. *Id.*
31. *Id.* § 3(2).
32. R v. Forsyth, 2 Crim. App. Rep. 299 (Q.B. 1997).

tion 3(2) of the 1990 Act, made on behalf of the defendant during the course of the trial. The case was appealed on other grounds, and the judgement in the Court of Appeal does not concern this point. The application asked the trial judge to issue a letter of request (in this case, the hearing of witnesses by television link) requesting assistance from the authorities in the Turkish Republic of Northern Cyprus. The judge summarized the matter as follows:

> Since 1983 the so-called Turkish Republic of northern Cyprus has not been recognised by the United Kingdom, nor by any other country except for Turkey itself. Thus it is impossible to obtain extradition of any fugitive from justice from northern Cyprus. The fact of non-recognition seems to me to present an insuperable obstacle to the issue of a letter of request since by section 3(4) such a letter has to be sent to the Secretary of State for the Home Department of Her Majesty's Government for transmission to the court of northern Cyprus. The Secretary of State would be unable and unwilling to comply with that requirement since to do so would necessarily imply recognition of the so-called Turkish Republic of northern Cyprus. Mr. Robertson (on behalf of the defendant) has submitted that there are a number of respects in which the authorities of the United Kingdom and of northern Cyprus cooperate with each other not least in certain investigations made by the Serious Fraud Office in this or in an associated case. He urges me to take the view that it would not amount to recognition for me to write to a judge in northern Cyprus but in my opinion this Act does not envisage the writing of letters on that basis, and does not empower me to do so. In my view the provisions of the Criminal Justice (International Co-operation) Act 1990 do not extend to the requesting of assistance in obtaining evidence from states which are not recognised by the United Kingdom. Accordingly I have no jurisdiction to grant the application and I therefore refuse it.[33]

The decision to refuse the application on behalf of the defense was thus made on the somewhat unusual ground that the country where the evidence was sought was not recognized by Her Majesty's Government. The merits or otherwise of the application were not considered. In most cases, U.K. courts will try

33. *Id.*

to accede to defense applications to obtain evidence from abroad, wherever this is possible in accordance with the statutory provisions.

Indeed, the Court of Appeal in *Forsyth* stated that:

> In general, once it is shown that there is difficulty in obtaining the attendance of witnesses abroad whose evidence is relevant to the defense, we consider the court should lean in favour of permitting evidence to be given in this way, though in particular cases, there may be reasons to refuse it.[34]

The reasoning in *Forsyth* appears to ignore the two stage process involved in seeking mutual assistance:

a) the issue of the letter of request—the duty of the court and; [Section 3(1)]
b) the transmission of the letter of request—the duty of the Secretary of State. [Section 3(4)].

The court has a discretion; it "may" issue a letter if it appears that an offense has been committed, or that there are reasonable grounds to suspect that it has, and that proceedings have been instituted.

In *Forsyth*, both conditions were clearly satisfied. One would expect the court to issue the letter and, in accordance with Section 3(4) of the 1990 Act, to send it to the U.K. Secretary of State for transmission. Then, the U.K. Secretary of State must transmit the letter either to a court or tribunal specified in the letter or to any authority recognized in the requested state as the appropriate authority for receiving such requests. The question mark over the recognition or otherwise of the "so-called Turkish Republic of Northern Cyprus" was a matter for the U.K. Secretary of State rather than the court. It is interesting to note that the U.K. Secretary of State appears to have no discretion under Section 3(4). The defendant's position is inextricably linked with the legal and procedural parameters of the jurisdiction from which assistance is sought. The problems that arise for U.K. defendants will reflect the contrasts between these jurisdictions.

34. *Id.*

VII. *U.S. MECHANISMS*

Of considerable use to the U.K. defendant who requests evidence from the United States, and of particular interest in the context of the *Fordham International Criminal Law Symposium*, is the availability of Section 1782 of the U.S. Code for the defendant in U.K. proceedings.[35] In the United Kingdom, applications can only be made by or on behalf of the defendant under the 1990 Act when he is charged. The situation may be different, however, if the evidence that an actual or potential defendant seeks is in the United States. In those circumstances, the applicant may be able to use the provisions of Section 1782 of the U.S. Code to seek to obtain the evidence at an earlier stage.

Section 1782, which was revised by U.S. Congress in 1964 to liberalize U.S. "procedures for assisting foreign . . . tribunals and litigants in obtaining oral and documentary evidence in the United States,"[36] states:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing being produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or

35. 28 U.S.C. § 1782 (2000).

36. S. REP. No. 88-1580, § 9 (1964).

> statement or to produce a document or other thing in violation of any legally applicable privilege.
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.[37]

In effect, Section 1782 permits a U.S. federal court to order U.S.-style discovery for use in international proceedings. This section is the normal vehicle by which corporations or individuals involved, or about to become involved, in international arbitration or litigation request that a potential witness in the United States provide statements or produce documents for use in those proceedings. It has also been used in criminal proceedings and, in some cases, in criminal investigations. Letters rogatory in aid of foreign criminal proceedings are authorized. The Crown Prosecution Service of the United Kingdom is "an interested person" within the meaning of the federal statute governing foreign applications for judicial assistance.[38]

It is not necessary for proceedings to have been commenced before an application under Section 1782 may be granted. The various circuits, however, have applied different tests, both to "discoverability" and also to imminence of proceedings. For instance in *In re Request For International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, et. al.*,[39] it was held that the district court may order production of evidence pursuant to a foreign government's letter rogatory in the absence of pending adjudicative proceedings. This applies only if such proceedings are imminent, that is they are very likely to occur within a brief interval from the request. It is not sufficient that adjudicative proceedings are merely probable.

In re Letter of Request from Crown Prosecution Service of United Kingdom[40] held that British criminal proceedings need not be pending in order for the Crown Prosecution Service to request assistance in a criminal investigation. Rather, it was sufficient

37. 28 U.S.C. § 1782 (a)-(b) (1994).

38. *In re* Letter of Request from Crown Prosecution Service of the United Kingdom, 870 F.2d 686, 687 (D.C. Cir. 1989).

39. *In re* Request For International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, 936 F.2d 702 (2d Cir. 1991).

40. *In re Letter of Request from Crown Prosecution Service*, 870 F.2d at 686.

that judicial proceedings were within reasonable contemplation. In the same case, it was held that the lack of pending judicial proceedings did not prohibit the U.S. District Court, under Section 1782, from ordering a U.S. national to give deposition testimony. The U.S. District Court also had the power to order a U.S. national to provide documents to assist U.K. authorities during a criminal perversion of justice investigation upon application via a letter rogatory.

It was held in the application of *In Re Asta Medica, S.A.*,[41] that, in determining whether an interested person has established that the information sought would be discoverable in the international jurisdiction, the district court need not explore whether the information being sought by the applicant would be admissible in the United States. Further, courts have held that witnesses cannot object to a district court's action in issuing subpoenas in response to letters rogatory on the grounds that the testimony to be taken might not be admissible in the trial in the other country.[42]

The procedure by which an "interested person" initiates a request under Section 1782 depends upon the circuit in which the request is sought. A request generally comprises a brief *ex parte* application, which is accompanied by a copy of the proposed order and the memorandum of the appropriate law. The U.S. court will issue the subpoena or other order, which may be challenged according to the U.S. Federal Rules of Civil Procedure.

A witness in the United States, who is subpoenaed in relation to a U.S. investigation, cannot rely upon any statute providing that a person before an international tribunal cannot be compelled to give testimony or to produce documents in violation of any legally applicable privilege.[43] Clearly, the prospects of success of any such application will depend upon the circuit in which the proposed witness resides. They will also depend upon technical questions of U.S. law and procedure. Obviously, any applicant in such circumstances should seek advice from specialist U.S. counsel.

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41. *In re* Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1992).

42. *In re* Letters Rogatory from the Tokyo District, Tokyo, 539 F.2d 1216 (9th Cir. 1976).

43. *In re* Mr. and Mrs. Doe, Witnesses Before the Grand Jury, 860 F.2d 40 (2d Cir. 1988).

Section 1782 is available as an alternative to the letters rogatory route, and it has clear advantages of speed and broader applicability for actual and potential defendants. This procedure is equally available to a prosecutor or investigator as "interested persons." Since the prosecutor or investigator can issue a letter of request at any stage of the U.K. investigation, Section 1782 is unlikely to offer advantages over the U.K. statutory route, unless, of course, severe delay is anticipated.

CONCLUSION

Within the field of mutual assistance, the United Kingdom is very much one of the "new kids on the block." The United Kingdom only effectively joined the club in 1990, and thus examples of defense requests and the problems they met are limited. Problems between the United Kingdom and other common law jurisdictions, including the United States and members of the Commonwealth, will be easier to predict and thereby to resolve. It is the requests involving civil law jurisdictions, which have already started to highlight problems, some of which may indeed impact U.K. proceedings to such an extent that they may themselves be threatened.

In the early days under the 1990 Act, defense requests to civil law jurisdictions (and others, such as Islamic law jurisdictions) commonly disappeared into the ether. Once they were transmitted, nothing was heard of them again. Thankfully, things have moved apace and at least requests are now being answered. The problems, however, have not disappeared.

In a recent case involving Denmark, D was charged in the United Kingdom with offenses of international drug trafficking. It was additionally alleged that he was involved with another U.K. citizen, A, who was in custody in Denmark. Evidence of continuous contact between D and A was relied upon by both sets of prosecutors. It was D's defense in the U.K. proceedings that telephone calls were made in order to contact his former girlfriend, the mother of his children. D's U.K. lawyers sought to interview A in Denmark before deciding whether to call him as a witness. A's lawyers agreed. Under Danish law, however, it was necessary to seek the authority of the Danish police to question A. The police insisted that the request had to be made officially to the Danish authorities by the U.K. authorities. This was done, and

three months later D's English lawyers received a telephone call from the Danish police insisting that before any interview took place, they needed to see a complete list of all questions that would be put to A. Whether they granted permission would depend upon those questions. Similarly, they required full details of D's girlfriend and children, including their address and telephone number. Furthermore, they stated that D's English lawyer would not be allowed to interview A alone; Danish police and English Customs & Excise (the authority prosecuting D in the United Kingdom) would also have to be present. Without prior permission from the police, no interview would take place.

This telephone call was followed up by a letter from the prosecutor (in Danish) formally imposing these conditions. Understandably, the U.K. lawyers questioned the necessity for such conditions and drew attention to potential breaches of Article 6 of the European Convention on Human Rights, which guarantees adequate facilities in the preparation of an accused's defense.[44] It was pointed out to the Danes that in the United Kingdom this would entitle the defense to interview potential defense witnesses privately. Since A was not a witness proposed to be called by the U.K. prosecutors, the police would not in the United Kingdom be entitled to be present during any interview of him. It was further pointed out that the requirement to supply details of the girlfriend and his children appeared to infringe the defendant's right to privacy under Article 8 of the European Convention on Human Rights.[45] This prompted the prosecutor to refuse the interview, thereby denying D the right to interview a potential defense witness.

The decision was appealed. The senior public prosecutor reversed his subordinate's decision but imposed the same conditions as before, plus an additional condition that the questioning of A be done by the Danish police and not by D's U.K. lawyers. In fact, the problem was side-stepped by the U.K. lawyers when they sought A's attendance as a witness in the United Kingdom under Section 6 of the 1990 Act and Article 11 of the European Convention on Mutual Assistance in Criminal Matters of 1959. They effectively called him "blind."

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44. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 222.

45. *Id.* art. 8.

This case eloquently demonstrates two potent sources of inequality of arms/opportunity. First, the U.K. investigators and prosecutors had been allowed unimpeded and unaccompanied access to A earlier. Of more importance was the threat to fairness in the U.K. proceedings by denying D "full and unimpeded access" to potential witnesses. In the case of *Connolly v. Dale*,[46] the applicant was charged with murder. While seeking to substantiate their client's alibi, the lawyers employed a private investigator to identify potential witnesses at a men's hostel. The investigator was prevented from interviewing residents and staff or showing them the accused's photograph. The police threatened to prosecute the lawyer and the investigator for obstructing the police in the execution of their duty. The court held that interference with witnesses, actual or potential, amounted to contempt of court. Interference with a lawyer in the discharge of his duties could also constitute contempt. The police, therefore, had no right to stop and approach potential witnesses. Their threat to take action with the intention of preventing the defendant's solicitor from having full and unimpeded access to such witnesses was a clear contempt of court.

While the jurisdiction for contempt of court is unlikely to run outside the United Kingdom, it does amount to an interference with the due course of justice. This may itself invoke an application from the defense that to continue the trial would amount to an abuse of the court's process. If the course of justice is so interfered, then it is unfair to try the accused if he is the victim of interference. If it is unfair, then there should not be a trial; fairness must be assessed objectively according to U.K. principles and with reference to the result of the interference. There would be no need to prove *mala fides* on the part of the Danish authorities. If a defendant's right to a fair trial is breached, it "must inevitably result in the conviction being quashed."[47]

The Human Rights Act of 1998 is designed to

> give further effect to rights and freedoms guaranteed under the European Convention on Human Rights . . . securing to everyone within the jurisdiction of the UK the fundamental

46. *Connolly v. Dale*, 1 Crim. App. Rep. 200 (Q.B. 1996).

47. The right to a fair trial "is a fundamental constitutional right recognised by the common law." DPP ex parte Kebilene, 3 W.L.R. 188 (Q.B. 1999).

> values and rights that are entrenched in binding international law by the UK's ratification of the Convention and membership of the Council of Europe.[48]

It will come fully into force in October 2000. Hopefully, it will strengthen the defendant's rights to a fair trial in his own jurisdiction.

48. LORD LESTER & DAVID PANNICK, HUMAN RIGHTS LAW & PRACTICE (Butterworths ed., 1999).