

Third Study Commission Questionnaire 2023

TAIWAN

Responses on behalf of England and Wales

1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year - mutual cooperation in the investigation of criminal cases and in the presentation of evidence in a criminal proceeding at court? Please explain.

1.1 Yes.

1.2 *There are many bilateral and multilateral agreements and treaties to which the UK is a signatory that govern the provision of mutual legal assistance in criminal matters as well as extradition. There currently exist 50 bilateral agreements governing the provision of mutual legal assistance as well as UN EU and Commonwealth Treaties / Agreements.*

As far as the EU is concerned

A. the UK has ratified the following multilateral agreements:-

- *1957 Convention on Extradition*
- *1959 Convention on Mutual Assistance in Criminal Matters*
- *1978 Additional Protocol to the Convention on Mutual Assistance in Criminal Matters*
- *1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*
- *2001 Second Additional Protocol to the Convention on Mutual Assistance in Criminal Matters*
- *2001 Convention on Cybercrime (“the Budapest Convention”)*
- *2005 Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (“the Warsaw Convention”).*

B. Since 1st May 2021 and following its departure from the EU the scheme for mutual assistance between the UK and EU States is governed by the Trade and Co-operation Agreement (TCA).

The relevant sections dealing with mutual assistance in criminal matters are set out in Part Three “Law Enforcement and Judicial Cooperation in Criminal Matters” and provides for:-

- i. Mutual co-operation in the automated transfer of DNA profiles; fingerprint and vehicle registration data;*
- ii. The provision of mutual assistance for the purposes of prevention, investigation detection or prosecution of criminal offences; the execution of criminal penalties; safeguarding against and prevention of threats to public safety;*

iii. Cooperation between the European Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities of the UK in combating serious crime;

iv. A mechanism of surrender pursuant to an arrest warrant (replacing the European Framework Decision on the European Arrest Warrant). This provision is enacted under the terms of the amended Extradition Act 2003.

v. Cooperation in measures to prevent and combat money laundering and financing of terrorism and for the freezing of assets with a view to confiscation of criminal property.

As far as the UN is concerned:

The UK has ratified the following key UN Multilateral agreements

- *1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)*
- *2000 UN Convention against Transnational Organised Crime (UNTOC)*
- *2003 UN Convention against Corruption (UNCAC)*

As far as Commonwealth countries are concerned:-

There are 2 Commonwealth schemes of relevance:

- *2011 Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters (“Harare Scheme”)*
- *2001 Commonwealth Scheme Relating to Extradition (“London Scheme”)*

1.3 Set against the backdrop of its international treaties the principal legislative provisions governing the practice and procedure of mutual international assistance within England and Wales are:

- *The Criminal Justice (International Co-operation) Act 1990*
- *The Crime (International Co-operation) Act 2003 (CICA)*
- *The Extradition Act 2003 (EA)*

1.4 In addition a number of statutes dealing with investigative powers generally have relevance in relation to implementing any requests for investigative assistance. These include:

- *The Police and Criminal Evidence Act 1984 (PACE)*
- *The Terrorism Act 2000 Sections 32-39 and Schedules 5&6*
- *The Proceeds of Crime Act 2002 (POCA)*
- *The Proceeds of Crime Act (External Investigations) Order 2014*
- *The Investigatory Powers Act 2016 – (Governing the interception of communications and acquisition and retention of communications data)*
 - *A Judicial Commissioner may approve the issuing of a mutual assistance warrant (which is ultimately issued by the Secretary of State for the Home Department) – which authorises a person to make an international mutual assistance request for the provision of*

assistance detailed in the warrant, being in the form of interception of communications.

- *Such warrants are within the provenance of those appointed by the Prime Minister and accordingly are generally limited to those who are in, or have been, members of the senior judiciary,*
- *Crime (Overseas Production Orders) Act 2019 – where an international cooperation arrangement is in place a court may make an overseas production order requiring a person based overseas to produce, or give access to, “electronic data”. Such an order may only be served by the Secretary of State or a prescribed person. Procedure is governed by CPR 47.63- 47.68*

1.5 The Crime (International Co-operation) Act 2003 [CICA] provides for the practice and procedure in relation to mutual legal assistance in a number of areas including:-

i. The service of overseas process (summons, orders, court documents) on those in the UK and for the issuing of process before a court in the UK for service abroad (Chapter 1 – Sections 1-6). The procedural requirements for making any application before a court in the UK for service abroad is contained in Criminal Procedure Rules (CPR) 49.1

*ii. Mutual assistance in the **obtaining of evidence** (Chapter 2 – Sections 7-28)*

a. Sections 7-12 deal with the process of securing assistance in obtaining evidence FROM abroad and in preserving such evidence.

- *Where either an offence has been committed and proceedings instituted for that offence OR there are reasonable grounds for suspecting that an offence has been committed and that offence is being investigated the Court may request assistance in obtaining evidence specified in the request for use in the proceedings or investigation; the Crown Prosecution Service is itself a designated prosecuting authority and may itself make such a request for assistance;*
- *The request may either be sent to a court or recognised authority in the country where the evidence is situated OR to the Secretary of state for forwarding to such a country or authority.*
 - *In practice, direct transmission only applies to some countries that have implemented the Council of Europe Convention on Mutual assistance. The European Judicial Network (EJN) Atlas tool identifies the competent local authority in each EU Member State to receive and execute and ILOR.*
 - *ILORs seeking the recognition and enforcement overseas of either a restraint order and/or a confiscation order cannot be sent directly and must be sent via the Home Office for onward transmission.*
- *Evidence obtained pursuant to such a request may only be used for the purposes set out in the formal request unless the overseas authority gives its consent for such evidence to be used for any other purpose.*
- *In the case of certain listed offences where the conditions for a request to an overseas territory for assistance are met AND it appears that the evidence is on premises specified in the application in the participating country then the UK court may make a domestic freezing order in respect of that evidence (S10-11). Any such*

order is sent to the Secretary of State for forwarding to court of the overseas country having jurisdiction in the place where the evidence is situated. The order must be accompanied by a certificate signed by the court giving specified information and a statement as to the accuracy of the information.

b. Sections 13-25 provide for the rendering of assistance TO overseas authorities and the protection/securing of evidence sought

- *These provisions are generally triggered by the making of a Mutual Legal Assistance (MLA) Request (by means of a Letter of Request) to the Secretary of State*
- *Upon receipt of such a LOR the Secretary of State may arrange for evidence to be obtained as requested provided the SoS is satisfied EITHER that an offence under the law of the requesting state has been committed and proceedings instituted OR that there are reasonable grounds for suspecting that an offence has been committed and that an investigation is being carried on there. A certificate issued by the requesting authority confirming these matters will be regarded as conclusive. [Different provisions apply for fiscal offences]*
- *The SoS will **nominate a court to** receive the evidence to which the request relates. Such a nominated court has powers to secure a witness to give evidence. CPR 49.4 – 49.5 sets out rules relating to persons entitled to appear at any such hearing; the exclusion of the public during such a hearing and for the recording of evidence given and creation of an “overseas” record. The evidence received by the court is then forwarded to the requesting court/authority.*
- *The SoS may also direct that a search warrant be applied for – in which case the police are entitled to exercise the powers of entry search and seizure under PACE provided the overseas offence is one which would amount to an indictable offence if committed in England and Wales.*
- *An overseas freezing order – made (by a court, prosecuting or other authority in the overseas country) for the purposes of protecting evidence which is in the UK and which may be used in any proceedings or investigations in the participating overseas country – that is received by the SoS may be given effect by a court nominated by the SoS (under s.21(1) of CICA).*
 - *The nominated court must consider the order no later than 5 business days after service (CPR 49.10) – and in general no later than the next business day*
 - *However the nominated court must NOT consider the order unless satisfied that the chief officer of police in the area where the evidence is situated has had notice of the order and has had an opportunity to make representations.*
 - *The nominated court gives effect to the overseas freezing order by*
 - *Either issuing a warrant authorising the police enter and search premises and seize and retain evidence for which they are authorised to search.*
 - *or in respect of material that is held in confidence (bank records) making a production order for such material.*

ii. Mutual assistance in the provision of information about banking transactions.

Sections 32-41 – cover requests made by an overseas authority for assistance

Customer information orders

Where the Secretary of State receives a request from a relevant overseas authority for customer information to be obtained in relation to a person being investigated for serious criminal conduct he may direct the police or customs to apply for a customer information order – which is directed to a financial institution requiring it to provide such customer information that it holds relating to the person specified in the order.

One of the requirements for the making of any such order is for the court to be satisfied that the conduct being investigated would itself constitute an offence in England and Wales.

Account monitoring orders

Similar provisions govern requests made from a relevant overseas authority for the obtaining of account information in relation to an investigation being conducted in a participating country. In this instance the Secretary of State may direct the police or customs to apply to the court for an account monitoring order – which requires a financial institution to provide account information for a period specified in the order

Sections 43 – cover requests made by a judicial authority for assistance in a participating country in the provision of information about banking transactions

A court in England and Wales may, where satisfied that a person in the UK is being investigated for serious criminal conduct and that that person holds or may hold an account at a bank situated in a participating country and that information is likely to be of substantial value to the investigation, make a request for assistance of that country in obtaining account information including details of those accounts and transactions carried out over a period of time.

Any such request may be sent to the Secretary of State to be forwarded to a court specified in the request or to any recognised authority in the participating state. In case of urgency the request may be made direct to the relevant court in the participating state.

iii. Mutual assistance in the transfer of prisoners. The mutual transfer of prisoners to give evidence or assist an investigation in the UK or overseas (Sections 5 & 6 of the Criminal Justice (International Co-operation) Act 1990 and Sections 47 & 48) of the CICA

A court may issue a witness summons or order requiring the presence of a prisoner detained in custody in a country outside the UK to give evidence before a UK court. To give effect to any such order/summons it is for the Secretary of State to issue a warrant for that person's attendance where satisfied that the country detaining that prisoner will make arrangements for him to come to the UK – or where there is an agreement to this effect

Where an overseas country requests the transfer of a person detained in the UK the request is made to the Secretary of State – whose decision it is whether to issue a warrant for such transfer

1.6 Other supporting legislation –

Money Laundering / Confiscation

As noted above there are other pieces of substantive legislation that provide for mutual assistance in criminal investigations. For the purposes of this questionnaire reference is in particular made to the legislative provisions relating to money laundering – including provisions for the investigation of criminal offending as well as the confiscation of criminal property.

Again in this context the UK assists in the enforcement of overseas confiscation orders by a combination of its obligations under various international conventions and agreements as well as national legislation

A. the UK has ratified conventions and entered into agreements and arrangements in respect of the investigation of financial crime and the forfeiture and confiscation of criminal property – examples include:

1. The United Nations Convention against Transnational Organised Crime 2000

- Article 13 1 (b) – provides for the UK authorities to accept and enforce an order for confiscation made in the requesting State*
- Article 13 1 (a) and (2) provides for the UK authorities to take measures to identify trace and freeze or seize proceeds of crime for a confiscation order to be made by the UK courts*

2. The United Nations Convention against Corruption 2003 – with similar provisions – including Article 54 and 55 – providing for mechanisms for recovery of criminal property through co-operation in confiscation.

3. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997

4. The European Convention on Laundering, Search Seizure and Confiscation of the Proceeds of Crime 1990 and the Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 have been replaced by the terms of the EU-UK Trade and Cooperation Agreement 2021 – including Title XI – Freezing and Confiscation

B. The courts of England and Wales give effect to external (confiscation) orders where property is located within these jurisdictions – through a combination of Part 11 (sections 443-447) of the Proceeds of Crime Act 2002 and The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (PCA Order 2005) which provides for the registration and enforcement of the external order.

C. The courts of England and Wales give effect to overseas requests for various orders such as production order, customer information and account monitoring orders – through both

the Proceeds of Crime Act 2002; The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005; and CICA 2003.

EXTRADITION

Extradition from the UK

Extradition is the formal process whereby a requesting state requires the requested state to return to the requesting state an individual to stand trial or serve a sentence of custody imposed by the requesting state.

The Extradition Act (EA) 2003 came into force 1st January 2004. It governs extradition proceedings in the UK. As a result, the Framework Decision on the European Arrest Warrant (EWA FD) came into effect. It has undergone various changes, including amendments via the European Union (Future Relationship) Act 2020, prompted by Brexit.

There are five parts to the EA. These deal with extradition to category 1 countries (part 1 or Arrest Warrant (AW) cases), extradition to category 2 countries (part 2 cases), extradition to the UK, Police powers, and Miscellaneous and general provisions.

The UK has extradition arrangements with over 100 countries, with all Category 1 countries issuing arrest warrants. However, an extradition request can still be made by a country that does not have an extradition treaty with the UK, by treating that requesting country as if it were a category 2 country. This is achieved by the requesting country entering into a memorandum of understanding with the UK ('ad hoc' arrangements).

In 2021, the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland (TCA) was introduced to insert into the EA scheme a principle of proportionality and to temper perceptions of overuse of the scheme to pursue trivial matters. It also replaced the outgoing European Arrest Warrant.

TCA arrest warrants must be issued by a competent judicial authority of the requesting state. All TCA warrants are received in the UK by the National Crime Agency (NCA), which undertakes a series of checks to establish the validity of each warrant – certification checks. These look at the validity of the issuing judicial authority, that the arrest warrant contains a statement that it has been issued to facilitate the arrest and detention of the subject to conduct a prosecution/serve a custodial sentence, the subject's identity, particulars of conviction (if relevant), particulars of any other warrants, particulars of the offence under investigation (if relevant) and sentence in the event of conviction, or particulars of any outstanding sentence in post-conviction cases. The NCA must refuse to issue a certificate if conditions set out at s208(2)-(4) EA are met (national security) or if the request would ultimately result in an order discharging the subject under s21A EA on the basis that extradition would be disproportionate.

The procedure that applies is informed by both the category of case and the stage of the proceedings.

First hearing:

In Arrest Warrant (category 1) cases:

The requested person must be brought before the court 'as soon as practicable' The meaning of that phrase has been considered in several cases and is ultimately fact specific – there is not a fixed amount of time permitted. (See R (Nikonovs) v Governor of Brixton Prison [2005] EWHC 2405 (Admin), Huczko v Governor of HMP Wandsworth [2012] EWHC 4134 (Admin)). In practice, new cases should be notified to the court by 15:30pm – thereafter they are accepted into that day's lists after judicial approval.

Once the requested person is before the court, it has powers similar to those of the Magistrates' Court (England and Wales) at summary trial of a criminal 'information', including the power to adjourn the proceedings. The Extradition Act (EA) requires the AW to have been served on the requested person as soon as practicable after arrest. In the event that it has not, if an application is made for the discharge of the requested person, then it is in the court's discretion to do so, albeit in practice this is rarely granted. The court must assess what prejudice there is to the requested person by the non-compliance with s4(2) and usually requires that this is remedied by service of the AW. Crim PR 50.16(2) provides the procedure to be followed for such applications.

The identity of the person before the court must then be determined by the judge on the balance of probabilities. (EA 2003, s7(3))

Sections 4-7 of EA 2003 must be covered before the court turns to the issue of obtaining consent from the requested person. Before a consent to extradition can be obtained, the requested person must have had the opportunity to receive legal advice. Consent to extradition must be given in writing and is irrevocable. Once given, an expedited extradition process results.

In cases where the requested person resists extradition, one of the following challenges may be raised:

- *Validity of the AW*
- *The offences in the AW are not extradition offences*
- *One (or more) of the bars to extradition (see sections 11-19B, EA 2003)) - eg*
 - *Rule against double jeopardy*
 - *Where the purpose of the extradition is to punish on account of race, religion, nationality gender, sexual orientation or political opinion;*
 - *Passage of time*
 - *Specialty*
 - *Forum*
- *Conviction in absence*
- *That extradition would be incompatible with Convention rights and /or disproportionate (accusation cases only)*
- *The physical/mental health of the requested person*

- Abuse of process

A specific case management form is completed in contested cases and directions made for provision of a statement of issues, a proof of evidence, any defence evidence, response from judicial authority, skeleton arguments and a joint bundle.

Whilst the court should start to hear the matter within 21 days, this timescale is invariably impossible. The case is marked as having been formally opened and then adjourned. The court may consider the issue of bail during the adjournment. In extradition (conviction) there is no presumption in favour of bail. In virtually all cases where bail is granted in extradition cases of any type, a security has been required.

In non-AW (i.e. Part 2 requests),

All Category 2 countries have bi-lateral or multilateral extradition treaties with the UK, or are non-EU countries that are signatories to the European Convention on extradition (ECE) or the London Scheme for extradition within the Commonwealth.

Extradition requests from outside the EU are more complicated procedurally. This is because they can be either 'provisional' or 'full' requests, with the procedure post arrest being informed by which of those is being dealt with. It is also possible for the provisional arrest without warrant of a requested person wanted by certain specified countries for serious extraditions offences. This is by virtue of an amendment to the EA brought about by the Extradition (Provisional arrest) Act (E(PA)A) 2003. They are much less common than Part 1 requests.

The following challenges to extradition may be raised:-

- *Rule against double jeopardy (s80 EA 2003)*
- *Extraneous considerations (s81 EA 2003)*
- *Passage of time (s82 EA 2003)*
- *Hostage-taking considerations (s83 EA 2003)*
- *Forum (s83A)*
- *Prima-facies case (ss84-86)*
- *Conviction in absence (s85 EA 2003)*
- *Physical/mental condition (s91)*
- *The possibility of a death sentence being imposed (s94)*
- *Challenge to the warrant on the grounds that the offences therein are insufficiently particularised.*

In advance of a contested hearing, the Crown Prosecution Service will decide what material will be disclosed. The usual domestic requirements do not apply to extradition proceedings, but, in R (Raissi) v Secretary of State for the Home Department [2008] EWCA Civ 72, it was held that the CPS owes the court a duty of 'candour and good faith'.

At the contested extradition hearing, the Judge will decide applying the standard of proof as if the person facing extradition is accused of an offence, with the judicial authority or

requesting state in the role of prosecutor, i.e. it is for the requesting state to prove to the criminal standard (beyond reasonable doubt).

In all extradition cases, the judge must consider whether extradition would be compatible with the requested person's human rights. If the judge finds that extradition would not be compatible with the requested person's human rights, that person's extradition cannot be ordered, and the judge must discharge them. Common challenges include claims in respect of Article 8 of the European Convention on Human Rights (ECHR) regarding family or private life in the UK and prison conditions in the requesting State (Article 3 of the ECHR) (See also s87 EA 2003).

Prosecutors and judges apply the statutory provisions of the Act and not the terms of international treaties. The international Treaty or Memorandum of Understanding being the enabling provision for the request which is decided in accordance with the domestic legislation of the UK. Once the request is issued it is for the Home Office (delegated power from SoS) to satisfy itself that the request is in accordance with the Treaty or MOU and if so issue a s70 EA 2003 Certificate requesting a warrant is issued by an appropriate Judge; if the judge is satisfied the warrant is issued, because the function is a administrative one a challenge that any S70 EA 2003 certificate has been issued for a purpose not covered by the Treaty / MOU is challengeable only to the High Court via Judicial Review. Once the certificate is issued this court deems the request to be in accordance with the treaty or MOU and proceeds according to the 2003 Act.

The judge must consider whether extradition would be disproportionate in any given case, based upon the seriousness of the alleged conduct, the likely penalty should the requested person to be found guilty and the possibility of less coercive measures being taken by the foreign authority, including whether it is likely there would be unnecessarily lengthy periods of pre-trial detention.

Extradition to the UK

From EU Member States

Extradition from EU Member States (Cat 1 countries) is governed by the TCA as implemented by Part 3 of the Extradition Act 2003. The surrender system applies to the extradition of persons wanted for criminal prosecution or for the execution of a custodial sentence or detention order.

The process is triggered by the issue of a warrant by the designated UK authority requesting the arrest of he person in the relevant territory. The extradition will then be carried out in accordance with the legislation of the territory in question implementing the surrender system provided for by the TCA.

From Category 2 Countries

Extradition requests to Category 2 territories are made under the royal prerogative with the procedure governed by and varying according to the domestic legislation of the requested territory and the individual arrangements made between the UK and that territory.

Procedural Rules

The statutory provisions are in turn supported by Rules of Court procedure (Criminal Procedure Rules [CPR]) – and in particular CPR 49 (International Co-operation)

2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?

Yes.

However the starting point for the prosecution in any criminal investigation involving an overseas element is to see if the evidence can be obtained via Police, rather than court-led processes. Where a request from a prosecutor is not necessary, cooperation between domestic police and an overseas police authority can and should be used. This is often referred to as police-to-police informal cooperation or mutual administrative assistance (MAA).

MAA is likely to be relevant to the following types of request:

- *Previous convictions;*
- *Public records;*
- *Voluntary witness statements (in which event the law/procedure of the other state must be respected and, where necessary, prior permission obtained from the relevant foreign authority for any witness to be approached)*

3. If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?

See the answers given to question 1 above in relation to the provisions of the CICA 2003. The role of the courts is limited to the overseeing of the procedural requirements to the making of any request for assistance of an authority in a participating country or in the making of an order at the request of such an authority – having been nominated as the responsible court by the Secretary of State.

4. What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios.

Receiving Evidence from a Foreign State

A. The principal legislation governing the receipt of evidence from a witness in a foreign country is:

CICA - Sections 7-8 (MLAs) Section 29 (Video / audio links)

Criminal Justice Act 2003 section 51 – allows for the giving of evidence in a court in England and Wales by means of video or audio links where the court determines that it is in the interests of justice to do so.

For permission to be granted the court will need to be satisfied that the country from where the witness is to give evidence has given permission for the witness to give evidence by means of an audio or video link.

This may require the Prosecution or Defence making an application to the Court for the making of a request for assistance (MLA) pursuant to Section 7 of CICA and in the event of the Court being satisfied that such a request should be made it will either forward a letter of request directly to the judicial authority in the relevant country or to the Secretary of State to be forwarded to the relevant authority in the overseas country (Sections 7-8 of CICA)

It will be for the applicant to confirm the views of the country from where the evidence is to be given – whether by seeking confirmation from the Embassy of that country or the Home Office (or, possibly, through the Taking of Evidence Unit of the Foreign Commonwealth and Development Office (FCDO)). The European Judicial Network also gives details of contact points to facilitate judicial cooperation in criminal matters. Assuming this is done the applicant will also have to ensure that all necessary practical steps are taken for the giving of such evidence

The Judge's role will be to

- i. Consider the application;*
- ii. Confirm with the applicant that relevant permissions have been sought of the relevant country;*
- iii. Consider and approve or draft a MLA of the overseas country;*
- iv. To direct the parties to take all necessary practical measures relating to the video / audio link that are appropriate to the evidence to be given*

The giving of evidence from a witness in England and Wales to a court in a foreign country.

The statutory provisions are those set out in CICA – sections 13-15

- i. The request for evidence to be given from England and Wales by means of video, audio link or by telephone, is made by a court exercising criminal jurisdiction or a prosecuting authority in a country outside the UK.*

ii. The request is made to the Secretary of State by means of an international letter of request (Mutual Legal Assistance Request – MLA Request) – Guidance is given at:- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069752/Request_for_MLA_in_criminal_matters_guidelines_2022.pdf

iii. A request may be refused by the Secretary of State where:-

- The investigation or prosecution is politically motivated
- There is a risk that the execution of the request may result in the imposition of the death penalty;
- The request relates to a person who, if proceeded against in the UK for the offence for which assistance is requested, would be entitled to be discharged on the grounds of previous acquittal or conviction (Double Jeopardy)
- There are reasonable grounds for believing that the request has been made for the purpose of investigating, prosecuting or punishing a person on account of their race, gender, sexual orientation, religion, nationality, ethnic origin or political opinions;

iv. It is for the Secretary of State to nominate a court from where the evidence by video/audio link or telephone is to be given.

v. Evidence will not be permitted to be given where the witness is the defendant or suspect and the hearing is or forms part of the trial of that person

vi. The Judge does not receive nor determine the request to give evidence to an overseas country. The Judge's role will be to preside over the hearing

5. As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.

5.1 in general a judge in the UK will not receive a direct request for assistance whether in relation to investigation of a crime or in the context of court proceedings. See above.

5.2 The process in relation to requests for assistance is for such requests to be made to the Secretary of State who may refuse requests for the reasons set out above. In addition the UK will conduct a human rights assessment when considering the provision of assistance overseas- Guidance on how this is applied is at:-

<https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance>

5.3 In relation to extradition proceedings the court may refuse to direct extradition where eg the extradition would not be compatible with the persons Convention rights, where there is an extraneous purpose behind the request, where the person has already been convicted or

acquitted of the same offence, where the proceedings would amount to an abuse of process. See examples above.

6. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

My own experience is limited to a witness giving evidence via link from Australia. Necessary consents were obtained. The evidence did not require the witness to refer to documents nor video playback (which could cause issues where evidence is to be given via a remote link). Timetabling the evidence was the principal issue. Otherwise the remote link worked well.

Extradition requests are generally handled by Senior District Judges in Westminster Magistrates Court. I have sought the views of Paul Goldspring Senior District Judge (Chief Magistrate) for England Wales to share his own experiences of handling extradition cases. He has also very helpfully provided assistance in formulating some of the above answers – in particular those relating to extradition. He comments as follows:-

My personal experience of the above law and procedures is largely in the extradition sphere. In the first instance courts MLA tends to be requests for the provision of evidence within the requesting states trial process, it is not rare but is not something I personally do a lot of. By contrast I have heard many 100's of extradition hearings, many with live link applications and the taking of evidence from abroad.

In the 30 months I have been Chief Magistrate this has included the taking of evidence over the link from Japan, Montenegro, Serbia, Mexico, Sint Maarten and the USA amongst many others.

The extradition requests from Japan, Montenegro, Sint Maarten and Mexico were the first ever extradition proceedings for those countries. The actual logistics of arranging the link, testing it works and the technical know-how needed are handled by HMCTS admin staff but from the judges' perspective issues surrounding objections to exercising our jurisdiction in another State, case management and timing are all for the judges consideration.

The current law on receiving witness evidence from abroad in these proceedings, despite case law, is uncertain and presents a challenge to the judge but when permission is granted and / or not deemed necessary the process is an extremely useful case management and evidential tool.

In the Japanese proceedings for example I was able to receive evidence from the Director of Prisons in the MOJ without him coming to the UK, given his remit and availability; without it the case would likely still be ongoing. I received expert evidence in relation to prison conditions in Japan and on their law and procedures, the challenge was seeking to show they do not comply with international norms on Human rights and in particular Articles 3 and 6 of the ECHR.

HHJ Timothy Smith (Chairman of the Criminal Sub-Committee of His Majesty's Council of Circuit Judges) with grateful thanks to
Paul Goldspring Senior District Judge (Chief Magistrate) for England and Wales