

# SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4581 of 31 May, 2019

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LEGAL NOTICE 110 OF 2019

## INTERPRETATION AND GENERAL CLAUSES ACT

### EUROPEAN ARREST WARRANT ACT 2004 (AMENDMENT) REGULATIONS 2019

In exercise of the powers conferred on it by section 23(g)(ii) of the Interpretation and General Clauses Act and for the purpose of further transposing into the law of Gibraltar Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, the Government has made these Regulations-

#### **Title.**

1. These Regulations may be cited as the European Arrest Warrant Act 2004 (Amendment) Regulations 2019.

#### **Commencement.**

2. These Regulations come into operation on the day of publication.

#### **Amendment of the European Arrest Warrant Act 2004.**

3. For section 33 of the European Arrest Warrant Act 2004 substitute-

**“Exceptions to duty to surrender: where offence has a nexus with Gibraltar or otherwise outside the issuing State.**

33.(1) A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him was committed or is alleged to have been committed in a place other than the issuing State and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than Gibraltar, constitute an offence under the law of Gibraltar.

(2) A person shall not be surrendered under this Act by reason of forum if the surrender would not be in the interests of justice.

(3) For the purposes of subsection (2) a surrender would not be in the interests of justice if the magistrates' court-

(a) decides that a substantial measure of the person's relevant activity was performed in Gibraltar; and

(b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the surrender should not take place.

(4) The specified matters relating to the interests of justice are—

- (a) the place where most of the loss or harm resulting from the offence occurred or was intended to occur;
- (b) the interests of any victims of the offence;
- (c) any belief of the Attorney General that Gibraltar is not the most appropriate jurisdiction in which to prosecute the person in respect of the conduct constituting the offence;
- (d) were the person to be prosecuted in Gibraltar for an offence that corresponds to the offence, whether evidence necessary to prove the offence is or could be made available in Gibraltar;
- (e) any delay that might result from proceeding in one jurisdiction rather than another;
- (f) the desirability and practicability of all prosecutions relating to the offence taking place in one jurisdiction, having regard (in particular) to—
  - (i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and
  - (ii) the practicability of the evidence of such persons being given in Gibraltar or in jurisdictions outside Gibraltar;
- (g) the person's connections with Gibraltar.

(5) In deciding whether the surrender would not be in the interests of justice, the magistrates' court must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the territory concerned.

(6) If, on an application by the Attorney General, it appears to the magistrates' court that the Attorney General has considered the offences for which the person could be prosecuted in Gibraltar in respect of the conduct constituting the offence specified in the European arrest warrant, the magistrates' court must make the Attorney General a party to the proceedings on the question of whether the person's surrender is barred by reason of forum.

(7) In this section "the person's relevant activity" means activity which is material to the commission of the offence specified in the European arrest warrant and which is alleged to have been performed by the person.

**Effect of Attorney General's certificate on forum proceedings.**

33AA.(1) The magistrates' court hearing proceedings under section 33(2) to (7) (the "forum proceedings") must decide that the surrender is not barred by reason of forum if (at a time when the magistrates' court has not yet decided the proceedings) it receives an Attorney General's certificate relating to the European arrest warrant.

(2) That duty to decide the forum proceedings in that way is subject to the determination of any question relating to the Attorney General's certificate raised in accordance with section 33AC.

(3) The Attorney General may apply for the forum proceedings to be adjourned for the purpose of assisting him—

- (a) in considering whether to give an Attorney General's certificate relating to the surrender,
- (b) in giving such a certificate, or
- (c) in sending such a certificate to the magistrates' court.

(4) If such an application is made, the magistrates' court must—

- (a) adjourn the forum proceedings until the application is decided; and
- (b) continue the adjournment, for such period as appears to the judge to be reasonable, if the application is granted.

(5) But the magistrates' court must end the adjournment if the application is not granted.

**Attorney General's certificate.**

33AB.(1) An "Attorney General's certificate" is a certificate given by the Attorney General which—

- (a) certifies both matter A and matter B, and
- (b) certifies either matter C or matter D.

(2) Matter A is that he has considered the offences for which the person could be prosecuted in Gibraltar in respect of the conduct constituting the offence specified in the European arrest warrant.

(3) Matter B is that he has decided that there are one or more such offences that correspond to the offence specified in the European arrest warrant (the "corresponding offences").

(4) Matter C is that—

- (a) he, together with the relevant law enforcement agency in Gibraltar, has made a formal decision as to the prosecution of the person for the corresponding offences,
- (b) that decision is that the person should not be prosecuted for the corresponding offences, and
- (c) the reason for that decision is a belief that—
  - (i) there would be insufficient admissible evidence for the prosecution; or
  - (ii) the prosecution would not be in the public interest.

(5) Matter D is that he believes that the person should not be prosecuted for the corresponding offences because there are concerns about the disclosure of sensitive material in—

- (a) the prosecution of the person for the corresponding offences, or
- (b) any other proceedings.

(6) In relation to the surrender of any person under this Act, neither this section nor any other rule of law (whether or not contained in an enactment) may require the Attorney General—

- (a) to consider any matter relevant to giving an Attorney General 's certificate, or
- (b) to consider whether to give an Attorney General 's certificate.

(7) In this section “sensitive material” means material which appears to the Attorney General to be sensitive, including, but not limited to, material appearing to be sensitive on grounds relating to—

- (a) the sovereignty, security, public order or other essential interests of Gibraltar, or
- (b) the prevention or detection of crime (including grounds relating to the identification or activities of witnesses, informants or any other persons supplying information to the police or any other law enforcement agency who may be in danger if their identities are revealed).

**Questioning of Attorney General's certificate.**

33AC.(1) No decision of the Attorney General relating to an Attorney General's certificate in respect of a person's surrender (a "relevant certification decision") may be questioned except on an appeal under section 38 against an order for that surrender.

(2) For the purpose of—

- (a) determining whether to give permission for a relevant certification decision to be questioned, and
- (b) determining any such question (if that permission is given),

the Supreme Court must apply the procedures and principles which would be applied by it on an application for judicial review.

(3) In a case where the Supreme Court quashes an Attorney General's certificate, the Supreme Court is to decide the question of whether or not the surrender is barred by reason of forum.

(4) Where the Supreme Court is required to decide that question by virtue of subsection (3)—

- (a) sections 33 to 33AB and this section apply in relation to that decision (with the appropriate modifications) as they apply to a decision by the magistrates' court; and
- (b) in particular—
  - (i) a reference in this section to an appeal under section 38 has effect as a reference to an appeal under section 44 to the Privy Council;
  - (ii) a reference in this section to the Supreme Court has effect as a reference to the Privy Council.

**Interpretation of sections 33 to 33AC**

33AD.(1) This section applies for the purposes of sections 33 to 33AC (and this section).

(2) These expressions have the meanings given—

"forum proceedings" has the meaning given in section 33AA(1);

"Attorney General's certificate" has the meaning given in section 33AB(1).

(3) In determining for any purpose whether an offence corresponds to the offence specified in the European arrest warrant, regard must be had, in particular, to the nature and seriousness of the two offences.

(4) A reference to a formal decision as to the prosecution of a person for an offence is a reference to a decision (made after complying with, in particular, any applicable requirement concerning any relevant code of practice) that the person should, or should not, be prosecuted for the offence.”.

Dated 31<sup>st</sup> May, 2019

N F COSTA,  
Minister with responsibility for Justice,  
for the Government.