

**MUTUAL LEGAL ASSISTANCE (SCHENGEN
CONVENTION) ACT 2004**

Principal Act

Act. No. 2004-03	<i>Commencement</i>	28.1.2004
	<i>Assent</i>	28.1.2004

ARRANGEMENT OF SECTIONS

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SCHEDULE
PROCEEDINGS UNDER SECTION 14

AN ACT TO IMPLEMENT ARTICLE 48 TO 53 OF THE CONVENTION OF 19 JUNE 1990 APPLYING THE SCHENGEN AGREEMENT OF 14 JUNE 1985 RELATING TO MUTUAL LEGAL ASSISTANCE; TO ENABLE FURTHER PROVISION TO BE MADE BY REGULATION, MAKING ARRANGEMENTS FOR MUTUAL LEGAL ASSISTANCE IN FAVOUR OF THE UNITED KINGDOM; AND OTHER PROVISIONS IN THAT RESPECT.

Title.

1. This Act may be cited as the Mutual Legal Assistance (Schengen Convention) Act 2004.

Interpretation.

2. In this Act and unless the context otherwise requires –

“Central Authority” means the Attorney General;

“court” includes a tribunal;

“criminal proceedings” include criminal proceedings outside Gibraltar in which a civil order may be made;

“evidence” includes information in any form, and articles, and giving evidence includes answering a question or producing any information or article;

“Minister” means the Chief Minister;

“notice” means a notice in writing;

“offence” does not include a fiscal offence, other than an offence relating to excise duty, value added tax or customs duties;

“process” means any summons or order issued or made by a court and includes–

- (a) any other document issued or made by a court for service on parties or witnesses;
- (b) any document issued by a prosecuting authority outside Gibraltar for the purposes of criminal proceedings;

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“the Schengen Convention” means the Convention implementing the Schengen Agreement of 14th June 1985;

“State” and “Schengen State” means a State party to the Schengen Convention not being the United Kingdom;

“territory” means the territory of a Schengen State to which articles 48 to 53 of the Schengen Convention apply.

Scope.

3.(1) Unless otherwise stated, this Act shall apply in relation to—

- (a) criminal proceedings and investigations, in respect of any criminal proceedings excluding proceedings under military law;
- (b) criminal proceedings brought by the administrative authorities in a Schengen State or territory, including Gibraltar, in respect of offences which are punishable either in Gibraltar or that State;
- (c) proceedings for compensation in respect of wrongful prosecution or conviction;
- (d) clemency proceedings;
- (e) communication of legal statements relating to the execution of a sentence or measure, the imposition of a fine or the payment of costs or proceedings;
- (f) measures relating to the suspension or delivery of a sentence or measure, conditional release or the postponement or suspension of execution of a sentence or measure;
- (g) civil proceedings joined to criminal proceedings, as long as the criminal court has not yet given a final ruling in the criminal proceedings.

(2) Assistance under this Act may be refused—

- (a) if the request for assistance concerns a political offence or an offence connected with a political offence;
- (b) if execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of Gibraltar;

(3) Requests for assistance under section 18, 19 or 21 shall be effected through the Ministry of Justice of the requesting State or territory.

Judicial Authority.

4. The Central Authority is a judicial authority for purposes connected with article 53 of the Schengen Convention.

Service of Schengen process in Gibraltar.

5.(1) An authority in a Schengen State may directly serve persons in Gibraltar by post with the following documents—

- (a) documents initiating or relating to court proceedings, including, but not limited to, summons, notices of hearings and adjournments;
- (b) witness summons;
- (c) judicial orders and judgments;
- (d) judicial documents relating to the enforcement of any judicial order or judgment.

(2) Where the process is to be served inside Gibraltar and is written in a language that the recipient may not understand, it shall be accompanied by a translation of the process into English.

(3) The power conferred by subsection (4) is exercisable where the Central Authority receives any process or other document to which this section applies from an authority in a Schengen State, together with a request for the process or document to be served on a person in Gibraltar.

(4) The Central Authority may cause the process or document to be served by post or, if the request is for personal service, direct the Commissioner of Police to cause it to be personally served on the person to whom the process or document is addressed.

(5) In respect of proceedings under section 3(1)(b), where an offence is punishable both under the law of Gibraltar and the law of the other Schengen State, the procedure for service of documents set out in subsection (4) shall be used.

Service of Schengen process: supplementary.

6.(1) No obligation to comply with the process is imposed by virtue of its service.

(2) The process shall be accompanied by a notice—

- (a) stating the effect of subsection (1);
- (b) indicating that the person on whom it is served may wish to seek advice as to the possible consequences of his failing to comply with the process under the law of the State where it was issued or made; and
- (c) indicating that under that law he may not be accorded the same rights and privileges as a party or as a witness as would be accorded to him in proceedings in Gibraltar.

(3) Where the Commissioner of Police causes any process or document to be served under section 5, he shall—

- (a) inform the Central Authority when and how it was served; and
- (b) (if possible) provide him with a receipt signed by the person on whom it was served.

(4) Where the Commissioner of Police is unable to cause any process or document to be served as directed, he shall at once inform the Central Authority of that fact and of the reason.

General requirements for service of Gibraltar process in a Schengen State.

7.(1) This section applies to any process issued or made by a court in Gibraltar for the purposes set out in section 3.

(2) The process may be issued or made in spite of the fact that the person on whom it is to be served is outside Gibraltar.

(3) Where the process is to be served outside Gibraltar and the person at whose request it is issued or made believes that the person on whom it is to be served does not understand English, he shall—

- (a) inform the court of that fact; and
- (b) provide the court with a copy of the process, or of so much of it as is material, translated into an appropriate language.

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(4) Process served outside Gibraltar requiring a person to appear as a party or attend as a witness—

- (a) shall not include notice of a penalty; and
- (b) shall be accompanied by a notice giving any information required to be given by rules of court.

(5) If process requiring a person to appear as a party or attend as a witness is served outside Gibraltar, no obligation to comply with the process under the law of Gibraltar is imposed by virtue of the service.

(6) Accordingly, failure to comply with the process does not constitute contempt of court and is not a ground for issuing a warrant to secure the attendance of the person in question.

(7) But the process may subsequently be served on the person in question in Gibraltar (with the usual consequences for non-compliance).

(8) The allowances, including subsistence, to be paid and the travelling expenses to be refunded to a witness or expert by the requesting State shall be calculated as from his place of residence and shall be at rates at least equal to those provided for in the scales and rules in force in proceedings before the Supreme Court.

Service of process otherwise than by post.

8. Process to which section 7 applies may, instead of being served by post, be served on a person outside Gibraltar in accordance with arrangements made by the Central Authority.

Requests for assistance in obtaining evidence in a Schengen State.

9.(1) If it appears to any judge or justice of the peace in Gibraltar—

- (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; or
- (c) that section 3 otherwise applies,

the judge or justice of the peace may request assistance under this section.

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(2) The assistance that may be requested under this section is assistance in obtaining outside Gibraltar any evidence specified in the request for use in the proceedings or investigation.

(3) The Central Authority may request assistance under this section if—

- (a) it appears to it that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and
- (b) proceedings in respect of the offence in question have been instituted or it is being investigated; or
- (c) section 3 otherwise applies.

Sending requests for assistance.

10.(1) A request for assistance under section 9 may be sent—

- (a) to a court exercising jurisdiction in the place where the evidence is situated; or
- (b) to any authority recognised by the government of the State or territory in question as the appropriate authority for receiving requests of that kind.

(2) In cases of urgency, a request for assistance may be sent to the International Criminal Police Organisation, for forwarding to any court or authority mentioned in subsection (1).

Use of evidence obtained.

11.(1) This section applies to evidence obtained pursuant to a request for assistance under section 9.

(2) The evidence may not, without the consent of the appropriate overseas authority, be used for any purpose other than that specified in the request.

(3) When the evidence is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.

(4) In this section, the appropriate overseas authority means the authority recognised by the government of the State in question as the appropriate authority for receiving requests of the kind in question.

Requests for assistance from overseas authorities.

12.(1) Where a request for assistance in obtaining evidence in Gibraltar is received by the Central Authority it may—

- (a) if the conditions in section 13 are met, arrange for the evidence to be obtained under section 14; or
- (b) direct that a search warrant be applied for under or by virtue of section 15.

(2) The request for assistance may be made only by—

- (a) a court exercising criminal jurisdiction, or a prosecuting authority, in a State or territory outside Gibraltar;
- (b) any other authority in such a State or territory which appears to the Central Authority to have the function of making such requests for assistance.

(3) Requests for assistance should be made in English or accompanied by a certified translation into English and any supporting documentation, if not in English, shall be accompanied by a certified translation into English.

(4) Requests for assistance shall indicate as follows—

- (a) the authority making the request;
- (b) the object of and the reason for the request;
- (c) where possible, the identity and the nationality of the person concerned;
- (d) where necessary, the name and address of the person to be served; and
- (e) the offence or alleged offence and a summary of the facts.

(5) Requests under this Act may be sent and returned through the national central offices of the International Criminal Police Organisation.

Powers to arrange for evidence to be obtained.

13. The Central Authority may arrange for evidence to be obtained under section 14 if the request for assistance in obtaining the evidence is made in

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connection with proceedings or investigations covered by section 3 being carried on in a State or territory outside Gibraltar.

Court to receive evidence.

14.(1) A court in Gibraltar shall receive any evidence to which the request relates which appears to it to be appropriate for the purpose of giving effect to the request.

(2) The Schedule is to have effect in relation to proceedings under this section.

Statutory search powers.

15.(1) Sections 25, 26 and 27 of the Criminal Procedure Act shall have effect as if references to an offence in section 25(1) included any conduct which—

- (a) constitutes an offence under the law of a State or territory outside Gibraltar; and
- (b) would, if it occurred in Gibraltar, constitute an offence punishable by imprisonment for a period of at least six months.

(2) An application for a warrant or order by virtue of subsection (1) may be made only in pursuance of a direction given under section 12(1)(b).

Seized evidence.

16. Any evidence seized by a police officer under or by virtue of section 15 is to be sent to the court or authority which made the request for assistance.

Powers under warrants.

17. A court may not issue a warrant under section 15 in respect of any evidence if the court has reasonable grounds for believing that it consists of, or includes, items subject to legal privilege.

Temporary transfer of prisoners.

18.(1) The Central Authority shall petition the court for an order that a person in custody whose personal appearance as a witness or for purposes of confrontation is applied for by the requesting State be temporarily transferred to the territory where the hearing is intended to take place, provided that -

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- (a) he shall be sent back within the period stipulated by the requested State;
- (b) the person in custody consents;
- (c) his presence is not necessary at criminal proceedings pending in Gibraltar;
- (d) the transfer is not liable to prolong his detention; and
- (e) there are no other overriding grounds for not transferring him to the territory of the requesting State.

(2) In a case within section 13 or subsection (1) of this section, the Central Authority may arrange for the assistance to be given only if it is satisfied—

- (a) that an offence under the law of the State or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and that proceedings in respect of the offence have been instituted in that State or territory or that an investigation into the offence is being carried on there; or
- (b) that section 3 otherwise applies.

(3) For the purposes of this section and section 13, an offence includes an act punishable in proceedings brought by the administrative authorities in a Schengen State in respect of offences which are punishable either in Gibraltar or that State where the decision may give rise to proceedings before a criminal court.

(4) The Central Authority is to regard as conclusive a certificate as to the matters mentioned in subsection (2)(a) and (b) issued by any authority in the State or territory in question which appears to him to be the appropriate authority to do so.

(5) Evidence or documents transmitted pursuant to this Act shall not require any form of authentication.

(6) Where the Central Authority or the court refuses any request for assistance, reasons shall be provided.

Transit through Gibraltar.

19.(1) Transit through Gibraltar of a person being conveyed from an requested State to a requesting State, pursuant to a request for assistance

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falling within the scope of this Act shall be permitted where the Central Authority receives a request in that behalf from the requesting State and where the requesting State provides the Central Authority with the following information—

- (a) the nationality of the person and such other information as will enable the person to be identified by the Central Authority;
- (b) information showing that a request for assistance has been issued by the requesting State in respect of the person;
- (c) the nature and classification under the law of the issuing State of the offence to which the request relates; and
- (d) the circumstances in which the offence specified was committed or is alleged to have been committed, including the date and place of its commission.

(2) The transit of a person through Gibraltar shall be supervised by a police officer if the Central Authority considers it appropriate, and where a person's transit is so supervised the person shall be deemed to be in the custody of a police officer who accompanies him.

(3)

- (a) This subsection applies to an aircraft that has taken off from a place (other than Gibraltar Airport) and that is scheduled to land in a place (other than Gibraltar Airport) and on board which there is a person who is being conveyed to a requesting State.
- (b) Where an aircraft to which this subsection applies lands (for whatever reason) in Gibraltar, the requesting State shall, upon its landing or as soon as may be after it lands, provide the Central Authority with the information referred to in subsection (1).
- (c) While an aircraft to which this subsection applies is in Gibraltar, a person referred to in paragraph (a) who is on board that aircraft shall be deemed to be in transit through Gibraltar and subsection (2) shall apply accordingly.

Immunity of witnesses.

20.(1) A witness or expert, whatever his nationality, may make his appearance before the judicial authorities of the requesting State conditional

on a prior assurance being given to him that he will not be prosecuted, detained or subjected to any other restriction of his personal liberty in the territory of that State in respect of acts or convictions prior to his departure from Gibraltar.

(2) An accused person, whatever his nationality, may make his appearance before the judicial authorities of the requesting State conditional on a prior assurance being given to him that he will not be prosecuted, detained or subjected to any other restriction of his personal liberty in the territory of that State in respect of acts or convictions prior to his departure from Gibraltar and not specified in the summons.

(3) This section shall not apply when the witness or expert or accused person having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned.

Transfer of judicial records.

21.(1) The Registrar of the Supreme Court shall communicate extracts from and information relating to judicial records, requested by the judicial authorities of a Schengen State and needed in a criminal matter, to the same extent that these may be made available to a court in Gibraltar in a like case.

(2) In any case other than that provided for in subsection (1), the request shall be complied with subject to such conditions as the Chief Justice may deem appropriate.

(3) The Registrar of the Supreme Court shall inform any other Schengen States of all criminal convictions and subsequent measures in respect of nationals of those States, entered in the judicial records at least once a year. Where the person concerned is considered a national of two or more other Schengen States, the information shall be given to each of these States, unless the person is a British national.

Rules of court.

22. The Chief Justice may make provision by rules of court as to the practice and procedure to be followed in connection with proceedings under this Act.

23. The Minister may, by regulations, make provision extending to the United Kingdom in whole or in part the provisions of this Act either with or without modifications.

SCHEDULE

PROCEEDINGS UNDER SECTION 14

Section 14

Power to administer oaths.

1. The court may take evidence on oath.

Proceedings.

2. Rules of court under section 22 may, in particular, make provision in respect of the persons entitled to appear or take part in the proceedings and for excluding the public from the proceedings.

Privilege of witnesses.

- 3.(1) A person cannot be compelled to give any evidence which he could not be compelled to give—

- (a) in criminal proceedings in Gibraltar; or
- (b) subject to sub-paragraph (2), in criminal proceedings in the State from which the request for the evidence has come.

(2) Sub-paragraph (1)(b) does not apply unless the claim of the person questioned to be exempt from giving the evidence is conceded by the court or authority which made the request.

(3) Where the person's claim is not conceded, he may be required to give the evidence to which the claim relates (subject to the other provisions of this paragraph); but the evidence may not be forwarded to the court or authority which requested it if a court in the State in question, on the matter being referred to it, upholds the claim.

(4) A person cannot be compelled to give any evidence if his doing so would be prejudicial to the security of Gibraltar. A certificate signed by or on behalf of the Governor to the effect that it would be so prejudicial for that person to do so is conclusive evidence of that fact.

(5) A person cannot be compelled to give any evidence in his capacity as an officer or servant of the Crown.

(6) Sub-paragraphs (4) and (5) are without prejudice to the generality of sub-paragraph (1).

Forwarding evidence.

4.(1) The evidence received by the court is to be given to the Central Authority for forwarding to the court or authority that made the request.

(2) So far as may be necessary in order to comply with the request—

- (a) where the evidence consists of a document, the original or a copy is to be provided;
- (b) where it consists of any other article, the article itself, or a description, photograph or other representation of it, is to be provided.

(3) The court may delay the forwarding of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings in Gibraltar.

(4) Any property, as well as original records or documents, shall be handed over in execution of a request on condition that it shall be returned as soon as reasonably possible unless the court waives the return thereof.

5. On the express request of the requesting State the Central Authority shall petition the court to state the date and place of execution of the request. Officials and interested persons may be present at such execution if the court deems it appropriate.

Supplementary.

6. The Bankers' Books Evidence Act 1879 applies to the proceedings as it applies to other proceedings before the court.

7. No order for costs may be made.