Judicial decisions

Who qualifies as 'judicial authority' for the purpose of extradition?

Assange v The Swedish Prosecution Authority
[2012] UKSC 22, [2012] 2 AC 471, [2012] 3 WLR 1, [2012] 4 All ER 1249, [2013] 1 CMLR 4, [2012] 2 WLR 1275

http://www.bailii.org/uk/cases/UKSC/2012/22.html

1 Introduction

> 'But the new Eurowarrant, which streamlines extradition throughout Europe, will not be confined to terrorism. It is a prime example of levelling down to reach agreed standards rather than the raising of all to a place in which justice is the likeliest outcome.'
>
> – Baroness Helena Kennedy QC
> (*Just Law* (2004) 55)

In a somewhat critical note on the role of the newly established United Kingdom Supreme Court (UKSC)[1] Rozenberg concluded his brief comment with the following rather tetchy observation: 'All-in-all, there is no doubt that the Supreme Court is easier to understand than its predecessor. But is has yet to make the impact it must have hoped for'.[2] For this reason the author observed that the court grasped 'enthusiastically' at the opportunity to hear the appeal of Julian Assange, founder of WikiLeaks.[3] In passing it needs to be noted that the despite the fact that the bench of the UKSC ordinarily consists

[1]The Supreme Court of the United Kingdom (SCUK) was established under the provisions of Part 3 of the Constitutional Reform Act 2005 c 4 and was adopted by the two Houses of Parliament on 21 March 2005. The Act received royal assent on 24 March 2005. Section 23(1) reads: 'There is to be a Supreme Court of the United Kingdom' whilst s 23(2) states that: 'The Court consists of 12 judges appointed by Her Majesty by letters patent'. In terms of s 42 a properly constituted court consists of an uneven number of judges with the minimum being three. See http://www.legislation.gov.gov.uk/ukpga/2005/4/contents (accessed 30 August 2014).
[2]'The media and the UK Supreme Court' (2012) *Cambridge J Int'l and Comp L* 44, 46.
[3]*Id* 44 n 3.

of an uneven number (but at least three) of judges, provision has been made for up to nine judges to hear any given case. Once again relying on Rozenberg, his reference to 'the great public importance of the issue raised' expressed in the appeal application, explains why seven rather than the minimum of three judges, presided in the *Assange* case.[4]

In what follows, a brief factual background to the decision is offered providing context for the founding of WikiLeaks (and the meaning of the word 'Wiki') as well as referring to Assange's exploits within the WikiLeaks operation/ organisation. This is followed by the reasons for the request from Sweden to have him extradited to that country and his subsequent unsuccessful appeal to the High Court of Justice (Queen's Bench Division (QB), Divisional Court) in London in 2011. Since the QB decision was largely subscribed to by the UKSC, this decision will receive the lion's share of attention in this case note.

Assange's unsuccessful appeal culminated in his last resort (in the United Kingdom at least) – an appeal to the UKSC. The judgment on appeal in *Assange v The Swedish Prosecution Authority*[5] was delivered on 30 May 2012 with five judges dismissing the appeal.[6] Two judges dissented and offered separate dissenting judgments.[7]

Against this background, I consider the views expressed and reasons advanced in both the majority and the minority judgments in the UKSC as regards extradition in English law in light of the UK's obligations in terms of European Union prescripts. Although not expressly articulated, it is submitted that the margin of appreciation doctrine played an important role in both the majority and minority decisions. In the brief comment on these judgments, my reasons for this submission are advanced.

2 Background: Origin of WikiLeaks

In a time of the ready availability of information from a multitude of electronic devices/media platforms, the publication of literally hundreds of thousands of

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[4] *Ibid.* See *Application for permission to appeal: Julian Assange v Swedish Judicial Authority* available at http://www.supremecourt.gov.uk/news/379.html (accessed 30 August 2014). Rozenberg (n 2 above) added yet another possible reason for the seven-judge bench asking whether '… the justices [are] queueing up to take part in a case in which, for once, the public may be interested?' (45).

[5] [2012] UKSC 22, [2012] 2 AC 471, [2012] 3 WLR 1, [2012] 4 All ER 1249, [2013] 1 CMLR 4, [2012] 2 WLR 1275. See http://www.bailii.org/uk/cases/UKSC/2012/22.html (accessed 30 August 2014).

[6] Each one of their Lordships Phillips (President of the Court), Walker, Brown, Kerr and Dyson wrote a judgment finding in favour of the extradition of Assange.

[7] The two minority judgments were delivered by Lord Mance and Lady Hale, respectively.

amongst others, 'secret' United States (USA) embassy cables from various diplomatic missions in different countries back to the USA by the famous (or should it be 'infamous'?) 'head' of WikiLeaks, Julian Assange[8] should theoretically not have raised an eyebrow. However, since some of the information (cynics would call it inane gossip) in certain of the cables was perhaps less than flattering about a particular host country (ie the country in which the particular diplomatic representative was stationed) the receiving countries – the USA in particular – were not particularly impressed by the development. (The fact that one may argue that diplomats should not use official channels to 'gossip' about the country in which they find themselves posted is, of course, a different matter entirely and in the present context beside the point.)

As an aside it is interesting that the word 'wiki' was coined by Ward Cunningham, a computer programmer, when he developed so-called 'collaborative software' in 1995 and which he named 'WikiWikiWeb'. The word 'wiki' is Hawaian and means 'fast; quick'.[9]

In an anonymous editorial dated 7 May 2011 entitled 'About: What is Wikileaks?'[10] the organisation described itself pithily (11 pages) under several headings – 'What is Wikileaks?'; '1.2 How WikiLeaks works'; '1.3 Why the media (and particularly Wiki-leaks) is important'; '1.4 How WikiLeaks verifies its news stories'; '1.5 The people behind WikiLeaks'; '1.6 Anonymity for sources'.

Under paragraph 2 entitled 'WikiLeaks' journalism record' the organisation's journalism record is rationalised under the following headings: '2.1 Prizes and background'; '2.2 Some of the stories we have broken' (followed by a list of these 'stories' under several headings including 'War, killings, torture and detention'; 'Diplomacy, spying and (counter-)intelligence'; and 'Abuse, violence, violation'. Under the heading 'Short essays on how a more inquiring media can make a difference in the world' paragraph 3 is devoted to four very brief 'essays' on various topics including a rather provocative, but at the same

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[8]Whittaker 'Wikileaks: A brief history, pre-2010' wrote of Julian Assange as follows: 'Julian Assange, who appeared seemingly from nowhere and propelled into the media spotlight as the primary spokesperson and founder of the whistleblowing website, appeared at first only to be "an official" and "member of the advisory board"' available at http://www.znet.com/blog/igeneration/wikileaks-a-brief-history-pre2010/10750 (accessed 21 October 2014).

[9]Anonymous 'What does "Wiki" mean, and what language is it from?' available at http://blog.dictionary.com/wikileaks-wikipedia/ (accessed 10 November 2014). In the blog dictionary it is explained further that as a noun '*wiki* means "a website that allows anyone to add, delete or revise content by using a web browser"' (1 of 7).

[10]Available at https://wikileaks.org/About/html (accessed 4 November 2014).

time thought-provoking essay entitled '3.2 The importance of principled leaking to journalism, good government and a healthy society'.[11]

In the introductory paragraph 'What is Wikileaks?' the organisation describes its purpose and objective as follows:[12]

> WikiLeaks is a not-for-profit media organisation. Our goal is to bring important news and information to the public. We provide an innovative, secure and anonymous way for sources to leak information to our journalists (our electronic drop box). One of our most important activities is to publish original source material alongside our news stories so readers and historians alike can see evidence of the truth.

From the American perspective on the Wikileaks saga and Julian Assange's 'philosophy', a somewhat matter of fact note was published in 2010 by Zittrain and Sauter in the *MIT Review.*[13] As point of departure they emphasise that Wikileaks and the Wikipedia are not connected in any way – 'both share the word "Wiki" in the title but they are not affiliated'.[14]

Under the heading '[W]ho is Julian Assange, and what is his role in the Wikileaks organization?', the authors wrote with a measure of scepticism of his role as follows:[15]

> Julian Assange is an Australian citizen who is said to have served as the editor-in-chief and spokesperson for Wikileaks since its founding in 2006. Before that, he was described as an advisor. Sometimes he is cited as its founder. The media and popular imagination currently equate him with Wikileaks itself, with uncertain accuracy.

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[11]Note 9 above 9-10.
[12]*Id* 1.
[13]'Everything you need to know about Wikileaks' (2010) *MIT Technology Review* (the MIT is the prestigious Massachusetts Institute of Technology) available at http://www.technologyreview .com/news/421949/everything-you-need-to-know-about-wikileaks/ (accessed 14 October 2014). See also Fildes 'What is Wikileaks?' published by BBC News: Technology on 7 December 2010, available at http://www.bbc.com /news/technology-10757263?print=true (accessed 21 October 2014). Fildes headed the article: 'Whistle-blowing website Wikileaks has dominated the news, both because of its steady drip feed of secret documents, but also because of the dealings of its enigmatic front man Julian Assange' (1). Fildes quoted Assange's view on the partnering of Wikileaks with newspapers to disseminate leaked information, where he said: 'We take care of the source and act as a neutral intermediary and then we also take care of the publication of the material whilst the journalist that has been communicated with takes care of the verification' and further, '[i]t provides a natural … connection between a journalist and a source with us in the middle performing the function that we perform best' (3).
[14]Zittrain and Sauter (n 13 above) 1 of the unnumbered five-page note.
[15]*Ibid.*

Under the heading 'Has Wikileaks released classified material in the past?' the authors answered in the affirmative and explained that with reference to the release of the 'diplomatic cables' (the bone of contention and the feature which landed Assange in hot water) such release did not take place through either using the 'wiki' model or through the publication of videos in which 'a political point of view' was expressed.[16] The authors continued that in releasing the diplomatic cables Wikileaks worked 'in close conjunction with a select group of news organizations to analyse, redact and release the cables in a curated manner, rather than dumping them on the Internet or using them to illustrate a singular political point of view'.[17] Under the heading: 'What news organizations have access to the diplomatic cables how did they get them?' the authors, quoting Associated Press, wrote that the news organisations chosen by Wikileaks for the publication of the diplomatic cables were *Le Monde*, *El Pais*, *The Guardian* (which shared its 'trove' of information with *The New York Times*), and *Der Spiegel.* The authors also mentioned that 'as of December, 2010 Wikileaks itself released 960 classified documents out of a staggering number of classified documents – 251,287'.[18]

3 Factual background to the *Assange* case and the Queen's Bench decision

The events leading up to the application from Sweden for the extradition of the appellant, Julian Assange, to that country are rather banal and are set out matter-of-factly in the QB decision – *Assange v Swedish Prosecution Authority.*[19] In August 2010 Assange visited Stockholm, Sweden to deliver a lecture. Between 13 and 18 August 2010 he had sexual relations with two women identified as AA and SW respectively. On 20 August SW and AA went to the police on a visit which the police regarded as 'the filing of complaints'.[20] Ten days later (on 30 August) Assange was interviewed and 'on or about' 27 September 2010 he left Sweden unaware that 'an arrest warrant had been issued'.[21]

According to facts before the court, the Swedish prosecutor attempted to interview Assange (from the court's narrative, however, it is not clear whether

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[16]*Id* 2.
[17]*Ibid*.
[18]Note 13 above 3. In the next few pages the authors address the question as to how the news organisations released the cables and pose the question '[W]hat happens if Wikileaks gets shut down? Can it be shut down?' (4-5). The authors' brief answer to the questions is a laconic '[s]o in terms of the recovery of leaked information, the downfall of Wikileaks as an organization would matter little' (4).
[19][2011] EWHC 2849 (Admin). The case was heard on2 November 2011. See also http://www.bailii.org.ew.cases/EWHC?Admin/2011/2849.html (accessed 30 August 2014).
[20]Paragraph 1 of the decision.
[21]*Ibid.*

these efforts were made only after he had left Sweden). Subsequently, and after proceedings in the Swedish courts 'including a hearing before the Court of Appeal of Svea' on 24 November 2010 at which Assange was represented but obviously not present, the Swedish Prosecuting Authority applied for and was granted a 'European Arrest Warrant (EAW)' on 26 November 2010. The EAW was signed by Ms Marianne Ny, a Swedish prosecutor (the prosecutor).

The EAW stated as follows:[22]

> This warrant has been issued by a competent authority. I request the person mentioned below [ie Mr Julian Assange] be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

The UK's Serious and Organised Crime Agency (SOCA) certified the EAW as complying with the provisions ('requirements') of the Extradition Act 2003 on 6 December 2010.[23] After a hearing on 7, 8 and 11 February 2011 before the Senior District Judge and Chief Magistrate, the Senior District Judge ordered Assange's extradition to Sweden on 24 February 2011.[24]

In an appeal to the QB (Sir John Thomas, President, and Mr Justice Ouseley officiating) four issues were raised. Only one of these – that the EAW was not issued by a 'judicial authority' will be considered in this outline of the QB's decision.[25] Since the judgment in the QB reflects largely the way the decision went against Assange in the UKSC, the judgment warrants our attention.

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[22] *Id* par 2. In the EAW four offences were set out … [and] '[n]o other description of the conduct was given elsewhere in the EAW'. These are: '1. Unlawful coercion [of the 'injured party [AA]' – on 13-14 August 2010; '2. Sexual molestation … by acting in a manner designed to violate her sexual integrity' – on 13-14 August 2010; '3. Sexual molestation … by acting in a manner designed to violate her sexual integrity' – on 18 August 2010; '4. Rape – on 17 August 2010' (par 3).

[23] At par 4 of the decision. SOCA acted under s 2(7)-(8) of the 2003 Act (see par 22 of the decision). It was further stated that Assange 'surrendered himself for arrest' on 7 December 2010 (par 4).

[24] At pars 4 and 5 respectively.

[25] To complete the picture the other three grounds of appeal were that (2) offences 1-3 were not a 'fair accurate description of the conduct alleged' and offence 4, 'if fairly and accurately described, would not have amounted to the offence of rape'; (3) as Mr Assange was not an 'accused' the condition in s 2(3) of the 2003 Act had not been satisfied; and that (4) there was no proportionality between the issue of the EAW and subsequent proceedings (at par 6). (To complete the picture as regards the third ground of appeal pertaining to the fact that Mr Assange was not an 'accused' s 2 of the Act headed 'Part 1 warrant and certificate' deals with the receipt of an arrest warrant by the UK. Section (3) refers to a 'statement' in which the particulars regarding the 'accused' person's alleged offences in the requesting state are set out. Section (3)(a) reads that the person whose extradition is requested is 'the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant'; …').

Before proceeding to address the issues at hand, the two judges set out the parameters/considerations they regarded as 'material to each of the issues' against which their decision should be read and understood.[26] In the following paragraphs of a wide-ranging judgment they consider first, the 'construction of the 2003 Act';[27] secondly, the 'differences between the 2003 Act and the Framework Decision';[28] thirdly, the 'purpose of the Framework Decision';[29] and finally, the 'approach required by mutual recognition'.[30]

For the purpose of presenting this background to the UKSC decision, the QB's account of the 'purpose of the Framework Decision' is notable. The court emphasised that the purpose of the Framework Decision was to supplant the European Extradition Convention of 1957 and other Conventions with a 'new regime' – 'a regime for surrender between judicial authorities founded on the basis of the common area for justice and the principle of mutual recognition of judicial decisions and judgments as "the cornerstone of judicial co-operation in both civil and criminal matters"'.[31]

The court emphasised the objective ('purpose') of the Framework Decision by quoting Recital (5) of its preamble in full. Recital (5) reads as follows:[32]

> The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

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[26]Under the heading 'our general approach' at par 8 these parameters are set out.

[27]The Extradition Act 2003 (c 41) is discussed briefly at pars 9-10. In these paragraphs the court referred *inter alia* to the impetus to this Act – the adoption of the Council of Europe of its Framework Decision (ie the 'EAW regime-legislation adopted on 13 June 2002'). See par 9. (The 'Framework Decision' the court referred to is the arrangement put in place by the Council of Europe pursuant to 'Acts adopted pursuant to Title VI of the Treaty on European Union' entitled Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).)

[28]See pars 11-13.

[29]See pars 14-17. The court relied on the 'recitals to the Framework Decision and the EU Commission's Explanatory Memorandum (2001/0215 dated 25 September 2001)' for this explanation of the purpose of the Framework Decision. See par 14.

[30]See pars18-19.

[31]Paragraph 14.

[32]*Ibid.*

The new regime 'in which there should be mutual confidence not only between judges but between the citizens of the Member States' is underpinned by the existence of the rights (of the citizens) and the observance of these rights by the courts.[33] The court continued that the 'basic principle' flowing from the new mechanism (regime) was nonetheless that when a 'judicial authority' requested the 'surrender of a person' (either because he or she had been convicted or was being prosecuted) the authority's decision 'must be recognised and executed automatically with only limited circumstances in which surrender could be refused'.[34] But the court also cautioned that 'in the present state of development of the common area for justice' such mutual confidence in the common area for justice and the operation of the EAW will not be 'advanced' unless the courts of the 'executing state scrutinised requests for surrender under the EAW with the intensity required by the circumstances of each case'.[35]As to the question of the 'approach required by mutual recognition', the judges drew a distinction between an EAW issued by a judge and an EAW issued by a 'judicial authority' who is not a judge. The court held in this regard:[36]

> It must always be remembered that a statement by a judge [in relation to an EAW] is a statement by a person who impartially adjudicates in the proceedings between the prosecution and the accused; statements made by persons not in that position therefore may in some circumstances require more intense scrutiny.

Having spelt out its 'general approach' to the particular issues before it, the court proceeded to address the important question (for the purposes of this case note, at least) of whether Assange's EAW had been issued by a 'judicial authority'.[37] The court undertook this particular enquiry under a number of headings: '(a) The provisions of the Framework Decision and the 2001 Act [*sic*];[38] (b) The decision of the Senior District Judge;[39] (c) The contention of

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[33] At par 16. It is interesting to note that instead of referring to the 'handing over' of a person by one state to another state for purposes of prosecution or punishment/sentencing as 'extradition' the verb 'surrender' is used. In view of the fact that to 'surrender' is defined as '[to] give up a person, right, or possession when demanded to do so' (*Compact Oxford English Dictionary* (2005)) it may well be asked what the reason is for the choice of the word 'surrender' since 'surrender' is also used within the context of a command [to hand over] as is the command 'to extradite'.

[34] *Ibid.*

[35] At par 17. The court continued and added that failure by the courts in the executing state to scrutinise requests for surrender under the EAW 'with the intensity required by the circumstances of each case' can pose the risk of 'undermining public confidence in the operation of the common area for justice' in general and in particular the operation of the EAW system (*ibid*).

[36] At par 19.

[37] At pars 20-54.

[38] At pars 20-23. The reference to the '2001 Act' is correctly referred to in the text as the '2003 Act'. The court referred in passing in its decision to the absence of either a definition or a 'deeming provision' as to the meaning of 'judicial authority' in the 2003 Act. In the Act an

Mr Assange;[40] (d) The meaning of judicial authority in the jurisprudence of the ECHR;[41] (e) The meaning of judicial authority in the 2001 Act [*sic*] and the Framework Decision;[42] (f) The status of the designation of judicial authority by another Member State;[43] (f) [*sic*] Circumstances giving rise to more intense scrutiny: The effect of the decision of the Svea Court of Appeal'.[44]

Notwithstanding the extensive number of questions addressed by the court with reference to the all-important issue of whether the EAW had been issued by a 'judicial authority', for the purposes of this note I will elaborate only on the court's findings on the last heading – 'Circumstances giving rise to more intense scrutiny: The effect of the decision of the Svea Court of Appeal'[45] although passing reference to the other headings is required to complete the picture. For example, when the court assessed the relevant provisions of the 2003 Act and the Framework Decision, it referred to the judgment in *Enander v Governor of HMP Brixton and the Swedish National Police Board*[46] as regards the status of the 'designation of judicial authority' by another member state. The *Enander* court held that 'the expression "judicial authority" must be read against the background that it was for each Member State to designate its own judicial authority under Article 6(3) of the Framework Decision'.[47] (The EAW referred to Enander who had been convicted by a court in Svea in Sweden and sentenced to a term of imprisonment in that country. The EWA was issued by the Swedish Police Board – under Swedish law the only body to issue a warrant for the enforcement of a warrant for the enforcement of a sentence – to surrender Enander to Sweden after he had been arrested in London.)

Apart from stating (referring to *Enander*) that the circumstances relating to a warrant issued for the execution of a sentence may be different [from a warrant to have a person prosecuted in another state], and that the approach adopted in *Enander* is one that will 'ordinarily apply',[48] the court nonetheless disagreed with the reading by the *Enander* court that it was at all times compelled to regard the designation by a member state of a 'judicial authority' as set out in article 6 of the Framework Decision, as conclusive.[49] The view of

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EAW is defined rather blandly as 'an arrest warrant issued by a judicial authority' (par 22).
[39]At par 24.
[40]At pars 25-27.
[41]At pars 28-32.
[42]At pars 33-43.
[43]At pars 44-48.
[44]At pars 49-54.
[45]At pars 44-54.
[46][2005] EWHC 3036 (Admin).
[47]At par 23.
[48]At par 45.
[49]At pars 46-48.

the court must be seen against the backdrop of its interpretation of the term 'judicial' (in 'judicial authority' designated to issue an EAW). It held first, that the term 'does not refer only to a judge who adjudicates'.[50] The court explained that although the status of the prosecutor is debatable, the prosecutor does find a niche within the term 'judicial authority' as he or she forms part of the *corps judicaire* although subject to the proviso that 'a prosecutor must enjoy independence in the decisions that he must take, though the functions of a prosecutor are distinct and separate from those of a judge'.[51]

Yet another reason for regarding the prosecutor as part and parcel of the 'judicial authority' is the recognition of 'differing European traditions'.[52] To do otherwise would be 'to construe the word "judicial" out of context and look at it simply through the eyes of a common-law judge, who would not consider a prosecutor as having a judicial position or acting as a judicial authority'.[53] For these and other reasons, the court concluded that 'in our view the Prosecutor was a judicial authority, as the term "judicial authority" is not confined to a judge who adjudicates but can extend to a body that prosecutes'.[54]

Notwithstanding the conclusion reached by the court, and that as a result 'no challenge' could be made to the validity of EAW issued by the prosecutor,[55] the court nonetheless posed the question of whether the EAW should not be accorded more 'intense scrutiny' since it was a warrant issued by a party to the proceedings against Assange.[56] However, the court noted the decision of the Svea Court of Appeals which heard Assange's appeal against his prosecution in Sweden *in absentia*.[57] The Swedish Court of Appeals rejected the appeal stating that 'given the case report then available, Mr Assange was suspected with probable cause of the four offences and that the arrest was justified. Two days later the EAW was issued by the Prosecutor'.[58]

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[50] At par 36. The court added that the term needs to be seen within the context of the recognition of the separation of powers doctrine ('the threefold division of functions and powers within each state between the legislative, executive and judicial "powers" or "branches of the state"') in each state but that it is fundamental that in each state the judicial branch 'is independent of the executive and legislative branch' (*ibid*).
[51] At par 38.
[52] At par 41.
[53] *Ibid.*
[54] At par 43.
[55] At par 49.
[56] *Ibid*.
[57] At par 51. The Court briefly summarised the basis of Assange's Swedish appeal. On his behalf (since the appeal was heard *in absentia*) it was *inter alia* contended that there was collusion by the complainants (*ibid*).
[58] At par 52. The Swedish Appeals Court seemingly based its decision on the fact that the prosecutor explained that the complainants had been 'questioned a number of times', and that the 'inconsistencies in their accounts and the comments made by them in text messages'

On the basis of the decision of the Swedish Court of Appeals, the QB held that the action of the prosecutor 'had been subject to independent scrutiny by judges in Sweden which as judges in another Member State we should accord due respect'.[59] For this reason the appeal on the basis that the EAW had not been issued by a 'judicial authority' was dismissed.

It was inevitable that Assange's next step would be to appeal to the UKSC. The UKSC granted permission to bring an appeal on the ground of the meaning of 'judicial authority' since as a point of law, 'the meaning of "judicial authority"' is one of 'general [public] importance'.[60] In the following paragraphs I concentrate on focal points in Lord Phillips's extensive judgment on the issue before the court. I will refer in passing to the judgments of the four judges in agreement with him. This is followed by an overview of the two minority judgments concentrating in the main on the judgment delivered by Lord Mance, again with passing reference where necessary, to the judgment of Lady Hale.

4 The decision of the United Kingdom Supreme Court

4.1 The 'primary case' before the Supreme Court

Lord Phillips commenced his judgment with a brief account of the issue before the court. On behalf of Assange this was 'that a "judicial authority" must be a person who is competent to exercise judicial authority and that such competence requires impartiality and independence of both the executive and the parties'.[61] Moreover, a prosecutor 'is and will' (as in Sweden), continue to be a party in the 'criminal process against Mr Assange', and this is why a prosecutor cannot qualify as a 'judicial authority'.[62] In essence the submission is that a '"judicial authority" must be some kind of court or judge'.[63] It is submitted that this submission boiled down to a narrow or restrictive reading of the term 'judicial authority'.

Assange's lawyer had relied on had been put to them. Furthermore, the prosecutor also explained 'how the complainants had been in touch with each other and had made the complaints' (par 51).

[59]At par 53.

[60]At par 1 of the UKSC decision. The court (per Lord Phillips, P) substantiated the view by adding that '… in the case of a number of Member States EAWs are issued by public prosecutors' and that the resolution of the matter therefore 'does not turn on the facts of Mr Assange's case' (*ibid*).

[61]At par 4 of the UKSC decision.

[62]*Ibid.*

[63]*Ibid.* Miss Rose submitted in the alternative that should 'judicial authority' in art 6 of the Framework Decision have a meaning 'wide enough to embrace the Prosecutor, it has a different and narrower meaning in the 2003 Act'. She sought 'to support that meaning with reference to parliamentary material' (par 3).

On behalf of the Special Crime Division, Crown Prosecution Service on the other hand, it was maintained that in the context of the Framework Decision and other European legal instruments, the term judicial authority 'bears a broad and autonomous meaning' since it describes any person or body authorised to play a part in the judicial process.[64] Moreover, the term 'embraces a variety of bodies, some of which have the qualities of impartiality and independence on which counsel for Mr Assange relied, and some of which do not'. Further,[65]

> [i]n some parts of the Framework Decision the term 'judicial authority' describes one type, in other parts another. A prosecutor properly falls within the description 'judicial authority' and is capable of being the judicial authority competent to issue an EAW under article 6 if the law of the State so provides. Judicial authority must be given the same meaning in the 2003 Act as it bears in the Framework Decision.

4.2 The judgment of Lord Phillips, President

Lord Phillips's approach to the issue is to be found in the following observation that the 'interpretation of the words "judicial authority" in Part 1 of the 2003 Act … must, if possible, be given the same meaning as they bear in the Framework Decision'.[66] To emphasise this particular point of departure, Lord Phillips introduced his judgment by referring to article 34.2(b) of the Framework Decision. It reads that '[f]ramework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods ...'.[67] Notwithstanding this particular wording of the article, Lord Phillips held with reference to the issue before the court, that:[68]

> What is in issue in respect of the construction of the 2003 Act is not a suggestion that the English Court ought, when interpreting the 2003 Act, to follow some general objective that the Framework Decision is designed to advance. It is the narrow issue of whether the words 'judicial authority' in section 2(2) of the 2003 Act should, if possible, be accorded the same meaning as those two words bear in the parallel requirement in article 6 of the Framework Decision.

In resolving this issue Lord Phillips referred to the objective of the Framework Decision and found that its direct objective 'is to create a single uniform

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[64] At par 5.
[65] *Ibid*.
[66] At par 13.
[67] At par 8.
[68] At par 9

system for the surrender of those accused or convicted of the more serious criminal offences' and for this very reason it is plain that a UK court should interpret Part 1 of the 2003 Act 'in a manner that accords with the Framework Decision'.[69] Moreover, such a view is in line with the presumption that the UK's 'domestic law will accord with [the UK's] international obligations'.[70] He continued[71]

> … it is hard to conceive that Parliament, in breach of the international obligations of this country, set out to pass legislation that was at odds with the Framework Decision. It is even more difficult to conceive that Parliament took such a course without making it plain that it was doing so. For this reason it is logical to approach the interpretation of the words 'judicial authority' on the presumption that Parliament intended that they should bear the same meaning in Part 1 of the 2003 Act as they do in the Framework Decision.

Lord Phillips then proceeded to examine in detail the 'meaning of "judicial authority" in the Framework Decision' keeping to the following order – '[p]arliamentary material'; '[t]he meaning of "judicial authority" in the Framework Decision'; '[t]he natural meaning'; 'the purpose of the Framework Decision'; an overview of 'the 1957 Convention'; the nature of the office of '[p]ublic prosecutors'; '[t]he more recent genesis of the Framework Decision'; '[t]he critical question'; 'i]mplementation of the Framework Decision by the Member States'; '[c]onclusions on the Framework Decision'; [t]he 2003 Act'; [t]he Lord Advocate's intervention'; '[t]he facts of this case'; and finally, '[p]roportionality'.

For the purpose of this case note I will concentrate on those aspects of the judgment which highlight the meaning of 'judicial authority' within the context of the Framework Decision omitting, for example, Lord Phillips's view on the role of 'parliamentary material' (from the UK);[72] his introductory

[69] At par 10.
[70] *Ibid.*
[71] *Ibid*. 'Part 1' the court referred to relates to 'Extradition to Category 1 territories'. In terms of section 2(2) 'A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory'. Section 1(1) headed 'Extradition to category 1 territories' reads: 'This Part deals with extradition from the United Kingdom to the territories designated for the purposes of this Part by order made by the Secretary of State'. All the member states to the Framework Decision (including Sweden) are 'category 1 territories'. See par 195 of the decision per the minority judgment of Lord Mance.
[72] *Id* pars 11-13. Lord Phillips found in any event that should the 'parliamentary material' he referred to be admissible, he would have found it 'inconclusive' (par 13).

remarks on the 'purpose of the Framework Decision';[73] his account of the 'natural meaning' of 'judicial authority';[74] and his summary of the facts of the case.[75]

By way of introduction, in Lord Phillips's analysis of the purpose of the Framework Decision he, like Sir John Thomas of the QB,[76] referred to Recital 5 of the preamble to the Framework Decision.[77] In the recital reference is made to the 'complexity and potential for delay inherent in the present extradition procedures' and Lord Phillips explained that the 'complexity and potential for delay' arose 'out of the involvement of the executive in the extradition process' present in the 1957 Convention.[78] Since the Framework Decision 'did not set out to build a new extradition structure from top to bottom, but rather to remove from it the diplomatic or political procedures that were encumbering it',[79] Lord Phillips found it apposite to embark on an explanation of the content of the 1957 Convention[80] to provide the necessary context to the adoption of the Framework Decision. Having explained the process of the 1957 Convention, Lord Phillips concluded:[81]

> Thus, when negotiations began in relation to the terms of the Framework Decision, the United Kingdom had given effect to a European Convention that required it to surrender fugitives [the term Lord Phillips used to denote persons against whom the requesting state were proceeding for an offence or who were wanted for the carrying out of a sentence or detention order] on proof of an antecedent process, namely that there had been issued in the requesting State a warrant of arrest or other order having the same effect, notwithstanding that, at least in 1957 when the Convention was negotiated, this might not have resulted from a judicial process and where the authority initiating the request might be a court or a public prosecutor.

He then proceeded to examine the 'nature' of the office of a public prosecutor since the issue in the Assange appeal is whether a public prosecutor qualifies

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[73]*Id* pars 14-15. Of significance though is his reference to *Craies on Legislation* 9th ed (2008). The particular author observed (at par 31.1.21) 'that the text of much European legislation is arrived at more through a process of political compromise, so that individual words may be chosen less for their legal certainty than for their political acceptability'. This observation is rather apt since an earlier draft of the Framework Decision 'left no doubt as to the meaning of "judicial authority" but a subsequent draft expunged the definition that made this clear' (par 14) leaving the UKSC with the 'problem of interpretation raised by this appeal' (*ibid*).
[74]*Id* pars 16-21.
[75]*Id* pars 84-85.
[76]See above.
[77]*Id* par 22.
[78]*Id* par 24.
[79]*Id* par 25.
[80]*Id* pars 26-35.
[81]*Id* par 32.

as a 'judicial authority'.[82] In the next two paragraphs (pars 37 and 38) Lord Phillips continued to enquire into the office of the public prosecutor reaching the conclusion that:[83]

> Both the function and the independence of the prosecutor must be borne in mind when considering whether, under the Framework Decision, the term 'judicial authority' can sensibly embrace a public prosecutor.

So as to determine exactly that – whether the 'term "judicial authority" can sensibly embrace a public prosecutor' – Lord Phillips turned his attention to '[t]he more recent genesis of the Framework Decision'.[84]

In this extensive overview of the more recent origins of the Framework Decision he turned his attention first to the Convention of 10 March 1995 on a 'simplified extradition procedure between Member States of the EU and the Convention of 27 September 1996 relating to extradition between the Member States'.[85] However, he opined that more relevant to his analysis of the recent origins of the Framework Decision was 'the integration into the European Union under the Amsterdam Treaty of 1997 of the Schengen Agreement of 1985'[86] and the 1990 Convention implementing the Schengen Agreement. Title 1V of the 1990 Convention established the Schengen Information System (SIS) and article 95 of the 1990 Convention provided for the 'judicial authority' in a member state to issue an alert 'requesting the arrest of a person for extradition purposes'.[87] This alert had to be 'accompanied by, *inter alia*, information as to whether there was "an arrest warrant or other document having the same legal effect"'.[88]

He continued to set out in detail subsequent events, placing heavy emphasis on a proposal (which he preferred to call the 'September draft') and its accompanying Explanatory Memorandum) both of which were submitted to the European Council on 19 September 2001.[89]

Lord Phillips concluded his analysis of the September draft with the following summary which is quoted in full:[90]

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[82] *Id* par 36.
[83] *Id* par 38.
[84] *Id* pars 39-59.
[85] *Id* par 39.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*. Lord Phillips also drew attention to art 98 which makes provision for the '"competent judicial authorities" to request information for the purpose of discovering the place of residence or domicile of witnesses or defendants involved in criminal proceedings' (*ibid*).
[89] *Id* par 42.
[90] *Id* par 54.

> In summary, under the September draft it was beyond doubt that 'judicial authority' was a term that embraced both a court and a public prosecutor. It was a precondition to the issue of a valid EAW that there should have been an antecedent process leading to an 'enforceable judicial decision which would involve deprivation of liberty'. The subsequent decision to issue the EAW might be taken by the same judicial authority responsible for the antecedent decision, or another. There was nothing to indicate that this could not be a public prosecutor. The scheme had much in common with the 1957 Convention, as implemented under Schengen, stripped of political involvement.

However, this earlier September draft which stated expressly that 'judicial authority' embraces both a court and a public prosecutor, was not followed in the Framework Decision after amendments to the September draft made in the December draft were agreed upon; and which formed the basis of the final Framework Decision approved by the (European) Council.[91] Had the September draft been adopted, 'the issue that has led to [Assange's] appeal could never have arisen', Lord Phillips held.[92]

Lord Phillips then proceeded to analyse the content of the Framework Decision after the adoption of the amendments to the September draft.[93] This led to the critical question of whether 'the changes made to the draft Framework Decision between September and December altered the meaning of "judicial authority" so as to exclude a public prosecutor from its ambit'.[94] According to him there are two possible readings of the removal of the express inclusion of 'public prosecutor' in the definition of 'judicial authority' in article 3 of the September draft – a restricted reading in which a 'public prosecutor' is excluded from the ambit of 'judicial authority'; or a broader reading 'so that it was not restricted to a judge or a public prosecutor'.[95] He then proceeded to present five reasons for his 'firm conclusion that the second explanation is the more probable'.[96]

The reasons he forwards are the following: (1) had the intention been to restrict the power to issue an EAW or to participate in its execution to a judge, he would expect this to have been made an express provision;[97] (2) the significant safeguard against the improper or inappropriate issue of EAWs lay

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[91] *Ibid.*
[92] *Id* par 55. Lord Phillips held further that it was unfortunate that the September draft in which art 3 'expressly provided that the "issuing judicial authority" might be a public prosecutor' was amended to such an extent that the position was 'obfuscated' (*ibid*).
[93] *Id* pars 56-59.
[94] *Id* par 60.
[95] *Ibid.*
[96] *Id* par 61.
[97] *Ibid.* The next paragraphs (pars 61-67) are devoted to these reasons.

in the antecedent process (the issue of a domestic warrant which is based on a 'judicial measure'[98]) which formed the basis of the EAW;[99] (3) it is 'likely' that the removal from the definition of a reference to a 'public prosecutor' 'was not because Member States wished to narrow its meaning to a judge, but because they were not content that its meaning should be restricted to a judge or a public prosecutor';[100] (4) certain features of the December draft suggest that 'the meaning of judicial authority was not restricted to a court or judge' amongst others, that the requirement that 'became article 6.3 of the final version to inform the General Secretariat of the Council of "the competent judicial authority under its law" makes more sense if there was a range of possible judicial authorities';[101] and finally, (5) '[t]he practices of the Member States in relation to those they appointed as issuing and executing "judicial authorities" coupled with the comments of the Commission and the [European] Council in relation to these, provide … a legitimate guide to the meaning of those two words ['judicial authority'] in the Framework Decision'.[102]

Lord Phillips held, having canvassed the '[i]mplementation of the Framework Decision by the Member States',[103] that 'the Prosecutor in this case fell within the meaning of "issuing judicial authority" in the Framework Decision'.[104] Towards the end of his judgment Lord Phillips also enquired into the question of whether a meaning similar to that accorded the term 'judicial authority' under the Framework Decision, can be applied to the term as used in Part 1 of the UK Extradition Act of 2003.[105] Once again Lord Phillips placed heavy emphasis on the antecedent process (the issue of a domestic warrant which is based on a 'judicial measure')[106] which forms the basis of the EAW, to reach the conclusion that he could see 'no impediment to according to "judicial authority" in Part 1 of the 2003 Act the same meaning as it bears in the Framework Decision'.[107]

Finally, Lord Phillips enquired into the matter of proportionality. However, this particular enquiry has to be seen against his observation that:[108]

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[98] *Id* par 62.
[99] *Id* par 62 and further developed in pars 62-64.
[100] *Id* par 65.
[101] *Id* par 66.
[102] *Id* par 67. In this regard Lord Phillips refers to the fact that EAW processes are subject to reports by the Commission, and that Evaluation Reports on the working of the EAW 'were prepared by experts and submitted to the Council' (*ibid*). In other words, the issue of EAWs is subject to proper control – a strong indication pointing at a wider reading of the words 'judicial authority'.
[103] *Id* pars 68-76.
[104] *Id* par 76.
[105] *Id* pars 77-80.
[106] See above.
[107] *Id* par 80.
[108] *Id* par 84.

> Under Swedish law the issue of a domestic detention order in absentia was a precondition to the issue of an EAW. That order was issued by a court which, it seems, had to be satisfied that there was sufficient evidence giving rise to probable cause and that domestic arrest was proportionate. The only possible additional area of discretion so far as the issue of the EAW was concerned would seem to be whether this was proportionate. There does not appear to have been a requirement that this should receive judicial consideration.

Lord Phillips nonetheless proceeded to examine to matter of proportionality but concluded that:[109]

> The scheme of the EAW needs to be reconsidered in order to make express provision for consideration of proportionality. It makes sense for that question to be considered as part of the process of issue of the EAW. To permit proportionality to be raised at the stage of execution would result in delay that would run counter to the scheme. It does not necessarily follow that an offence that justifies the issue of a domestic warrant of arrest will justify the issue of an EAW. For this reason the antecedent process will not necessarily consider the proportionality of issuing an EAW. There is a case for making proportionality an express precondition of the issue of an EAW. Should this be done, it may be appropriate to define 'issuing judicial authority' in such a way as to ensure that proportionality receives consideration by a judge. At present there is no justification for such a course.

For the extensive reasons he set out, Lord Phillips dismissed Assange's appeal.[110]

4.3 An outline of the judgments of the four concurring judges

For Lord Walker the most determinative point for agreeing with Lord Phillips's finding – that 'judicial authority' should be broadly interpreted – lies in Lord Phillips's reference to article 31.3(b) of the 1969 Vienna Convention on the Law of Treaties. This article permits, as an aid to interpretation, recourse to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' – in full article 31.3(b) reads:[111]

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[109] *Id* par 90.
[110] *Id* par 91.
[111] *Id* par 94 read with par 67. See Vienna Convention on the Law of Treaties (signed 23 May 1969 and coming into force on 27 January 1980), Part III 'Observance, application and interpretation of treaties', Section 3 Interpretation of treaties' available at http://oas.org/legal /english/docs/Vienna%20Treaties?/htm (accessed 2014-12-01).

> There shall be taken into account, together with the context: *(b)* Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; …

Lord Brown too was in agreement with Lord Phillips and he too relied on the fifth of the reasons Lord Phillips proposed for a broader reading of the term 'judicial authority' based on the wording of a 31.3(b) of the 1969 Vienna Convention on the Law of Treaties.[112]

Lord Kerr in also agreeing with the majority, held as follows[113]

> … [t]he inescapable fact is that public prosecutors in many of the member states had traditionally issued arrest warrants to secure extradition for many years. This was a firmly embedded practice in many jurisdictions. To bring that practice to an end would indeed have wrought a radical change. A substantial adjustment to administrative practices in many countries would have been required.

He added that[114]

> [i]t would be destructive of the international co-operation between states to interpret the 2003 Act in a way that prevented prosecutors from being recognised as legitimate issuing judicial authorities for European Arrest Warrants, simply because of the well-entrenched principle in British law that to be judicial is to be impartial.

Of the four judges concurring with Lord Phillips, Lord Dyson wrote the most extensive concurring judgment.[115] Although he did not use the international law concept of 'comity' as such, his arguments proceeded from this idea via his observation that 'the new scheme [of extradition] was based on the principle that the Member States had mutual trust and confidence in the integrity of their legal and judicial systems and would therefore respect and recognise each other's judicial decisions'.[116]

He emphasised that the 'the use of the phrase "judicial authority" does not of itself provide the answer to the question of interpretation. It is necessary to

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[112]*Id* par 95.
[113]*Id* par 104.
[114]*Id* par 117.
[115]*Id* pars 120-171.
[116]*Id* par 124.

look elsewhere'.[117] Like their Lordships Walker and Brown, he too based his judgment on the argument advanced by Lord Phillips for a broader reading of 'judicial authority' based on the provisions of article 31.3(b) of the 1969 Vienna Convention on the Law of Treaties.[118] Basing his judgment on this broader reading of article 31.3(b), Lord Dyson proceeded meticulously to analyse the question of whether a public prosecutor is included within the parameters of 'judicial authority'.[119] He concluded that '… in the context of instruments whose purpose is to promote such an aim, a public prosecutor may be a judicial authority'.[120]

He then – moving from the general to the specific – proceeded to address the arguments posed by counsel of the appellant 'that a public prosecutor does not satisfy the definition [of judicial authority]'[121] and concluded that he was indeed satisfied that 'a public prosecutor is an issuing judicial authority within the meaning of article 6.1 [of the Framework Decision]'.[122]

In the next few paragraphs Lord Dyson addressed the five additional reasons advanced by Lord Phillips to provide credence to his view that a public prosecutor is part and parcel of the definition of 'judicial authority', and found them convincing.[123] He concluded his judgment with an examination of the 'meaning of issuing judicial authority in the EA [Extradition Act]'[124] and held (contradicting the minority judgment of Lord Mance – see below) that 'the strong presumption that the phrase "judicial authority" bears the same meaning in section 2(2) of the EA as it does in article 6.1 of the Framework Decision was not rebutted by any assurances given by the minister during the progress of the Bill through Parliament'.[125]

4.4 The minority judgment of Lord Mance

Lord Mance (Lady Hale concurring) delivered a minority judgment.[126] He concluded[127]

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[117] *Id* par 127. Moreover, he argued further that 'rather than seeking to infer the reason why the Member States changed the definition' he preferred to 'concentrate on how relevant part of the Framework Decision has been applied and viewed in practice' (par 128).
[118] *Id* par 130.
[119] *Id* pars 131-140.
[120] *Id* par 142.
[121] *Id* par 147-153.
[122] *Id* par 153.
[123] *Id* pars 155-159.
[124] *Id* pars 160-170.
[125] *Id* par 170.
[126] *Id* pars 195-266.
[127] *Id* par 266.

> …that, whatever may be the meaning of the Framework Decision as a matter of European law, the intention of Parliament and the effect of the Extradition Act 2003 was to restrict the recognition by British courts of incoming European arrest warrants to those issued by a judicial authority in the strict sense of a court, judge or magistrate. It would follow from my conclusions that the arrest warrant issued by the Swedish Prosecution Authority is incapable of recognition in the United Kingdom under section 2(2) of the 2003 Act. Parliament could change the law in this respect and provide for wider recognition if it wished, but that would of course be for it to debate and decide. I would therefore allow this appeal, and set aside the order for Mr Assange's extradition to Sweden.

In reaching this conclusion as regards the meaning of 'judicial authority', Lord Mance's point of departure was what he termed the 'interface between the European Framework Decision operating at an inter-government level and the United Kingdom's domestic legislation in the form of the Extradition Act 2003'.[128] However, though the 'Act was introduced to give effect to the Framework Decision … the Act was and is in noticeably different terms'.[129] Arguing along the lines of giving precedence to English law (and per definition, I submit, the sovereignty of the English parliament) he held the following:[130]

> The only domestically relevant legal principle is the common law presumption that the Extradition Act 2003 was intended to be read consistently with the United Kingdom's international obligations under the framework decision on the European arrest warrant. But this presumption is subject always to the will of Parliament as expressed in the language of the Act read in the light of such other interpretative canons and material as may be relevant and admissible.

Elaborating on this claim, he painstakingly set-out the historical run-up of events to the adoption of the Framework Decision; to examine the content of the Framework Decision; and to analyse a number of post-adoption readings of the concept 'judicial authority' . He concluded:[131]

> My examination of the Framework Decision leads to a conclusion that it is far from easy to predict what the attitude of the Court of Justice might be on the question whether a public prosecutor can qualify as an issuing judicial authority for the purposes of reaching a judicial decision to issue a European arrest warrant in a case in which he or she is conducting the criminal prosecution.

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[128] *Id* par 201.
[129] *Ibid*.
[130] *Id* par 217.
[131] *Id* par 244.

Lord Mance held further:[132]

> As I see it, the natural assumption is either that Parliament meant the phrase 'judicial authority' in its ordinary English meaning, or, in the light of the uncertainty at all times about the position under European law, there is at lowest ambiguity about what Parliament meant. The Framework Decision is an important potential source of guidance, but it is obscure. The Supreme Court is concerned with the construction of a British statute, and our role is to elicit the true parliamentary intention in passing it. Parliament in 2003 may well have thought that the concept of a 'judicial authority' (taking a 'judicial decision') in the Framework Decision meant the same as its natural English meaning. If so, we should give effect to Parliament's intention.

Contrary to the four Lords (who found in favour of the Swedish Prosecution Authority and dismissed the appeal) who all found it unnecessary to enquire into the 'parliamentary history and material as an aid to interpretation', Lord Mance paid extensive attention to this particular aspect of the Extradition Act of 2003.[133]

This extensive enquiry into the historical background to the adoption of the British Act led Lord Mance to a number of conclusions flowing from the question:'What if any admissible guidance does one gain from this parliamentary history?'[134] One particular observation pertaining to the support he gleaned from the parliamentary history stands out. He held that against the background of the ambiguity of the wording of the Act[135] it was appropriate to have regard to ministerial statements (made during debate of the Extradition Bill, and thus to the *travaux preparatoire* preceding the adoption of the Act). Those statements showed that 'ministers repeatedly gave assurances or endorsed assumptions that an issuing judicial authority should have to be a court, judge or magistrate'.[136] This conclusion led him to maintain that he would allow the appeal, and set aside the extradition order.

4.5 The minority judgment of Lady Hale

Lady Hale held that she also would have allowed the appeal based on the reasons provided by Lord Mance.[137] The UK Parliament is sovereign and moreover, 'this is not a case where Parliament has told us that we must disregard or interpret away the intention of the legislation'.[138] Furthermore, the

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[132] *Id* par 246.
[133] *Id* pars 247-259.
[134] *Id* par 260 under the head 'Conclusions'.
[135] *Ibid.*
[136] *Id* par 261.
[137] *Id* pars 171-194.
[138] *Id* par 194.

reality is that the meaning of the Framework Decision is far from clear (in her words: '[g]iven the lack of common or concordant practice between the parties').[139] For these reasons the UKSC should not interpret the Act 'contrary to its natural meaning and the clear evidence of what Parliament thought that it was doing at the time'.[140]

5 A few comments on the judgment

Having examined the judgments of the seven judges – some in more detail than others – comments on both the majority and minority judgments are merited.

It is important first to refer to the sequel to the decision of the UKSC. Counsel for Assange applied for a 'stay of the Supreme Court's order' and to request a 're-open[ing of] the appeal'.[141]

The grounds for the application were explained as follows by the court:[142]

> The grounds of the application are that the majority of the Court decided the appeal on a ground that Miss Rose QC, Mr Assange's counsel, had not been given a fair opportunity to address. That ground was that article 31(3)(b) of the Vienna Convention on the Law of Treaties ('the Convention') and the principle of public international law expressed in that article rendered admissible State practice as an aid to the interpretation of the Framework Decision.

The court countered this application by stating that counsel gave five 'headings for the submissions that she proposed to make' and that the third of these was the 'relevance of subsequent events, other EU Instruments and the practice of EU States'.[143] The court also referred to the fact that a 'considerable volume of documentary material that had been placed before the Court related to these matters'.[144]

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[139] *Id* par 191. Lady Hale also referred to the 'natural meaning' of 'judicial' in UK law and that its meaning under UK law is restricted 'to a court, tribunal, judge or magistrate' (par 192). However, she also held (in contrast to Lord Mance's reference to the 'assurances given by ministers') that '… I would place more weight on the parliamentary history – in terms of the changes made to the Bill during its passage through Parliament – than on the assurances given by ministers. Why make the amendments eventually made unless to make the matter clear?' (*ibid*).
[140] *Ibid.*
[141] See 'Note' 116 of the judgment.
[142] *Id* par 1 of the 'Note'.
[143] *Id* par 2 of the 'Note'.
[144] *Ibid.*

The court dismissed the application as being 'without merit'.[145] It explained its reasons as follows:[146]

> In the course of her submissions under her third heading, as she has accepted, Lord Brown expressly put to her that the Convention applied to the interpretation of the Framework Decision. That Convention, as Miss Rose has recognised, sets out rules of customary international law. Had Miss Rose been minded to challenge the applicability of the Convention, or the applicability of State practice as an aid to the construction of the Framework Decision, or the relevance and admissibility of the material relating to State practice, she had the opportunity to do so. She made no such challenge. Her submissions were to the effect that caution should be exercised when considering the effect of State practice.

Be that as it may though, it is submitted that the emphasis placed on article 31.3(b) of the Vienna Convention in the judgments of four of the judges (and although to a lesser extent evinced in the judgment of Lord Phillips but indirectly in evidence through his consistent reference to the wording of the EAW) show a strict adherence (may one says a 'deference'?) to the UK's 'obligations' in conforming to the prescripts as found in Conventions and Framework Decisions of the European Union. It is further submitted that the judgments of the majority show an acknowledgment of the necessity of comity between nations. The notion of comity has been defined as follows: '*Comity of nations* [authors' emphasis] is a recognition of fundamental legal concepts that nations share. It stems from mutual convenience as well as respect and is essential to the success of international relations'.[147] Given this definition of 'comity' it is evident that the majority's decisions subscribed to such 'comity'.

Turning to the judgments of the two dissenting judges (Lord Mance and Lady Hale) one finds deference of a different kind. In both judgments one sees heavy emphasis on British parliamentary sovereignty and deference towards both Parliament and the Executive. This reality is particularly evident in Lord

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[145]*Id* par 4 of the 'Note'.
[146]*Id* par 3 of the 'Note'.
[147]Hill and Hill 'Comity: Legal definition of comity' at http://legal-dictionary.thefreedictionary.com/comity (accessed 14 December 2014) 1. See also Paul 'The transformation of international comity' (2008) 71 *Law and Contemporary Problems* 19. He describes the meaning of 'comity' as follows: 'Originally, international comity was a discretionary doctrine that empowered courts to decide when to defer to foreign law out of respect for foreign sovereigns. Comity has become a rule that obligates courts to apply foreign law in certain circumstances' (20). It needs to be acknowledged that the author's reference to 'foreign law' may be misleading since it was not the application of 'foreign law' which was at issue in the *Assange* case but international law *strictu sensu* (in the application of European law) but his explanation of the meaning of the concept of 'comity' nonetheless sheds light on the meaning of the concept.

Mance's conclusion which I repeat:[148]

> … the intention of Parliament and the effect of the Extradition Act 2003 was to restrict the recognition by British courts of incoming European arrest warrants to those issued by a judicial authority It would follow from my conclusions that the arrest warrant issued by the Swedish Prosecution Authority is incapable of recognition in the United Kingdom under section 2(2) of the 2003 Act. Parliament could change the law in this respect and provide for wider recognition if it wished, but that would of course be for it to debate and decide.

Their minority judgments can consequently best be described as ones steeped in deeply-entrenched positivism (a heavy reliance on 'black letter' law) and with a substantial reliance on the political speeches of ministers (statements of ministers) as well as ordinary members of parliament during the debate on the adoption of the Extradition Act. This is not a route to be recommended when interpreting legislation as Gardner astutely pointed out in reference to an observation made after his comment on the judgment entitled 'Supreme Court judgment: *Assange v Swedish Judicial Authority*'[149] appeared. As an unidentified commentator wrote: 'What I found really extraordinary about this judgment was that it appears that when Parliament passed this law [the Extradition Act], some MPs didn't seem to be clear what "judicial authority" meant' and further: 'As a non-lawyer, I find that pretty shocking. I wonder how common it is for Parliament to pass laws without actually understanding the meaning they're voting for?' Gardner's response was succinct: 'Very common is the answer! Legislation's usually complex, and you have EU measures in the background, that makes them only more complex. There's often a lot of misunderstanding all round'.[150]

The minority decision poses yet another question – this one related to the application of the principle of margin of appreciation although the principle is not mentioned at all in the decisions.

Incidentally, it is interesting that in the indexes of the international law textbooks I consulted, not a single reference to this principle is to be found. A different picture, however, emerges when one has a look at articles published on the principle. The number of articles on the topic is (to put it mildly) impressive.

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[148]See n 137 above.
[149]See http://www.headoflegal.com/2012/05/30/supreme-court-judgment-assange-v-swedish-judicial-authority/ (accessed 30 August 2014).
[150]*Id* 4.

As far back as 1982 O'Donnell wrote of the margin of appreciation that '[w]hile difficult to define, the margin of appreciation refers to the latitude allowed to the member states in their observance of the Convention [European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950]'.[151] Seventeen years later, however, Benvinisti wrote an article in which he referred to the 'potentially negative influence of the margin of appreciation doctrine on the goals of setting communal and global standards'.[152] In 2007 Bakircioglu warned that '… it must be stressed that margin of appreciation does not grant the national authorities [I would argue that the judiciary is included in the reference to 'uncontrolled power'] an uncontrolled power …'[153] It is my submission that both Lord Mance's and Lady Hale's decisions are poignant examples of exactly such 'negative influence' on the setting of international standards.

6 Conclusion

Any question of Assange's extradition came to naught since he sought 'diplomatic sanctuary and political asylum' in the Ecuadorean Embassy nearly two months before the judgment and was granted this asylum on 16 August 2012 on the basis that the 'South American nation believed the WikiLeaks founder's fears of persecution were legitimate'.[154] Assange has been holing up in the Ecuadorean Embassy in London ever since. The last word on Assange's 'destiny' has definitely not yet been spoken.

However, as far as the legal situation pertaining to extradition and Assange is concerned, the last word belongs to Lord Kerr (one of the judges delivering judgment in the *Assange* decision) who was invited to deliver the Boydell lecture on 13 June 2012.[155] By way of introduction he observed that the case was[156]

> … not even remotely about – Mr Assange's role as an internet activist; and contrary to the assumption of some commentators, it was not about his possible extradition to the United States of America; it was not even about

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[151] 'The margin of appreciation doctrine: Standard in the jurisprudence of the European Court of Human Rights' (1982) *HRQ* 474, 475.

[152] 'Margin of appreciation, consensus, and universal standards' (1999) *International Law and Politics* 843, 845.

[153] 'The application of the margin of appreciation doctrine in freedom of expression and public morality cases' (2007) *German Law Review* 711, 718.

[154] Adetunji and Davies 'Julian Assange granted asylum by Ecuador – as it happened' *The Guardian* 16 August 2012, 6 available at http://www.theguardian.com/media/2012/aug/16 /julian-assange-ecuador-embassy-asylum-live (accessed 1 September 2014).

[155] 'European arrest warrants: A European understanding of "judicial authority" as highlighted in *Assange v Swedish Prosecution Authority*' available at https://www.supremecourt.uk/docs/ speech-120613.pdf (accessed 1 September 2014).

[156] *Id* 2.

> whether the allegations which had prompted the Swedish prosecution authority to seek his extradition were sustainable. The appeal was concerned with what was meant by a judicial authority where that term is used in, on the one hand, the Framework Decision of 13 June 2002 on the European Arrest Warrant and, on the other hand, the Extradition Act 2003.

It is feasible and appropriate to quote in full what Lord Kerr had to say about the adoption of the Framework Decision; that the adoption was[157]

> [n]o mere tinkering with the scheme of extradition. It represented the outworking of a fundamental change in the legal order. Whereas, previously, extradition depended on a bilateral, mutual co-operation between the state that requested and the state was requested to provide extradition, the Framework Decision was premised on a 'supranational, harmonised legal system'. Moreover, subscribing to that system, it was acknowledged, necessarily involved a partial renunciation of sovereignty. While, therefore, the direct source of the more easily obtained surrender of fugitive offenders is to be found in the terms of the Framework Decision, far more importantly, what underpins the new scheme is the notion that the legal systems of the various member state have been subsumed into a supranational order. In these circumstances examination of the efficacy of the legal system of the requesting state is not only precluded, it would be a wholly inapposite exercise.

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