Extradition in Europe

Felicity Maher reports on *Assange v Swedish Prosecution Authority* [2012] UKSC 22

There has been intense international interest in the efforts of Julian Assange to resist extradition from the United Kingdom to Sweden to face questioning in relation to offences including rape. In February this year, his fight reached the UK's Supreme Court. On 30 May, the court handed down its judgment. Despite a clear majority dismissing Assange's appeal, his future remains uncertain.

Facts, issue and decision

In December 2010, the Swedish Prosecution Authority (SPA) issued a European Arrest Warrant (EAW) against Assange, who was then in the UK. Assange unsuccessfully challenged the validity of the EAW, on a number of grounds, in the Magistrates Court and the High Court.

Section 2(2) of the UK *Extradition Act 2003* (EA) requires that an EAW be issued by a 'judicial authority'. The EA implemented the Council of the European Union framework decision on the European arrest warrant and surrender procedures between Member States of the European Union (framework decision).[1] The sole ground of Assange's appeal to the Supreme Court was that the SPA was not a judicial authority.

By a majority of 5:2, the Supreme Court held that the SPA is a judicial authority within the meaning of section 2(2) EA.

Majority judgments

Lord Phillips gave the leading judgment of the majority. Given the presumption that parliament intended that 'judicial authority' should bear the same meaning in the EA as in the framework decision, he considered the first question was the meaning of this phrase in the framework decision.[2] Lord Phillips considered the natural meaning of the words, the purpose of the framework decision and relevant preparatory materials. He noted that in an earlier draft of the framework decision (the September draft), 'judicial authority' was defined as a judge or a public prosecutor. That draft was amended by a later draft (the December draft), which abandoned the definition of judicial authority. The later draft formed the basis of the framework decision finally adopted.[3]

Lord Phillips identified two possible reasons for abandoning the definition: to restrict the meaning, so as to exclude public prosecutors; or to broaden the meaning, so as not to restrict it to judges and public prosecutors. He then set out five reasons why the second of these possibilities was more probable.[4]

First, if the intention was to restrict the power to issue EAWs to judges, one would expect this to be expressly stated. Such a restriction would effect a radical change, preventing public prosecutors from performing functions they had performed for decades.

Second, a significant safeguard against the improper issue of EAWs lay in the antecedent process that formed the basis of an EAW. If there was concern to ensure the involvement of a judge, the obvious focus should have been on this process.

Third, member states had existing procedures for extradition and the authorities involved in those procedures were not restricted to judges and public prosecutors.

Fourth, various articles in the December draft suggested that there was a range of possible judicial authorities, not restricted to judges.

Fifth, article 31.3(b) of the 1969 Vienna Convention on the Law of Treaties (VC) permitted recourse, as an aid to interpretation, to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. After the framework decision took effect, various member states had designated public prosecutors as judicial authorities, and commission and council reports reviewing the implementation of the framework decision did not criticise this.

Lord Phillips concluded that, in the framework decision, 'judicial authority' embraced public prosecutors, including the SPA.[5] Further, the phrase should be given the same meaning in the EA.[6]

Lord Walker agreed, regarding Lord Phillips' fifth reason, based on article 31.3(b) VC, as determinative.[7] Lord Brown also agreed, principally on the basis of Lord Phillips's fifth reason.[8]

Lord Kerr agreed that, since the framework decision had come into force, various member states had designated public prosecutors as judicial authorities. Accordingly, there was a sufficiently widespread and uncontroversial practice in Member States to enable article 31.3(b) VC to come into play.[9] Like Lord Phillips, Lord Kerr relied

on the presumption that parliament did not intend to legislate contrary to the UK's international obligations, and concluded that 'judicial authority' had the same meaning in the EA as in the framework decision.[10]

Lord Dyson also agreed, again for the fifth reason given by Lord Phillips. He held that 'judicial authority' in the framework decision included public prosecutors as, within article 31.3(b) VC, there was an agreement established by subsequent practice to this effect.[11] Lord Dyson rejected Lord Phillips' four other reasons.[12] He concluded that 'judicial authority' should be given the same meaning in the EA as in the framework decision, again relying on the presumption in favour of interpreting domestic statutes consistently with the UK's international obligations. Lord Dyson considered that this presumption was even stronger where (as here) the language in the domestic statute, and the international law to which it gave effect, were identical.[13]

Dissenting judgments

Lord Mance gave the leading dissenting judgment. He did not accept Lord Phillips' first four reasons.[14] As to the fifth, he accepted that the subsequent use, by various member states, of public prosecutors as judicial authorities was a relevant factor in the interpretation of 'judicial authority' in the framework decision.[15] Indeed, he concluded that the European Court of Justice was likely to hold that public prosecutors may be judicial authorities under the framework decision.[16]

However, Lord Mance differed from the majority in relation to the question whether 'judicial authority' in the EA should have the same meaning. He held that the presumption relied on by the majority was merely a canon of construction which must yield to contrary parliamentary intent.[17] To ascertain the intention of parliament when the EA was passed, Lord Mance conducted a detailed analysis of parliamentary materials which he regarded as admissible under the rule in *Pepper v Hart*.[18] He concluded that those materials demonstrated an intention that, under the EA, a judicial authority must be a court, judge or magistrate.[19]

Lady Hale agreed with the reasons of Lord Mance.

Watch this space

On 30 May, counsel for Assange indicated that an application would be made to re-open the Supreme Court's decision, on the ground that the majority had based their decision on article 31.3(b) VC, which she had not been given a fair opportunity to address. The unusual application was made and unanimously dismissed by the court on 14 June. The court considered that counsel had made relevant submissions, placed before the court relevant documentary material, and importantly had been asked by Lord Brown about the applicability of the VC and been given an opportunity to challenge its applicability and the relevance of customary international law rules arising under it, which she did not do.

At the same time, it is understood that Assange may appeal to the European Court of Human Rights. Media commentary has been circumspect on the availability of such an appeal. Future developments will be reported in subsequent editions of *Bar News*.

Endnotes

1. 2002/584/JHA.
2. *Assange v Swedish Prosecution Authority* [2012] UKSC 22 at [10].
3. At [42],[54],[55].
4. At [61]-[71].
5. At [76].
6. At [80].
7. At [92],[94].
8. At [95].
9. At [106],[108]-[109].
10. At [112].
11. At [131]-[132].
12. At [155]-[159].
13. At [122],[160].
14. At [239].
15. At [242],[244].
16. At [244].
17. At [201],[206]-[207].
18. [1993] AC 593.
19. *Assange v Swedish Prosecution Authority* [2012] UKSC 22 at [261],[263]-[265].