IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM
THE HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT)
(ENGLAND AND WALES)
[2011] EWHC 2849

B E T W E E N :-

JULIAN PAUL ASSANGE

Appellant

- and -

SWEDISH PROSECUTION AUTHORITY

Respondent

APPLICATION TO
SET ASIDE JUDGMENT
AND RE-OPEN THE APPEAL

Summary of the application

1. On 30 May 2012, the Supreme Court by a majority of 5 to 2 (Lady Hale and Lord Mance dissenting) dismissed the Appellant's appeal, and held that a European Arrest Warrant ("EAW") issued by a public prosecutor is a valid Part 1 warrant issued by a "judicial authority" within the meaning of sections 2(2) and 66 of the Extradition Act 2003 ("the 2003 Act").

2. This is the Appellant's application for that judgment to be set aside, and the appeal reopened, on the ground that the decision of the majority was reached on a basis which was not argued before the Supreme Court, and on which the Appellant was accordingly not given a fair opportunity to be heard.

3. The argument which was solely determinative of the result of the appeal, in the case of two members of the majority (Lord Walker and Lord Dyson), and of central importance to the reasoning of two more (Lord Brown and Lord Kerr) was that:

   a) in interpreting the meaning of the phrase "judicial authority" in the Framework Decision ("FD") (consistently with which the 2003 Act was to be read), the Court ought, in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties ("the VCLT") to take into account any subsequent practice in the application of the FD which established the agreement of the parties regarding its interpretation; and

   b) the subsequent practice of EU Member States, some of which had nominated prosecutors as "judicial authorities" for the purpose of issuing EAWs, established the agreement of the signatories to the FD that such parties fell within the meaning of the term "judicial authority" in the FD.

4. Had the applicability and effect of the VCLT been argued during the appeal, the Appellant would have submitted that:

   a) Article 31(3)(b) of the VCLT, and the principle of customary international law expressed in that article, has no application to the interpretation of legislation of the EU, such as a framework decision. Such legislation, which is the unilateral act of an EU institution (the Council), and not a treaty between States, is to be interpreted in accordance with its wording, context and purpose, and not taking into account the subsequent practice of Member States;

   b) In any event, the subsequent practice relied upon by the majority was not sufficient to satisfy the test for subsequent practice to be taken into account under Article 31(3)(b) of the VCLT, since it did not establish the agreement of all parties to the FD regarding the interpretation of the FD. It was not argued at any stage of the appeal that the subsequent practice in question was sufficient to establish such agreement.

The Court's power to re-open its judgment

5. It was well established that the Judicial Committee of the House of Lords had inherent power to set aside its own judgment and order a re-hearing if such a course was necessary to correct injustice, including in circumstances in which a party had not had a fair opportunity to address argument on a point. In ***R v Bow Street Magistrates' Court, ex parte Pinochet Ugarte (No. 2)*** [2000] 1 AC 119, Lord Browne-Wilkinson (with whom the other Law Lords agreed) held, at p132, that

> "…In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co. Ltd. v. Broome (No. 2)* [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point. However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong…"

6. The continuing existence of the "*inherent jurisdiction*" under the 2003 Act was expressly acknowledged in ***Norris v Government of the United States of America (No. 1)*** [2008] 1 AC 920, at §110, where, notwithstanding the existence of no express power to remit in section 115 of the 2003 Act, it was held that:

> "…we have no doubt that the House has an inherent power to remit determination of an issue to an inferior tribunal where the interests of justice so require, and that is a power which nothing in the 2003 Act purports to abrogate…"

7. There can be no doubt that the Supreme Court has the same power, both as part of the inherent jurisdiction transferred to it from the House of Lords, and pursuant to section 40(5) of the Constitutional Reform Act 2005, by which the Court has power "to determine any question necessary to be determined for the purposes of doing justice" in an appeal to it under any enactment.

The decisive importance of the VCLT in the determination of this appeal

8. In concluding that the intention of the EU Member States had not been to restrict the meaning of "judicial authority" in the FD to a judge, all of the members of the majority of the Court relied upon on the subsequent practice in the application of the FD which, it was held, established the agreement of the parties regarding the interpretation of the phrase, pursuant to Article 31(3)(b) of the VCLT.

9. For Lord Phillips, the VCLT constituted the fifth of five reasons for answering the "critical question" of the meaning to be attributed to the term "judicial authority" under the FD adversely to the Appellant (§61-71).

10. Lord Walker held that "the application of the Vienna Convention" was "compelling" (§92) and that "the Vienna Convention point is to my mind determinative" (§94). Lord Walker expressed no view upon Lord Phillips' remaining four points (§94).

11. Lord Dyson expressly rejected each of Lord Phillips' four other reasons (at §§155-159). He dismissed the appeal only on the basis of the VCLT, Lord Phillips' fifth reason (at §§128-136) and ultimately concluded that "…The reasons that I have given coincide with the fifth reason given by Lord Phillips (paras 67 to 71)…." (§154 & 171).

12. Lord Brown answered the critical question "…principally upon the fifth of Lord Phillips' reasons (paras 67-71 of his judgment)…" whilst "…not discount[ing] entirely the various other strands of reasoning on which he relies…" (§95).

13. Lord Kerr agreed that "the necessary pre-conditions for the activation of article 31(3)(b) were….present" (at §§106-109), and regarded this as a factor that "strongly fortified" his "preliminary conclusion" based upon *prior* state practice (at §§104-106).

14. Had two members of the majority answered the "critical question" in favour of the Appellant, or had they concluded that there was no clear answer to it, the result of this appeal would have been different. In the circumstances, it is clear that the VCLT was determinative of the appeal. It was the sole basis for the

findings of Lord Walker and Lord Dyson. It was, moreover, of central importance to the reasoning of Lord Brown and Lord Kerr.

15. It is also clear that the point is far from straightforward, since Lady Hale and Lord Mance both took different views from the majority on the question at issue.

16. Lady Hale (at §190-191) disagreed with Lord Phillips' fifth reason. She held that given the lack of common or concordant State practice, the conditions of Article 31 of the VCLT were not satisfied. Lady Hale rejected the contention that agreement may be found in the acquiescence of Member States, concluding that failure to address minds to the issue is not to be equated with acquiescence or agreement (§191).

17. Lord Mance (at §241-242 & 244-246 & 263) regarded the "evidently suspect" State practice concerning the nomination of executive authorities as precluding the application of Article 31 of the VCLT (§241-242). Whilst State practice regarding nomination of prosecutors as issuing judicial authorities was a factor to be taken into account (although not pursuant to the VCLT), it was to be set against the "highly questionable" nomination by some States of prosecutors as executing authorities (§242, 244 and 263). Notwithstanding "strong arguments" to the contrary, Lord Mance regarded it as probable that the ECJ would on balance regard a prosecutor as within the notion of a judicial authority in the FD, in part by reference to subsequent State practice (§244 and 246). Lord Mance, however, regarded the meaning of the FD as obscure (now and in 2003) and therefore subject to the intention of Parliament (§246).

The VCLT was not argued during the appeal

18. Neither the applicability of Article 31(3)(b) of the VCLT nor the legal implications of its application to the subsequent practice of EU Member States in this case was the subject of argument during the written or oral procedure in this appeal. The VCLT is not referred to in the printed case of any party or intervener, formed no

part of either party's oral submissions, and was not included in the bundles of authorities[1].

19. It is of course the case that the *factual* question of subsequent EU Member State practice was the subject of argument in this case. However, no consideration was given by the parties or the Court at any stage to the questions of law raised by the invocation of the VCLT in the context of an EU instrument, which are outlined below, or to the satisfaction of the actual requirements of Article 31(3)(b).

20. It is notable that, following the hearing, the Court on three occasions wrote to the parties seeking further written submissions on points which the Court was considering including in its judgment, but which had not been argued before it, including elements of the Parliamentary process, and the applicability of *Pupino*. The applicability and effect of Article 31(3)(b) of the VCLT was not raised even at that stage. It is of particular note that the issues upon which the parties were afforded the opportunity to make subsequent written submissions were ultimately determined against the Respondent. The Respondent thus was afforded an opportunity to make submissions upon new issues which were adverse to the Respondent's interest. By contrast, the Appellant was afforded no opportunity to make submissions upon the single issue, arising post-hearing, that was to be decided adversely to him, and determinatively so.

21. In the circumstances, it is submitted that the Appellant was denied a fair opportunity to make submissions on this point. As Lord Diplock stated, giving the judgment of the House of Lords in ***Hadmor Productions Ltd v Hamilton*** [1983] 1 AC 191, 233:

> "…the right of each [party] to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is…" was "…one of the most fundamental rules of natural justice…".

[1] The Appellant has been able to find only one passing reference to the VCLT made at any stage in these proceedings. Shortly after lunch on the first day, Lord Brown made the comment: "Surely the Vienna Convention allows the subsequent events and the way it has been interpreted and applied to operate in terms of construing an international convention, here the FD, but I am not sure that then it can bear similarly on the interpretation of the 2003 Act." It is submitted that this single remark (the point of which was that the VCLT was *not* an aid to the interpretation of the 2003 Act) plainly did not constitute fair entertainment of what was ultimately the determinative issue on the appeal.

22. As well as constituting a fundamental element of the right to natural justice at common law, the right to make submissions on issues determinative of a person's civil rights or obligations is intrinsic to the right to a fair hearing under Article 6(1) ECHR. See, for example, ***Karakasis v Greece*** (2003) 36 EHRR 507, at §26:

> "…no decision on the question of compensation should be taken without affording the applicant an opportunity to submit to the courts his arguments on the matter. A procedure whereby civil rights are determined without ever hearing the parties' submissions cannot be considered to be compatible with Article 6 § 1…the Court notes that on 2 September 1996 the Court of Appeal ruled on the applicant's entitlement to compensation proprio motu without inviting comments on his part…It follows that there was a violation of Article 6 § 1 of the Convention in respect of the Court of Appeal's failure to hear the applicant…"

23. The Supreme Court has recently held that Article 6(1) ECHR applies to the conduct of extradition proceedings under the 2003 Act, at least insofar as UK nationals are concerned (***Lukaszewski v The District Court in Torun, Poland*** [2012] 1 WLR 1604 at §§27-40).

24. The position of non-UK nationals (such as the Appellant) was not determined (see §40). As Lady Hale noted (at §52), affording an Article 6 right to a fair hearing to proceedings concerning UK nationals, but denying the same right to the same proceedings where non-UK nationals are concerned "…discriminates between nationals and aliens…".

25. The Appellant submits that Article 14 ECHR requires in these circumstances that the same Article 6(1) procedural standards be applied to non-UK nationals. The Appellant is in a comparable situation to UK nationals subject to an extradition request, with whom he shares the characteristics of being irremovable from the United Kingdom save insofar as the 2003 Act permits it. There is no objectively justifiable reason to treat the Appellant differently on grounds of his nationality or immigration status (see ***A v Secretary of State for the Home Department*** [2005] 2 AC 68, HL per Lord Bingham at §§45-70 & 73, Lord Nicholls at §85, Lord Hoffman at §97, Lord Hope at §§134-138, Lord Scott at §§157-159, Lord Rodger at §189, Lady Hale at §§232-238 and Lord Carswell at §240).

The Appellant's response to the reasoning of the majority

26. The Appellant does not seek in this application to set out the full detail of the submissions which he wishes to make on the applicability and effect of Article 31(3)(b) of the VCLT in this case, but summarises below an outline of the main submissions which would have been developed had he been afforded the opportunity to make them, and which he will seek to develop in the event that this application to re-open the appeal is allowed. The Appellant will make three principal submissions:

    a) Article 31(3)(b) of the VCLT and the principle of interpretation which it embodies is not applicable to the EU legal order;

    b) Even if it were so applicable, the FD EAW is not a treaty within the meaning of the VCLT, and the VCLT, and the principle of interpretation which it embodies, has no application to it;

    c) Even if Article 31(3)(b) is applicable, its requirements are not fulfilled.

Submission 1: Article 31(3)(b) of the VCLT is not applicable to the EU legal order

27. There is a clear distinction between the approach taken by the ECJ in applying the VCLT to external agreements concluded by the EC/EU with other parties and the approach which it adopts in interpreting the EC/EU treaties themselves, even where identically worded. In particular:

    a) Article 31(3)(b) of the VCLT has no application to the internal Community legal order. The instruments of the Community legal order fall to be interpreted in accordance with Community principles alone. That is especially true of secondary Community legislation; and

    b) The ECJ does not apply the principle of customary international law embodied in Article 31(3)(b). The ECJ does not interpret the meaning of the acts of the EU institutions by reference to subsequent State practice, but, rather, in accordance with their language, context and purpose.

28. For the distinct and different nature of the Community legal order as compared to external treaties, see, for example, ***Polydor*** [1982] Case 270/80, ECR 329, where

notwithstanding that the terms of the respective articles in the EC-Portugal agreement were virtually identical to Articles 30 and 36 of the EEC Treaty, the ECJ held that the similarity of terms was not sufficient reason to apply to the provisions of the Agreement its existing case-law on the free movement of goods within the Community, because the EC / EU legal order seeks to attain different objectives.

29. Considering Article 31 of the VCLT in ***Opinion 1/91, First EEA Opinion*** [1991] ECR-6084, at §14, the ECJ stated:

> "…The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose…".

30. The ECJ emphasised the context of the different objectives of the two agreements, finding that the EEA is a normal international treaty merely creating rights and obligations between the parties and "providing for no transfer of sovereign rights to the intergovernmental institutions which it sets up", whereas by contrast the EEC Treaty "constitutes the constitutional character of a Community based on the rule of law". The ECJ reiterated (at §19-21) the special character of the Community legal order due to its primacy over national law and the direct effect of many provisions of Community law.

31. In the ***Opel Austria*** case (Case T-115/94, [1997] ECR II-43), the Court of First Instance affirmed that:

> "[i]t is clear from the case-law that in order to determine whether the interpretation of a provision contained in the EC Treaty must be extended to an identical provision contained in an agreement such as the EEA Agreement, that provision should be analyzed in the light of both the purpose and objective of the Agreement and in its context" (at §106).

32. The ECJ does not apply Article 31(3)(b) of the VCLT to the interpretation of EU legislation. Article 31(3)(b) does not feature in its case law at all. Rather, it applies

a Community rule of interpretation, which reflects the substance of Article 31(1) of the VCLT alone.

33. Furthermore, not only does Article 31(3)(b) of the VCLT not apply to the internal Community legal order, but neither does the principle of customary international law that is expressed in that sub-article. As far as Community law is concerned, and certainly where the provisions of the EC Treaty are concerned, the ECJ does not accept arguments of subsequent practice at all.

34. On the contrary, the ECJ has held that "a mere practice cannot override the provisions of the Treaty" (see Case C-327/91, ***France v Commission*** [1994] ECR I-3641, at §36). The ECJ affirmed this position in ***Opinion 1/94*** [1994] ECR, p. I-5267, at §52. The same is true of institutional practice (see §61).

35. The Appellant makes two additional observations about the application of the VCLT by the majority of this Court:

    a) The majority of the Court relied as an aid to the interpretation of the FD upon the subsequent practice of the EU Commission and Council, as well as that of Member States. However, the VCLT is concerned with *State practice* only. The subsequently expressed *views* (not practice, since neither the Commission nor the Council issues or executes EAWs) of the EU Commission or Council are of no assistance in interpreting EU legislation. The Commission, of course, has the right to make submissions in cases referred for a preliminary ruling to the ECJ, and frequently does so. It would be very surprising if it could also influence the interpretation of EU legislation by that Court by the expression of its views (or, as in this case, silence, interpreted as acquiescence in a particular practice) as to the proper meaning of legislation.

    b) Not all EU Member States have ratified the VCLT. Amongst those that have not are some of those whose practices were relied upon by the majority of this Court, including France (which has nominated prosecutors as issuing and executing judicial authorities) and Romania (which has nominated prosecutors and its Ministry of Justice as an executing judicial authority).

Submission 2: The FD is not a 'treaty' within the meaning of the VCLT

36. In any event, the secondary acts of the Community do not qualify as "treaties" under Article 2 of the VCLT. Framework decisions are legal instruments of the second and third pillars of the European Community created under Article 34 of the Amsterdam Treaty, used exclusively within the Community's competences in police and judicial cooperation in criminal justice matters.

37. Article 34(2)(b) TEU gave the *Council* the right to adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions are instruments created by the Council, an organ of an international organisation (the EU), and are not agreements between sovereign states. The procedure for the adoption of a framework decision is different from the procedure of concluding a treaty, and there are no parties to the instrument, which is a unilateral act of the EU. For these further reasons, framework decisions do not fall under the definition of "treaty" contained in Article 2 of the VCLT, and the provisions of Article 31(3)(b) do not apply to them.

38. It is thus not surprising that the ECJ has never applied Article 31(3)(b) of the VCLT to secondary acts. The ECJ has never referred to the VCLT, or to subsequent State practice, in interpreting secondary acts of the EU. Instead, it refers to the "principles of interpretation", the content of which becomes clear from an examination of its case law, and <u>not</u> from international law sources on treaty interpretation. See, for example:

    a) Case 105/84, ***Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar*** [1985] ECR 02639, at §23:

        > "…In order to establish its meaning it is necessary to apply generally recognized principles of interpretation by referring in the first place to the ordinary meaning to be attributed to that term in its context and by obtaining such guidance as may be derived from community texts and from concepts common to the legal systems of the member states…";

    b) Case C-83/94, ***Leifer and Others*** [1995] ECR I-3231, at §22:

> "..in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part".

39. In short, Community legislation such as the FD is to be interpreted in accordance with its wording, context and purpose, and not on the basis of the subsequent practice of Member States. Community legislation is not an international agreement between States, where subsequent State practice can evidence agreement by those States as to its proper interpretation: it is a legislative act *of the Community*.

Submission 3: Article 31(3)(b) of the VCLT not engaged in any event

40. Even if Article 31(3)(b) did apply to the construction of the present FD (which it does not, for the reasons summarised above), the subsequent State practice in relation to the EAW regime was not sufficient to satisfy the test under Article 31(3)(b) of the VCLT. It was not argued at any stage of the appeal that the subsequent practice in question was sufficient to establish *agreement* between EU Member States as to the interpretation of the FD.

41. First, whilst positive participation in the relevant practice by a party is not the only method by which agreement may be registered, mere silence or non-responsiveness is not sufficient: if silence is to be construed as agreement, it must be accompanied by a positive awareness of the practice, such as that obtained through formal notification or participation in a forum at which the issue was discussed and effectively approved, e.g. by taking action referable to the contested interpretation.

42. Lady Hale was correct to hold that mere silence or non-responsiveness does not satisfy the requirements of Article 31(3)(b). The Appellant will refer to, inter alia:

    a) The evolution of VCLT Article 31(3)(b) from the initial draft of the VCLT (draft Article 70 which became draft article 27(3)(b)) - by which "understanding" was replaced with "agreement" of the parties – and the ILC's deliberations.

    b) The ILC's draft commentary, which states that "…It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a

whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice…".

c) It is for this reason that the words 'state practice' in Article 31(3)(b) are subject to the crucial qualifier "which establishes the agreement of the parties regarding [the treaty's] interpretation". The ILC intended not just any subsequent practice to be sufficient to qualify as a tool of interpretation. 'Consistency' and 'uniformity' of practice were crucial and the members of the Commission were well aware of potential for divergent or abusive interpretation if anything short of this was demonstrated.

43. The jurisprudence of the Dispute Settlement Body of the World Trade Organisation ("DSB") is also instructive. The DSB is, in its core functions, comparable to the ECJ, in that it is a tribunal of specialist jurisdiction which oversees a complex multilateral treaty system with a large membership. The jurisprudence of the DSB reveals a system of treaty interpretation that places a premium on a '"concordant, common and consistent" sequence of acts and pronouncements which is sufficient to establish a discernible pattern implying the agreement of all of the parties regarding its interpretation. In ***EC – Chicken Cuts, WT/DS269/AB/R, WT/DS286AB/R*** (Appellate Body Report, 27 September 2005), the DSB examined the requirements of valid subsequent practice within the meaning of Article 31(3)(b) of the VCLT. It noted that the "practice by some, but not all parties is obviously not of the same order as practice by only one, or very few parties". If only some WTO Members actually positively engaged in the practice, then "this circumstance may reduce the availability of such "acts and pronouncements" for purposes of determining the existence of "subsequent practice" within the meaning of Article 31(3)(b) (at §259). Significantly, the DSB expressly considered the question of how to establish agreement among the States parties who had not positively participated in the relevant practice. It noted that positive participation would reflect agreement, but expressed considerable reservations as to whether non-participation, silence or a lack of reaction could be understood as acceptance of the practice by other treaty parties (at §272), though it conceded that non-participation combined with "notification

or [...] participation in a forum where [the practice] is discussed" (§273) could be reflective of agreement. It concluded that:

> "…[T]he 'lack of reaction' should not lightly, without further inquiry into attendant circumstances of a case be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty…" (§273)

44. Secondly, and in any event, Article 31(3)(b) of the VCLT, in order to recognize subsequent practice as valid, requires that practice to evidence an agreement (in the form of positive agreement or knowing acquiescence) between *all* states parties to the relevant treaty. See, for example, ***EC – Chicken Cuts*** (supra), in which the DSB held that, whilst not all WTO Members needed to positively participate in the relevant practice, subsequent practice must reflect agreement as between all parties as to the meaning of the relevant provision.

45. The United Kingdom is one of the States parties to the FD. All members of the Court recognise that the legislative history of the 2003 Act demonstrates that the UK legislature did not agree that the concept of judicial authority within the FD included prosecutors. For this reason alone, Article 31(3)(b) of the VCLT cannot apply to the FD at all and its invocation by the majority of the Court in support of an interpretation of the FD contrary to that of the UK legislature is unsustainable..

46. In sum, if the FD were a treaty entered into between the Member States, to which Article 31(3)(b) applied, in order for a relevant subsequent practice to be identified which should properly be taken into account in interpreting the FD, the party relying on the practice would need to be able to prove that *every* Member State was in agreement as to the validity of the practice either because: (a) they had themselves participated in the practice; or (b) they were positively aware of the practice through notification or participation in a forum where the practice was discussed and had accepted or at least acquiesced in it. This

standard has resulted in the DSB rejecting as invalid every purported example of subsequent practice brought before it.[2]

47. The Appellant will therefore submit that Lady Hale's analysis is correct. The meaning of the FD is unclear and cannot be ascertained from subsequent State practice. Moreover, the ECJ would not have regard to subsequent State practice under Article 31(3)(b) of the VCLT or customary international law in construing the FD (and both the majority and Lord Mance are wrong to assume otherwise). There is thus no clear answer to Lord Phillips' "critical question" of the proper interpretation of the term "judicial authority" under the FD. As Lady Hale and Lord Mance both held, the Court should in these circumstances determine the meaning of the 2003 Act by ascertaining and applying the intention of the United Kingdom legislature (whether with the assistance of Hansard or otherwise).

The suggested procedure going forward

48. By section 36(7) of the 2003 Act, the decision of the Supreme Court on the appeal becomes final when it is made. The current position is that the commencement of the "required period" for removal under s36(2)-(3) has been delayed until 13 June 2012 (pursuant to s36(3)(b)) to facilitate the making of the present application.

49. The Appellant's primary contention is that, once an application to re-open is made, and whilst it remains extant, the Court's decision on the appeal has not been finally made and the "required period" is automatically halted by ss36(3)(a) & (7), and no further order of this Court is required. However, in case any other party might seek to argue that that analysis is not correct, the Appellant invites the Court as a matter of urgency now to order that the Court's order of 30 May 2012 should be stayed pending the determination of this application, and any subsequent re-hearing of the appeal, so as to preserve the position.

[2] See **Japan – Alcoholic Beverages II, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R** (Appellate Body Report, 1 November 1996) §14; ***EC – Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R*** (Appellate Body Report, 22 June 1998), §92-97; ***Chile – Price Band System, WT/DS207/AB/R*** (Appellate Body Report, 23 October 2002) §214; ***US – Gambling, WT/DS285/AB/R*** (Appellate Body Report, 20 April 2005) §191-195; ***EC – Chicken Cuts, WT/DS269/AB/R, WT/DS286AB/R*** (Appellant Body Report, 27 September 2005) §272-3. Similar reservations are evident in the practice of DSB Panels: ***US – Section 110(5) of the US Copyright Act, WT/DS160/R*** (Panel Report, 27 July 2000) §6.55 (n.68); ***Brazil – Desiccated Coconut, WT/DS22/R*** (Panel Report, 20 March 1997), §256; ***US – Zeroing, WT/DS294/R*** (Panel Report, 9 May 2006), §7.218.

50. The Appellant further invites the Court to direct that the Respondent and the interveners should make any submissions objecting to this application in writing within 14 days of the date hereof, and that the Appellant should be afforded a further 14 days to reply to those submissions.

51. In the event that this application to set aside the judgment and re-open the appeal is allowed, the Appellant invites the Court to make the following further directions:

    a) that the Appellant should have 28 days from the date of the order re-opening the appeal to make further written submissions on the applicability and effect of Article 31(3)(b) of the VCLT;

    b) that the Respondent and interveners should have a further 14 days thereafter to make any written submissions in response;

    c) that the Appellant should have a further 14 days thereafter to make any written submissions in reply to the submissions of the Respondent and interveners;

    d) that the Court should relist the appeal before the same constitution for a single day's oral hearing on this issue only.

52. In particular, the Appellant invites the Court to reconvene for a further oral hearing. It is submitted that such a course is both necessary and proportionate, and that resolving the issue by further written submissions alone would not be appropriate, given:

    a) the centrality of this issue to the determination of the appeal;

    b) the different views expressed so far by members of the Court upon it, without the benefit of argument;

    c) the desirability of any questions which members of the Court may have being canvassed directly with counsel as they arise, given the particular circumstances which have arisen in this case; and

d) the strong public interest in the public hearing of this appeal, which has attracted significant national and international attention.

53. The Appellant notes that a reconvened oral hearing has been undertaken by the House of Lords on previous occasions. In ***R v City of Sunderland, ex parte Beresford*** [2004] 1 AC 889, Lord Bingham records, at §10, that in respect of a legal issue, occurring to the members of the House after the conclusion of oral argument, "…*which appeared to be potentially relevant*…", the House heard further oral argument. Reconvened oral hearings were also ordered in like circumstances for example in ***Sempra Metals Limited (formerly Metallgesellschaft Ltd.) v. Her Majesty's Commissioners of Inland Revenue and another*** [2008] 1 AC 561 and in ***Pepper v Hart***.

Costs

54. The Appellant submits that the order of the Court that the parties make written submissions on costs by 20 June 2012 should be deferred pending the determination of this application, and any subsequent re-hearing of the appeal.

Correction to the judgment

55. The Appellant finally draws the attention of the Court to a factual error in the judgment, which is addressed in the annex to this submission, and invites the Court, in any event, to correct it.

DINAH ROSE QC **PROF. JAMES CRAWFORD SC**
MARK SUMMERS **HELEN LAW**

12 June 2012

Annex: Correction to the Judgment

1. Having had the opportunity to read the Court's judgment in full, the Appellant invites the Court to make the following factual correction to it:

    a. **Paragraph 83, line 4**: it is said that the Appellant "*stands charged*" of offences in Sweden. The Appellant has not been charged with any offences. The Swedish Prosecution Authority seeks the Appellant's extradition in order to interrogate him as part of a preliminary investigation into allegations of sexual offences (see the Statement of Facts and Issues at §§21, 22 and 29). The Appellant suggests that the Judgment be amended to state "…*prosecution of Mr Assange for the offences in relation to which his extradition is sought*".

2. The reference to the Appellant being "*charged*" with serious sexual offences was repeated by the Court when the Judgment was handed down on 30 May 2012, and was subsequently reported by the international press. The correction sought is accordingly of particular importance to the Appellant.