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Case No: CO/1925/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 2 November 2011

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR JOHN THOMAS)
and
MR JUSTICE OUSELEY

- -

Between :

Julian Assange	**Appellant**
- and -	
Swedish Prosecution Authority	**Respondent**

- -
- -

Mr Ben Emmerson QC and **Mr M Summers** (instructed by **Birnberg Peirce**) for the **Appellant**
Ms Clare Montgomery QC, Mr A Watkins and **Ms H Pye** (instructed by **CPS**) for the **Respondent**

Hearing date: 12 and 13 July 2011

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Judgment Approved by the court for handing down (subject to editorial corrections)

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The President of the Queen's Bench Division:

This is the judgment of the court

Introduction

1. In August 2010 the appellant, Mr Julian Assange, a journalist well known through his operation of Wikileaks, visited Sweden to give a lecture. Between 13 August 2010 and 18 August 2010, Mr Assange had sexual relations with two women there, AA and SW. On 20 August 2010 SW, accompanied by AA, went to the police. The police treated their visits as the filing of complaints. On 30 August 2010 Mr Assange, who had voluntarily remained in Sweden to co-operate with the investigation, was interviewed. Mr Assange subsequently left Sweden on or about 27 September 2010 in ignorance of the fact that an arrest warrant had been issued. Attempts had been made by the Swedish prosecutor to interview him.

2. After proceedings in the courts of Sweden, including a hearing before the Court of Appeal of Svea on 24 November 2010, at which Mr Assange was represented and to which we refer in more detail at paragraph 51, a European Arrest Warrant (EAW) was issued on 26 November 2010 by the Swedish Prosecution Authority (the Prosecutor), the Respondent to this appeal. It was signed by Marianne Ny, a prosecutor. The warrant stated that:

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

3. It set out four offences:

> "1. Unlawful coercion
>
> On 13-14 August 2010, in the home of the injured party [AA] in Stockholm, Assange, by using violence, forced the injured party to endure his restricting her freedom of movement. The violence consisted in a firm hold of the injured party's arms and a forceful spreading of her legs whilst lying on top of her and with his body weight preventing her from moving or shifting.
>
> 2. Sexual molestation
>
> On 13-14 August 2010, in the home of the injured party [AA] in Stockholm, Assange deliberately molested the injured party by acting in a manner designed to violate her sexual integrity. Assange, who was aware that it was the expressed wish of the injured

> party and a prerequisite of sexual intercourse that a condom be used, consummated unprotected sexual intercourse with her without her knowledge.
>
> 3. Sexual molestation
>
> On 18 August 2010 or on any of the days before or after that date, in the home of the injured party [AA] in Stockholm, Assange deliberately molested the injured party by acting in a manner designed to violate her sexual integrity i.e. lying next to her and pressing his naked, erect penis to her body.
>
> 4. Rape
>
> On 17 August 2010, in the home of the injured party [SW] in Enköping, Assange deliberately consummated sexual intercourse with her by improperly exploiting that she, due to sleep, was in a helpless state.
>
> It is an aggravating circumstance that Assange, who was aware that it was the expressed wish of the injured party and a prerequisite of sexual intercourse that a condom be used, still consummated unprotected sexual intercourse with her. The sexual act was designed to violate the injured party's sexual integrity."

No other description of the conduct was given elsewhere in the EAW.

4. On 6 December 2010 the EAW was certified by the Serious and Organised Crime Agency (SOCA) under the Extradition Act 2003, (the 2003 Act), as complying with the requirements of the 2003 Act. On 7 December 2010 Mr Assange surrendered himself for arrest. On 7, 8 and 11 February 2011 there was a hearing before the Senior District Judge and Chief Magistrate, Senior District Judge Riddle. Evidence was given by Brita Sundberg-Weitman, a former judge of the Svea Court of Appeal and distinguished jurist, Mr Goran Rudling, an expert in the law relating to sexual offences in Sweden, Mr Sven-Eric Alhem, a retired senior prosecutor, and Mr Bjorn Hurtig, Mr Assange's lawyer in Sweden. The evidence is carefully summarised in the judgment of the Senior District Judge.

5. In a judgment given on 24 February 2011 the Senior District Judge ordered Mr Assange's extradition.

6. Mr Assange originally appealed on a number of grounds; these were reduced to five in a skeleton argument served on behalf of Mr Assange on 29 June 2011. As a result of clarification provided by the Prosecutor, and an amendment to the translation of one of the parts of the EAW, one of those grounds was withdrawn. The four issues that arose on the grounds can be briefly summarised as follows:

   i) The EAW had not been issued by a "judicial authority".

ii) Offences 1-3 described in the EAW (set out at paragraph 3 above) did not meet the dual criminality test. None was a fair and accurate description of the conduct alleged. As regards offence 4, the conduct, if fairly and accurately described, would not have amounted to the offence of rape.

iii) The condition in s.2(3) of the 2003 Act had not been satisfied as Mr Assange was not an "accused".

iv) The issue of the EAW and subsequent proceedings were not proportionate.

The first issue was argued as the last issue, but it is convenient to consider the issues in the order we have set them out.

7. Mr Assange did not pursue the allegation made before the Senior District Judge that there had been abuse in issuing the EAW for a collateral purpose or that there had otherwise been an abuse of process.

Our general approach

8. Before turning to the detail of the issues, it may be helpful to set out the approach we have taken to a number of more general issues, as that approach is material to each of the issues which arises.

(a) Construction of the 2003 Act

9. The powers of the court in ordering the surrender of a person to another Member State of the European Union are governed by Part 1 of the 2003 Act. It was enacted to implement the Framework Decision establishing the EAW regime - legislation adopted on 13 June 2002 by the Council of the European Union. Although Part 1 of the 2003 Act could be applied to other territories, it has not been so applied. Part 2 of the Act applies to extradition to other States with which the United Kingdom has extradition arrangements.

10. Although the 2003 Act does not mention the Framework Decision, it is now well established that Part 1 of the 2003 Act must be read in the context of the Framework Decision and that the national courts of the Member States should construe national laws so far as possible to attain the results sought to be achieved by the Framework Decision: see *Criminal Proceedings against Pupino* (Case C105/03 [2006] QB 83 at paragraphs 43 and 47 and *Dabas v High Court of Justice in Madrid* [2007] UKHL 6, [2007] 2 AC 31 at paragraphs 4 and 5 (Lord Bingham), paragraphs 15-22 (Lord Hope), paragraph 76 (Lord Brown); a helpful review is made by Professor John Spencer in (2009) 30 Statute Law Review 184.

(b) The differences between the 2003 Act and the Framework Decision

11. However, although the courts must give effect to the purpose of the 2003 Act as national legislation implementing the Framework Decision, the court has to consider carefully the position where the terms of the 2003 Act and the Framework Decision differ. In *Officer of the King's Prosecutor Brussels v Cando Armas* [2006] 2 AC 1, Lord Bingham expressed at paragraph 8 his view:

> "Part 1 of the 2003 Act did not effect a simple or straightforward transposition, and it did not on the whole use the language of the Framework Decision. But its interpretation must be approached on the twin assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of cooperation by the United Kingdom than the Decision required, it did not intend to provide for less."

12. He agreed, however, with Lord Hope who said at paragraph 24:

> "But the liberty of the subject is at stake here, and generosity must be balanced against the rights of the persons who are sought to be removed under these procedures. They are entitled to expect the courts to see that the procedures are adhered to according to the requirements laid down in the statute. Unfortunately this is not an easy task, as the wording of Part 1 of the 2003 Act does not in every respect match that of the Framework Decision to which it seeks to give effect in domestic law. But the task has to be approached on the assumption that, where there are differences, these were regarded by Parliament as a necessary protection against an unlawful infringement of the right to liberty."

13. Recital 12 of the Framework Decision permitted Member States to apply constitutional rules relating to due process.

(c) The purpose of the Framework Decision

14. The purpose of the Framework Decision, as set out in the recitals to the Framework Decision and the EU Commission's Explanatory Memorandum (2001/0215 dated 25 September 2001) was to replace the European Extradition Convention of 1957 and other Conventions by a new regime. The new regime was to be 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". Recital (5) stated:

> "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."

15. It was intended to make a break with the previous regime which had been intergovernmentai and replace it with a regime where:

> "Each national and judicial authority should *ipso facto* recognise requests for the surrender of a person made by the judicial authority of a Member State with a minimum of formalities." (Paragraph 2 of the Explanatory Memorandum)

16. The Framework Decision was adopted against the background of the opening of borders within the European Union by making it easier for justice to be administered across borders, whilst at the same time protecting citizens' rights. That protection was buttressed by national courts remaining subject to rules protecting fundamental rights, particularly the ECHR and the Charter of Fundamental Rights of the European Union. The existence of the rights and the observance of those rights by the courts were intended to underpin a regime in which there should be mutual confidence not only between judges but between the citizens of the Member States. Subject to that, however, it was intended, as is made clear by paragraph 4.5.3 of the Explanatory Memorandum that the mechanism was based on the mutual recognition of court judgments. The basic principle was that when a judicial authority of a Member State requested the surrender of a person, either because he had been convicted or was being prosecuted, its decision must be recognised and executed automatically with only limited circumstances in which surrender could be refused.

17. It follows, in our view, that when issues arise relating to the execution of a European Arrest Warrant of someone being prosecuted for an offence, those issues must be considered in the context of the common area for justice based upon recognition by one judicial authority of the acts of another judicial authority. However, it is clear that in the present state of development of the common area for justice, 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 scrutinise requests for surrender under the EAW with the intensity required by the circumstances of each case. Failure by courts in the executing state to accord such scrutiny as the circumstances of each case require can risk undermining public confidence in the operation of the common area for justice and in particular the system for the operation of the EAW.

(d) The approach required by mutual recognition

18. Mutual recognition of judicial decisions of other Member States within a common area for justice requires a court to approach issues on the basis that effect must be ordinarily given to the procedures of another Member State. In *Caldarelli v Court of Naples, Italy* [2008] UKHL 51, [2008] 1 WLR 1724 the House of Lords had to consider a challenge to an EAW issued by an Italian court which described the person as being "prosecuted", even though he had been tried in absentia. Lord Bingham stated in relation to respecting a judge's description of the status of a person under that judge's system of law:

> "It might in some circumstances be necessary to question statements made in the EAW by the foreign judge who issues

> it, even where the judge is duly authorised to issue such warrants in his category I territory, but ordinarily statements made by the foreign judge in the EAW, being a judicial decision, will be taken as accurately describing the procedures under the system of law he or she is appointed to administer."

19. Although Lord Bingham was dealing with a specific issue, we would adopt this approach in general to statements in an EAW made by a judge. However, more intense scrutiny is required, as we explain at paragraphs 49-50, where a warrant is issued by a "judicial authority" who is not a judge. It must always be remembered that a statement by a judge 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.

Issue 1: Was the EAW issued by a judicial authority?

(a) The provisions of the Framework Decision and the 2003 Act

20. As we have set out at paragraph 14, recital (5) to the Framework Decision refers to abolishing the system of extradition and replacing it by a system of surrender between "judicial authorities". Recital 8 also refers to "judicial authority":

> "Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender."

Articles 14 and 15 give effect to that recital by specifying the right to a hearing before a judicial authority before the decision to surrender is made.

21. Article 1 of the Framework Decision refers to the EAW as "a judicial decision issued by a Member State." It refers to "issuing judicial authority" and "executing judicial authority". Article 6 provides:

> "1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European Arrest warrant by virtue of the law of that state.
>
> 2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute a European Arrest warrant by virtue of the law of that state.
>
> 3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law."

22. The 2003 Act defines an EAW as "an arrest warrant issued by a judicial authority", but does not define a judicial authority or provide a deeming provision. However the designated authority, an authority designated by the Secretary of State, currently

SOCA, is entitled to issue a certificate if it believes that the authority that issued the EAW has the function of issuing EAWs in the Member State that issued the EAW (s.2(7)-(8) of the 2003 Act). As we have set out at paragraph 4 it did so in this case.

23. In *Enander v Governor of HMP Brixton and the Swedish National Police Board* [2005] EWHC 3036 (Admin), the Swedish Police Board issued an EAW for the arrest of Enander who had been convicted by a court in Svea and sentenced to a term of imprisonment. The EAW was certified under s.2 as having been issued by a judicial authority. Enander was arrested in London. There was evidence before the court that under Swedish law the sole authority for issuing a warrant for the enforcement of a sentence was the Police Board. It was contended on behalf of Enander that the EAW was invalid as it had not been issued by a judicial authority on the basis that "judicial authority" must be construed as a body which would be recognised in the national law of the UK as being a judicial authority. The court (Gage LJ and Openshaw J) 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.

(b) The decision of the Senior District Judge

24. The Senior District Judge found that SOCA was better placed than the court to determine whether the person who issued the EAW was a judicial authority, but if there was any doubt and there was a possibility of a mistake, then the court should check. There was no reason to believe there had been a mistake. The Prosecutor and Mrs Ny had authority to issue the EAW as both were a judicial authority which had the function of issuing EAWs under the law of Sweden.

(c) The contention of Mr Assange

25. It was contended on behalf of Mr Assange that for the purposes of the 2003 Act, a judicial authority must be an independent person or body exercising judicial powers and functions. This construction was supported by the fact that warrants for extradition into the United Kingdom have to be issued by a judge (see s.142) and that there is nothing in the 2003 Act to indicate a contrary intention for the issue of warrants for execution in the UK. On basic principles of UK constitutional law, those who prosecute are not judicial authorities.

26. The Extradition Bill when before Parliament in 2002 provided that a warrant must be a warrant issued by "an authority" of a category 1 territory. When an amendment was proposed to insert the word "judicial" before "authority", the Under Secretary of State (Mr Ainsworth) made it clear on 9 January 2003 in a Standing committee of the House of Commons, (*Hansard* col.48), that EAWs would be issued by the same authorities which had issued warrants under the then existing procedures for extradition; he gave as examples examining magistrates, courts and "the magistrate at the public prosecutor's office in Amsterdam". Subsequently in the House of Lords Grand Committee, when a further amendment was proposed to add the words "after a judicial decision", it was made clear again by a Minister (Lord Bassam), 9 June 2003 (*Hansard* col.32) that the practice would not change; there would be a judicial process. As the 2003 Act contained the express requirement that the EAW be issued by a judicial authority, it was therefore submitted on behalf of Mr Assange that the courts were bound to apply the provisions of the 2003 Act in the way that a judicial

authority would be understood in the UK, particularly in the light of what had been said by Ministers.

27. It was submitted that it followed that the EAW issued by the Prosecutor was not a warrant issued by a judicial authority. Although the Senior District Judge had been bound by the decision in *Enander* to accept the designation of the Swedish Prosecution Authority under the law of Sweden as authorised to issue an EAW, it was wrong. We should not follow it.

(d) The meaning of judicial authority in the jurisprudence of the ECHR

28. In support of the argument, Mr Assange also relied on the jurisprudence of the ECHR under Article 5.3 which establishes that a prosecutor is not a judge or other officer authorised to exercise judicial power.

29. In *Schiesser v Switzerland* (1979) 2 EHHR 417, the Strasbourg court had to consider whether a District Attorney in Switzerland (Bezirksanwalt) who sometimes acted as a prosecuting authority should be recognised as "an officer authorised to exercise judicial power" within the meaning of Article 5(3) of the ECHR which requires a person arrested to be brought promptly before such an officer. The court observed:

> "27. In providing that an arrested person shall be brought promptly before a "judge" or "other officer", Article 5 para. 3 leaves the Contracting States a choice between two categories of authorities. It is implicit in such a choice that these categories are not identical. However, the Convention mentions them in the same phrase and presupposes that these authorities fulfil similar functions; it thus clearly recognises the existence of a certain analogy between "judge" and "officer". Besides, were this not so, there would scarcely be any explanation for the inclusion of the adjective "other".
>
> 28. "Magistrat" in French and, even more, "officer" in English manifestly have a wider meaning than "*juge*" and "judge". Again, the exercise of "judicial power" is not necessarily confined to adjudicating on legal disputes. In many Contracting States, officers (*magistrats*) and even judges exercise such power without adjudicating, for example members of the prosecuting authorities and investigating judges. A literal analysis thus suggests that Article 5 para. 3 includes officials in public prosecutors' departments as well as judges sitting in court (*les magistrats du parquet comme ceux du siège*)."

30. However the court went on to hold that at paragraph 31:

> "To sum up, the "officer" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested. The first of such conditions is independence of the executive and of the parties (see, mutatis mutandis, the above-mentioned *Neumeister* judgment, p. 44).

> This does not mean that the "officer" may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence. In addition, under Article 5 para. 3, there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him (see, mutatis mutandis, the above-mentioned *Winterwerp* judgment, p. 24, para. 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (*Ireland v. the United Kingdom* judgment, p. 76, para. 199)."

As the District Attorney was acting in that case as an investigating authority with power to charge and detain and subsequently to gather the evidence both in favour of the accused and against him, and not as a prosecutor, he was "an officer authorised to exercise judicial power".

31. That decision was applied by the Commission in *Skoogstrom v Sweden* (1984) 6 EHHR CD 77 in determining that a prosecutor in Sweden was not an officer authorised to exercise judicial power. Although the prosecutor had personal independence, public prosecution formed part of the Executive power or branch of the State and there was no distinction in Sweden between investigation and prosecution.

32. There has been a consistent line of cases since the decision in *Schiesser* which has held that under Article 5.3, a judge or other officer must be independent of the Executive and the parties; he must not be in a position to intervene subsequently on behalf of the prosecuting authority; the person must have power to order the release of the individual after reviewing the lawfulness of the arrest: see *Medvedyev v France* (2010) 51 EHRR 39 (ECHR App No 3394/03) at paragraphs 123-127 where the court held that, although a prosecutor could not be a judge or other officer within the meaning of article 5.3, an investigating judge could be, as the duties of such a judge were to seek evidence for and against the accused without participating in the prosecution and that judge had the power to release an accused.

(e) The meaning of judicial authority in the 2003 Act and the Framework Decision

33. The task of the court in our view is to interpret the 2003 Act in accordance with the guidance of the House of Lords, as we have set out at paragraphs 9 and following, to give effect to the results sought to be achieved by the Framework Decision, but allowing for the right of Parliament to have inserted additional safeguards against surrender.

34. Assuming in Mr Assange's favour it is permissible to consider the statements in Parliament which we have summarised at paragraph 26, we do not think much assistance is gained from them given the broad category of authorities and the practice under the 1989 Act to which the Ministers referred. That practice is illustrated by *R v Bow Street Magistrates Court (ex p Van Der Holst)* (1986) 83 Cr App R 114, where one of the warrants was signed by the Public Prosecutor to the District Court of

Amsterdam. The court held it was valid as all that was required was that it be signed by an officer of the Netherlands. In *Re Speight* (31 July 1996, transcript), the warrant was also signed by the Public Prosecutor of the Amsterdam District Court; no challenge was made to the validity of the warrant.

35. What is significant, in our view, is the fact that in s. 2(2) Parliament adopted the same term, "judicial authority" as that used in the Framework Decision. Although in Recital 8 and Articles 14 and 15 (to which we referred at paragraph 20), the term judicial authority is plainly used to refer only to a judge who adjudicates, we do not consider that the term can be so confined when it is used elsewhere in the Framework Decision.

36. In the first place, it is clear that the term "judicial" as used in the several Member States does not refer only to a judge who adjudicates. Each Member State recognises the threefold division of functions and powers within each state between the legislative, executive and judicial "powers" or "branches of the state". It is a fundamental in each Member State that the judicial branch is independent of the executive and legislative branch.

37. Although no Member State should for a moment consider that its Ministry of Justice was part of the judicial branch, many states, as is clear from the judgment in *Schiesser,* consider that the exercise of judicial power is not confined to adjudicating. In some states it encompasses the function of investigating where this is entrusted to an investigating judge with the characteristics described in *Medvedyev*.

38. Although the status of a prosecutor is more debatable, a prosecutor does in some Member States come within the term "judicial authority". In some Member States, the prosecutor is recognised as part of "*corps judiciaire*". For example, in some Member States, the Judicial Council (*Conseil de la Magistrature*) comprises both prosecutors and judges. In France, judges and prosecutors are within the term "*authorité judiciare*" as used in its constitution (see Bell: *Judiciaries within Europe* page 65). There is without doubt a considerable diversity within the common area for justice as to whether prosecutors are "judicial authorities". It is also relevant to consider the status of a prosecutor. It is generally recognised 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 (see Opinion no 12 of the Consultative Council of European Judges (2009)). Although a prosecutor is in many Member States part of the Executive, as distinct from the judiciary, that independence gives the prosecutor a special status.

39. Secondly, the Explanatory Memorandum of 25 September 2001 (to which we referred at paragraph 14) stated in the commentary on definitions:

> "The term "judicial authority" corresponds, as in the 1957 Convention (cf Explanatory Report, Article 1) to the judicial authorities as such and the prosecution services, but not to the authorities of police force. The issuing judicial authority will be the judicial authority which has the authority to issue the European arrest warrant in the procedural system of the Member State."

Article 1 of the 1957 Convention provided for the extradition of all persons "against whom the competent authorities of the requesting Party are proceeding for an offence". The Explanatory Report on that Convention stated in respect of that Article:

> "The term competent authorities in the English text corresponds to *autorités judiciaries* in the French text. These expressions cover the judiciary and the Office of the Public Prosecutor, but exclude the police authorities."

40. Thirdly, if the term "judicial authority" were confined to a judge who adjudicates, it is difficult to see what purpose Article 6 of the Framework Decision would have served. The Article must have been intended to allow Member States to designate authorities in their state which were "judicial authorities", having regard to their own national law, given the diversity to which we have referred at paragraph 38.

41. Fourth, it cannot be said that the term judicial applies only to a judge who adjudicates. The differing European traditions recognise that others, including prosecutors, can be included within that term for various purposes. It is therefore entirely consistent with the principles of mutual recognition and mutual confidence to recognise as valid an EAW issued by a prosecuting authority designated under Article 6. 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. The position in some other Member States is different as we have explained at paragraph 38.

42. In *Goatley v HM Advocate* [2006] HCJAC 55, the High Court of Justiciary considered an EAW for arrest of a convicted person which had been issued by the "Chief Attorney-General and Deputy Public Prosecutor, of the District Public Prosecutor's office in Leeuwarden" in the Netherlands. One of the grounds of challenge was that that person was not a judicial authority. The submission was rejected on the grounds that the issue should not be looked at through Scottish eyes; the EAW scheme operated on the basis of confidence between Member States; the carefully worked out scheme should not be

> "frustrated by mere descriptions of the executing officials of the respective countries. We are confirmed in that view by the terms of Article 6.1, the effect of which is that the law of the issuing Member State determines who is to be the judicial authority."

In any event,

> "Further material supplied from the Netherlands gives information about the position of the public prosecutor in his relations with *inter alios* the police and the Minister of Justice. It is not necessary here to refer to this in detail. Suffice it to say that it shows that he performs a function as part of the judiciary in that country. He is not part of the executive."

43. Thus 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

(f) The status of the designation of a judicial authority by another Member State

44. In *Enander,* the court concluded that it was for each Member State to designate its issuing authority, as we have set out at paragraph 23. A similar approach seems to have been taken by the Supreme Court of Cyprus as set out in notes of the decisions in *Anderson v Attorney-General* (2008) and *Ovakimyan v Attorney-General* (2005) as noted in *European Cross Border Justice: a case study of the EAW (Christou, The Aire Centre,* 2010).

45. It is not necessary for us to consider *Enander* further in the light of the principles which, with the benefit of much fuller argument, we have endeavoured to set out. It is important to emphasise that the issue in that case related to the issue of a warrant by the police for the service of a sentence. It may be that the circumstances relating to a warrant issued for the execution of a sentence are different.

46. Although the approach in *Enander* is one that will ordinarily apply, the designation under Article 6 does not, in our view, always compel the recognition by another Member State as conclusive, if the authority is self evidently not a judicial authority within the meaning of that broad term in the Framework Decision. It is of some interest to note in the light of our observation at paragraph 37 on the status of a Ministry of Justice that in 2007 the Commissioner for Justice and Home Affairs in the Report on the Evaluation of the Transposition of the Framework Decision stated that the designation by some states directly or indirectly of the Ministry of Justice as a judicial authority was contrary to the terms of the Framework Decision. However there appear to have no instances where the Commission has taken action in respect of a body that should not have been designated as a judicial authority.

47. For example, if a warrant was issued by a Ministry of Justice which the Member State had designated as an authority under Article 6, it would not, in our view, be a valid EAW under the Framework Decision. The principles of mutual recognition and mutual confidence which underpin the common area for justice would not require the recognition of such a warrant, as it would self evidently not have been issued by a body which, on principles universally accepted in Europe, was judicial. In our view a national judge within the European Union is bound to uphold the principles of mutual recognition and mutual confidence for the reasons we have given at paragraph 17; public confidence in the EAW would only be undermined by the recognition of an EAW issued by a Ministry of Justice in contradistinction to an EAW issued by a judge or prosecutor.

48. It was accepted by Miss Montgomery QC (who appeared for the Prosecutor) that if circumstances arose where it could be said that the person issuing the EAW was not a judicial authority, the designating certificate issued by SOCA would not be conclusive. It would have to be challenged by judicial review. She was right to accept that the certificate was not conclusive, as under s.2(8) of the 2003 Act the function entrusted to SOCA is to certify that the issuing authority has the function of issuing EAWs. It does not certify that it is a judicial authority. The judge in performing the duties imposed by s.64 and 66 must determine whether the authority is

a judicial authority. In *Harmatos v Office of the King's Prosecutor in Dendermond, Belgium* [2011] EWHC 1598 (Admin), the Court (Dobbs and Lloyd Jones JJ) permitted the status of the body issuing the EAW to be considered in the course of the appeal. It was therefore permissible for Mr Assange to raise the issue in the course of this appeal. However for the reasons we have given we are satisfied that the Prosecutor was a judicial authority.

(f) Circumstances giving rise to more intense scrutiny: The effect of the decision of the Svea Court of Appeal

49. Although in our view no challenge can be made to the validity of the EAW issued by the Prosecutor, it is necessary to consider whether the EAW should be accorded more intense scrutiny as a warrant issued by a party to the proceedings. That might be the case where it had not been subject to the impartial scrutiny of a judge in the Member State of issue. Although a prosecutor would ordinarily act independently in the decision to issue the EAW and in pursuance of what would in the terms of the Framework Decision be regarded as a judicial function, the decision is that of a party to the proceedings which has not been subjected to the impartial scrutiny of a judge.

50. It would therefore be entirely in conformity with the principles of mutual recognition and the promotion of mutual confidence between judges and citizens in the several Member States to recognise that circumstances can arise in respect of an EAW issued by a prosecutor as distinct from a judge where it is necessary for a court to accord more intense scrutiny to such a warrant. Mutual confidence, particularly the confidence of citizens in the operation of the EAW system, is not enhanced by according to such an EAW the deference that would ordinarily be accorded to an EAW issued by a judge who is bound to take into account the interests of both parties to the proceedings

51. However in this case, the Svea Court of Appeals on 24 November 2010, considered an appeal made by Mr Assange against an order of the Stockholm District Court made on 18 November 2010 that Mr Assange should be arrested *in absentia*. Mr Assange's appeal was advanced on the basis that there was no probable cause for the allegations that the Prosecutor had made against Mr Assange. Amongst the contentions made was an allegation of collusion by the complainants and, in relation to the offence of rape (offence 4), that the complainant had done nothing to make Mr Assange understand that she did not want to have sex with him. The Svea Court of Appeal was provided with a statement by the Prosecutor which set out details of the offences and of the investigation. It was made clear that the complainants had been questioned a number of times and the inconsistencies in their accounts and the comments made by them in text messages which had been relied on by Mr Assange's Swedish lawyer had been put to them. It explained how the complainants had been in touch with each other and had made the complaints.

52. The Svea Court of Appeal rejected the appeal on the basis 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.

53. In this case, therefore, the action of the Prosecutor has been subject to independent scrutiny by judges in Sweden which as judges in another Member State we should accord due respect.

54. We therefore dismiss this first ground of challenge.

Issue 2: Dual Criminality; the fairness and accuracy of the description of the conduct alleged

(a) The contention of Mr Assange

55. It has long been a principle of extradition that a person should only be extradited where the conduct is not only an offence under the law of the State requesting extradition, but also under the law of the State from which the person's extradition is sought. Dual criminality remains a condition under s.64 of the 2003 Act for all offences which are not what are known as Framework Offences, a term we explain at paragraph 59 below. Offences 1-3 are not Framework Offences. S.2(4)(c) of the 2003 Act requires the EAW to contain particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the Member State under which the conduct is alleged to constitute an offence.

56. It should ordinarily be the case that a court in this jurisdiction will accept the designation of the conduct as constituting an offence under the law of the issuing state; the particulars given in the EAW should also ordinarily make clear whether the conduct would also constitute an offence under the law of England and Wales.

57. It was accepted by Mr Assange that it was not necessary to identify in the description of the conduct the mental element or *mens rea* required under the law of England and Wales for the offence; it was sufficient if it could be inferred from the description of the conduct set out in the EAW. However, the facts set out in the EAW must not merely *enable* the inference to be drawn that the Defendant did the acts alleged with the necessary *mens rea.* They must be such as to *impel* the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged. Otherwise, a Defendant could be convicted on a basis which did not constitute an offence under the law of England and Wales, and thus did not satisfy the dual criminality requirement. For example, an allegation that force or coercion was used carries with it not only the implicit allegation that there was no consent, but that the Defendant had no reasonable belief in it. If the acts of force or coercion are proved, the inference that the Defendant had no reasonable belief in consent is plain.

58. The position of Mr Assange in respect of offences 1-3 where dual criminality was required was:

i) Offence 1: Although it was accepted that the conduct as described would constitute an offence in England and Wales, a fair and accurate description of the prosecution case would not meet that test.

ii) Offence 2: This did not meet the dual criminality test on the basis either of the description of the offence set out in the EAW or of a fair and accurate description of the offence.

iii) Offence 3: The position was the same as offence 1.

59. Offence 4, rape, is a Framework Offence, as it is an offence listed in Article 2.2 of the Framework Decision which we set out at paragraph 104 below. Under the provisions of s.64(2) of the 2003 Act, dual criminality is not necessary. However it was contended that the conduct was not fairly and accurately described. If it had been, it would not have been rape.

60. In respect of each offence, Mr Assange contended that the court should examine the underlying material from the prosecution file, even though the whole of the file had not been made available to Mr Assange's Swedish lawyer as under Swedish law it is only made fully available at a later stage. However what was provided contained the principal statements of the complainants and other material which made it obvious that the conduct of which he was accused was not fairly and accurately described in the EAW. The Prosecutor had told the Swedish Court that the further statements made by the complainants were materially the same. The stance taken by the Prosecutor in not disclosing the remainder of the file was criticised by Mr Emmerson QC who appeared for Mr Assange. However, it was consistent with the stance of the Prosecutor that this court should not consider the extraneous material in arriving at its decision on whether Mr Assange should be surrendered; it would be made available in accordance with Swedish law at the appropriate time.

61. The Senior District Judge did not consider it necessary to examine the statements from the complainants which were the only material put before him in the course of the hearing. He looked only at what was set out in the EAW. He concluded that dual criminality was established for offences 1-3 and that what was described in relation to offence 4 was rape.

62. Miss Montgomery QC, on behalf of the Prosecutor, had invited Mr Assange at the close of the hearing before the Senior District Judge to put the translation of the file made available before the court. That was done by annexing it to a witness statement dated 22 February 2011, 2 days before judgment was handed down. All that material was put before us and we were taken through it *de bene esse.*

(b) Can the court have regard to extraneous material to determine the accuracy of the description of the conduct?

63. Before turning to consider the description of the conduct, it is necessary to consider whether the court should make its decision on the basis of the description in the EAW or should have regard to material extraneous to the EAW. That material was the material contained in the prosecution file. The question whether the court could examine such material extraneous to the formal extradition request arose under the Extradition Act 1989 in *R (Castillo) v Kingdom of Spain* [2004] EWHC 1676 (Admin), [2005] 1 WLR 1043. The extradition request was made by the Spanish Government under the European Convention on Extradition 1957 incorporated into the law of the UK by the European Convention on Extradition Order 2001. During a stage in the extradition proceedings, a lawyer instructed by the applicant inspected

the dossier at the Spanish court. On the basis of that inspection it was alleged that two of the extradition requests misrepresented the conduct alleged against him. The dossier was made available to the court in the evidence filed by the Kingdom of Spain. In giving the first judgment, one of us, Thomas LJ, held that, although the judge in the UK was not concerned with the proof of facts or the sufficiency of evidence, a court had to decide whether the conduct alleged amounted to an offence under the law of the United Kingdom. For a court to be able to do this, Thomas LJ said at paragraph 25 :

> ".. it is very important that a state requesting extradition from the UK fairly and properly describes the conduct alleged, as the accuracy and fairness of the description plays such an important role in the decisions that have to be made by the Secretary of State and the court in the UK. Scrutiny of the description of the conduct alleged to constitute the offence alleged, where as here a question is raised about its accuracy is not an enquiry into evidential sufficiency; the court is not concerned to assess the quality or sufficiency of the evidence in support of the conduct alleged but, it is concerned, if materials are put before it which call into question the accuracy and fairness of the description, to see if the description of the conduct alleged is fair and accurate.

On the facts of that particular case an examination of the dossier showed that the description of the conduct alleged was not a proper, accurate or fair description.

64. That was a decision under the Extradition Act 1989 and the European Convention on Extradition Order 2001. It was submitted on behalf of Mr Assange that we should apply the principles in that decision to a request for surrender under Part 1 of the 2003 Act. As there was no enquiry into evidential sufficiency and, as it had been consistently held that the issuing state had to prove that the EAW strictly complied with the terms of s.2 (see *Cando Armas* referred to at paragraph 138 below), it was no less essential to the protection of the rights of the person whose surrender was requested that the description of the conduct be fair and accurate. It was therefore just as important under the 2003 Act that the court should consider the fairness and accuracy of the description of the conduct by reference to extraneous material. Although it was said in *Dabas v High Court of Madrid* that extraneous material cannot be used to cure an EAW that was invalid (as we set out at paragraph 138 below), the converse was not true.

65. The requirement set out in *Castillo* that the conduct be fairly and accurately described was said to be applicable to s.2(4)(c) of the 2003 Act in *Palar v Court of First Instance Brussels* [2005] EWHC 915 (Laws LJ and David Steel J) and in *La Torre v Her Majesty's Advocate* [2006] HCJAC 56 (the High Court of Justiciary). However in neither case did the court have to consider whether extraneous material should be admitted to challenge the fairness and accuracy of the description of the conduct in the EAW. Self evidently, the description of the conduct alleged must be fair and accurate. We were also referred to the decision in *Ektor v National Public Prosecutor of Holland* [2007] EWHC 3106 (Admin) where a challenge was made to the adequacy of the particulars given in the EAW. The court (Richards LJ and Cranston J) held the challenge failed. In giving the first judgment, Cranston J in

setting out a summary of the law referred at paragraph 7 to the need in cases of dual criminality for the detailed description of the conduct to be sufficient for that judgment to be made. Although that statement is not controversial, it does not address the issue that arises in the present case.

66. However in *The Criminal Court at the National High Court, 1st Division (a Spanish Judicial Authority) v Murua* [2010] EWHC 2609 (Admin) the court had to consider the applicability of *Castillo* in circumstances where the accused sought to place material extraneous to the EAW before the court to show the description of the conduct alleged was not fair and accurate. On its face, the EAW complied with the requirements of s.2 in describing terrorist conduct that endangered life. The extraneous material showed that the accused's co-defendants charges had been reduced to a less serious offence and they had been convicted of that. That offence was time barred against the accused. Sir Anthony May, President of the Queen's Bench Division, concluded that it would rarely be appropriate or permissible for a court to go behind a judicial decision or explanation as to the law or procedure of a judicial authority of a Member State in relation to the law of that State. He said at paragraph 58:

> "The court's task -- jurisdiction, if you like -- is to determine whether the particulars required by section 2(4) have been properly given. It is a task to be undertaken with firm regard to mutual co-operation, recognition and respect. It does not extend to a debatable analysis of arguably discrepant evidence, nor to a detailed critique of the law of the requesting state as given by the issuing judicial authority. It may, however, occasionally be necessary to ask, on appropriately clear facts, whether the description of the conduct alleged to constitute the alleged extradition offence is fair, proper and accurate. I understood Ms Cumberland [counsel for the Spanish judicial authority] to accept this, agreeing that it was in the end a matter of fact and degree. She stressed, however, a variety of floodgates arguments with which in general I agree, that this kind of inquiry should not be entertained in any case where to do so would undermine the principles to be found in the introductory preambles to the Council Framework Decision of 13 June 2002."

On the facts of that case, the extraneous material was examined and the court held that the EAW was not a valid EAW as there was not a proper, accurate and fair description of the conduct.

67. It is the submission made to us by Miss Montgomery QC for the Prosecutor that, applying the usual principles in the Divisional Court, we should follow the decision in *Murua*. Mr Emmerson QC for Mr Assange submitted that we should continue to apply *Castillo,* and not treat *Murua* as modifying it for the purposes of the 2003 Act.

68. Although, it is always open to a Divisional Court of two or three judges not to follow the decision of a single judge, we entirely agree with the conclusion reached by Sir Anthony May. The decision in *Castillo* to admit extraneous material was made under the 1957 Convention under which the ultimate decision on extradition

was for the Executive, not the judiciary. As is clear from the objectives of the Framework Decision (to which we have referred at paragraph 14 and following), that regime has been replaced by a regime of surrender between judicial authorities based on mutual recognition. That necessitates a different approach for the reasons we have given; the statement as to the admission of extraneous material set out in *Castillo* does not apply to surrender under the provisions of the 2003 Act. Ordinarily, therefore, the judge in the executing state should scrutinise the terms of the EAW and make the decision to order surrender on the basis of what is contained in the EAW and not have regard to material extraneous to the EAW. That course gives effect to the underlying purpose of the regime and the principles of mutual recognition to which we have referred.

69. It is always possible, as *Murua* demonstrates, that there may be circumstances in which extraneous material should be admitted without undermining the principles underlying the Framework Decision. Such circumstances will be exceptional and therefore are likely to be very rare, given those underlying principles. In our view, those circumstances will not arise where the EAW is clear on its face and the evidence sought to be adduced does not show that the case actually being advanced by the prosecutor is different to the case set out in the EAW. Such circumstances will normally only occur where there has been a fundamental error or fundamental unfairness or bad faith on the part of the court or prosecutor in the issuing state. It is necessary to consider whether the request for Mr Assange's surrender is such a case.

(d) Offence 1: Dual criminality: consideration of the accuracy and fairness by reference to extraneous material

70. It is conceded the conduct described in relation to offence 1 in the EAW discloses dual criminality, and that therefore, if a UK court does not take account of the material in the prosecution file provided to Mr Assange, then this ground of objection to Mr Assange's extradition under the EAW would fall away in respect of this offence.

71. In our view, it is not apposite to take into account the material in the prosecution file:

i) The description in the EAW sets out a clear description of the conduct that the Prosecutor alleges against Mr Assange. It is for the Prosecutor not the court to set out what is alleged.

ii) The Svea Court of Appeal has considered the offences and determined that there is cause to proceed.

iii) It cannot be said that what is set out is plainly wrong.

iv) No allegation of bad faith on the part of the Prosecutor was made in this court.

v) The facts set out were sufficient to lead to the inevitable inference of lack of consent to the specific matter alleged against Mr Assange and to the requisite knowledge on his part. In the case of the first offence, Mr Assange lay on AA forcibly restricting her movements to which she did not consent. That is what

would have to be proved. If he did those acts it would also be the inevitable inference, to the extent relevant, that he knew that she was not consenting.

72. Nonetheless, as the material was put before us *de bene esse*, we will express our view on what difference it would have made if we had taken it into account in determining whether the description of the conduct was fair and accurate.

73. As is clear from the text describing the offences we have set out in paragraph 3, offences 1, 2 and 3 involved the complainant AA. She had made a statement on 21 August 2010. This was the only statement made by her which was in the file that had been disclosed to Mr Assange, though there was another statement which had been made by AA subsequently but which, as we have said, would only be disclosed to Mr Assange at a later stage of the proceedings.

74. As regards offence 1, AA said in her statement that she had offered the use of her apartment to Mr Assange from 11-14 August 2010 when she was away. She had returned on 13 August 2010 earlier than planned and then met him for the first time. They went out to dinner and returned to her apartment. As they drank tea, he started to fondle her leg which she welcomed. Everything happened fast. Mr Assange ripped off her clothes and at the same time broke her necklace. She tried to put her clothes on again, but Mr Assange had immediately removed them again. She had thought that she did not really want to continue, but it was too late to tell Mr Assange to stop as she had consented so far. Accordingly she let Mr Assange take off all her clothes. Thereafter they laid down on the bed naked with AA on her back and Mr Assange on top. Mr Assange wanted to insert his penis into her vagina, but she did not want him to do that as he was not using a condom. She therefore squeezed her legs together in order to avoid him penetrating her. She tried to reach several times for a condom which Mr Assange had stopped her from doing by holding her arms and bending her legs open and trying to penetrate her with his penis without a condom. Mr Assange must have known it was a condom AA was reaching for and he had held her arms to stop her. After a while Mr Assange had asked AA what she was doing and why she was squeezing her legs together; AA told him she wanted him to put on a condom before he entered her. Mr Assange let go of AA's arms and put on a condom which AA found for him. AA felt a strong sense of unexpressed resistance on Mr Assange's part against using a condom.

75. In relation to this and the other offences, Mr Emmerson QC put forward what he said would be a fair description of the conduct which, if adopted, would show that there was no dual criminality. In summary, his contention was that the alleged offending conduct had been taken out of context; in relation to offence 1 that context was consensual sexual activity (undressing and lying naked on top of AA)) with the joint expectation that sexual intercourse would take place, followed by sexual intercourse taking place consensually, once he had used a condom. The offending conduct alleged was no more than a brief period, which could readily be seen as a mere misunderstanding. During that brief period, AA did not object to the continued naked contact as the apparent precursor to intercourse; AA did not wish to proceed immediately for a reason not immediately obvious but shortly thereafter rectified. It was also of importance in relation to the *mens rea*, since for dual criminality, the facts alleged had to impel the conclusion that Mr Assange had no reasonable belief that AA was consenting to what had happened.

76. It seems to us that the conduct described as offence 1 fairly and properly describes the conduct as set out in AA's statement in relation to what is complained of – restricting her movement by violence. We accept that Mr Assange subsequently allowed AA to move so she could find a condom for him to use, but at the point in time to which the offence relates, we do not read anything in her statement to indicate consent to his restraining her. Indeed her statement indicates precisely the opposite at the point of time to which it relates. It of course might well be argued that his subsequent decision to let go of her might indicate a lack of coercion or consent to what followed, but at the point of time to which the offence relates, we consider the conduct of which he is charged to have been fairly and accurately described. As we have set out at paragraph 71.v) above, the matters alleged are sufficient, in our view, and to the extent relevant, to impel the inference of knowledge. The context does not change our view.

77. It must therefore follow in respect of offence 1 that the challenge made fails, even if the extraneous material was taken into account.

(e) Offence 2: Dual criminality

78. It was contended that the conduct in respect of offence 2 described in the EAW was not an offence under the law of England and Wales and, in the alternative, that if the offence had been fairly and accurately described, then it was also not an offence under the law of England and Wales.

(i) The offence as set out in the EAW: consent and the use of a condom under the law of England and Wales

(1) The issue

79. The essence of the offence as described in the EAW, as set out at paragraph 3, was that Mr Assange knew that AA would only consent to sexual intercourse if he used a condom throughout, but he had concluded sexual intercourse with her without a condom. The point was taken on Mr Assange's behalf that consent to sexual intercourse on condition that Mr Assange wore a condom remained under the law of England and Wales consent to sexual intercourse, even if he had not used a condom or removed or damaged the condom he had used. No offence was, it was submitted, therefore committed under the law of England and Wales.

(2) The law prior to the Sexual Offences Act 2003

80. It had been clear, before the law in relation to sexual offences was codified by the Sexual Offences Act 2003, that in cases of rape consent to sexual intercourse was consent in all circumstances, unless there had been fraud as to the nature of the act or to the identity of the person who did the act (see *R v Clarence* (1889) 22 QBD 23). In *R v Dee* (1884) 14 L.R. Ir 468, an Irish case that was subsequently declared to be the law of England and Wales, Pales CB expressed the rationalisation of the cases involving fraud as to identity at 488 on the basis that:

> "The person by whom the act was to be performed was part of its essence."

The law thus established was applied in 1994 in *R v Linekar* [1995] QB 250 in a case where the Court of Appeal quashed a rape conviction of a man who had never intended to pay a prostitute with whom he had had sexual intercourse after she had agreed to sexual intercourse for £25. She had consented to sexual intercourse. It mattered not that the consent had been conditional, as there had been no fraud as to the nature of the act or identity of the person.

(3) The Sexual Offences Act 2003

81. S.1(1) of the codifying statute, the Sexual Offences Act 2003 set out the offence of rape; s.2 sets out the offence of assault by penetration and s.3 the offence of sexual assault. It is an ingredient of each offence that there is no consent by the person penetrated or assaulted and no reasonable belief by the defendant that the person is consenting. The basic definition of consent is set out in s.74:

> "For the purposes of this part, a person consents if he agrees by choice and has the freedom and capacity to make that choice."

In our view it is this section that is the relevant section but, before considering it, it is convenient to set out the argument made by Mr Assange in more detail.

(4) The contention of Mr Assange

82. Mr Assange primarily relied on *R v B* [2006] EWCA Crim 2945 [2007] 1WLR 1567 where the court considered one of the evidential presumptions relevant to consent – s.76:

> (1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—
>
> (a) that the complainant did not consent to the relevant act, and
>
> (b) that the defendant did not believe that the complainant consented to the relevant act.
>
> (2)The circumstances are that—
>
> (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
>
> (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

S.77 defines "the relevant act" for the offence of rape as the defendant intentionally penetrating, with his penis, the vagina of another person and for the offence of sexual assault the intentional touching.

83. The court held in *B* that deception as to HIV was not deception as to the nature or purpose of the act of sexual intercourse which was the relevant act to which the complainant consented; the deception had been as to the risk of infection. The court said at paragraph 17:

> "Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexual transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease."

The court went on to hold that the fact that the defendant had not disclosed that he was HIV infected was not in any way relevant to the issue of consent to sexual intercourse under s.74.

84. It was therefore submitted that in the present case, as AA had consented to sexual intercourse, and as that was the nature of the relevant act, it did not matter that she had consented only on the basis that he used a condom, as that did not change the nature of the act. It was accepted on Mr Assange's behalf that this contention might not be one contemporary society would readily understand or consider justifiable, but Parliament had enacted the law in those terms and the duty of the courts was to apply the law.

(5) Our conclusion

85. We cannot accept that contention. In *R v Jheeta* [2007] EWCA Crim 1699, [2008] 1 WLR 2582 the court made clear that in most cases the absence of consent and the appropriate state of the defendant's mind would be proved without reference to the evidential presumptions set out in s.75 and s.76. The facts of *Jheeta* are instructive. The complainant had sexual intercourse with the defendant after he had tricked her, by impersonating a police officer, into believing that, if she did not have sexual intercourse, she would be fined. As the court pointed out, s.76 was applicable. As it contained conclusive presumptions where intercourse was proved, the section required the most stringent scrutiny. Sir Igor Judge, President of the Queen's Bench Division, in giving the judgment of the court said at paragraph 24:

> "In our judgment the ambit of section 76 is limited to the "act" to which it is said to apply. In rape cases the "act" is vaginal, anal or oral intercourse. Provided this consideration is constantly borne in mind, it will be seen that section 76 (2)(a) is relevant only to the comparatively rare cases where the defendant deliberately deceives the complainant about the *nature or purpose* of one or other form of intercourse. No conclusive presumptions arise merely because the complainant was deceived in some way or other by disingenuous blandishments or common or garden lies by the defendant. These may well be deceptive and persuasive, but they will

> rarely go to the nature or purpose of intercourse. Beyond this limited type of case, and assuming that, as here, section 75 has no application, the issue of consent must be addressed in the context of section 74."

86. In our view, therefore, s.76 has no application. The question of consent in the present case is to be determined by reference to s.74. The allegation is clear and covers the alternatives; it not an allegation that the condom came off accidentally or was damaged accidentally. It would plainly be open to a jury to hold that, if AA had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act 2003, whatever the position may have been prior to that Act.

87. It might be said that Mr Assange's conduct in having sexual intercourse with AA without a condom (or in continuing sexual intercourse with AA after removing, damaging or tearing the condom) was deceptive. Assuming it was deceptive, then in our view it was not deceptive as to "the nature or quality of the act". We accept it could be argued that sexual intercourse without a condom is different to sexual intercourse with a condom, given the presence of a physical barrier, a perceived difference in the degree of intimacy, the risks of disease and the prevention of a pregnancy; moreover the editors of *Smith & Hogan* (12th edition at p.866) comment that some argued that unprotected sexual intercourse should be treated as being different in nature to protected sexual intercourse. It seems to us, however, that s.76 should be given a stringent construction, because it provides for a conclusive presumption. The issue of the materiality of the use of a condom can be determined under s.74 rather than under s.76.

88. It appears to have been contended by Mr Assange, that if, in accordance with the conclusion we have reached, the deception was not a deception within s.76 (a deception as to the nature or quality of the act or a case of impersonation), then the deception could not be taken into account for the purposes of s.74. It would, in our view, have been extraordinary if Parliament had legislated in terms that, if conduct that was not deceptive could be taken into account for the purposes of s.74, conduct that was deceptive could not be. There is nothing in *R v B* that suggests that. All the court said at paragraph 21 was:

> "All we need to say is that, as a matter of law, the fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 in relation to the sexual activity in this case."

89. The editors of *Smith & Hogan* in the passage to which we have referred regard it as self evident that deception in relation to the use of a condom would "be likely to be held to remove any purported free agreement by the complainant under s.74". A very similar view is expressed in *Rook and Ward on Sexual Offences*; (4th edition) at paragraph 1.216. Moreover *Jameel* makes clear the limited scope of s.76. The complainant was deceived in a manner which did not go to the nature or purpose of

the act; s.76 was therefore of no application (see paragraph 28). The evidence in relation to the fabricated scheme was sufficient, in the court's view, to negative consent for the purposes of s.74 (see paragraph 29).

90. In our view s.76 deals simply with a conclusive presumption in the very limited circumstances to which it applies. If the conduct of the defendant is not within s.76, that does not preclude reliance on s.74. *R v B* goes no further than deciding that failure to disclose HIV infection is not of itself relevant to consent under s.74. *R v B* does not permit Mr Assange to contend that, if he deceived AA as to whether he was using a condom or one that he had not damaged, that was irrelevant to the issue of AA's consent to sexual intercourse as a matter of the law of England and Wales or his belief in her consent. On each of those issues, it is clear that it is the prosecution case she did not consent and he had no or no reasonable belief in that consent. Those are issues to which s.74 and not s.76 is relevant; there is nothing in *R v B* which compels any other conclusion. Furthermore it does not matter whether the sexual contact is described as molestation, assault or, since it involved penile penetration, rape. The dual criminality issue is the absence of consent and the absence of a reasonable belief in consent. Those issues are the same regardless of the description of the conduct.

91. Thus, if the question is whether what is set out in the EAW is an offence under the law of England and Wales, then it is in our view clear that it was; the requirement of dual criminality is satisfied.

(ii) Consideration of the accuracy and fairness by reference to extraneous material

92. The alternative contention relies on the statement of AA. For the reasons we have given at paragraphs 68 and 71 as applied to this offence, it is not necessary to consider this. But as the material was put before the court *de bene esse*, then we will express our view by reference to it.

93. AA's statement went on to describe what happened immediately after what we have set out in relation to offence 1. She made it quite clear, as we have set out at paragraph 74, that she wished him to put a condom on before he entered her. Indeed she was concerned he had not put a condom on. She felt his penis with her hand to check he had really put it on. She felt that the edge of the condom was in the right place on the root of his penis. They therefore continued to have sex, as she said that she thought that she just wanted to get it over with. After a while AA noticed that Mr Assange had pulled his penis out of her and started to arrange the condom. Judging by the sound AA thought he was removing the condom. He then penetrated her again and continued sexual intercourse. She felt again with her hand that the edge of the condom was, as previously, around the root of the penis. She therefore let him continue. AA stated that a while later he ejaculated inside her and then pulled out. When he removed the condom from his penis, AA saw it was empty of semen. When she started to move her body she noticed something was seeping out of her vagina and understood it must be his semen. AA told the police she was convinced that Mr Assange, when he pulled out of her, broke the condom by the glans and then continued the intercourse until he ejaculated.

94. The evidence in the file showed that the condom was examined by the Swedish National Laboratory of Forensic Science. The conclusion of the expert was that there

was nothing to indicate that a tool had been used, but that the damage to the condom was created by the wear and tear of the condom.

95. It is in our view clear from her statement that AA only wished to have sexual intercourse with Mr Assange if he used a condom. It is also clear that a case being made by the Prosecutor is that Mr Assange, knowing that, nonetheless broke the condom. It was submitted that it should have been made clear that the allegation was founded on her belief he had torn the condom and that the forensic science evidence did not support that belief; it was also submitted that the evidence showed she consented. Whether there is sufficient evidence is a matter with which this court cannot be concerned. Nor was it necessary to set out facts that might disprove her case that she did not consent, such as her invitation to him to remain in the flat. The sole concern of this court is whether, on the basis that the fairness and accuracy of the description can be examined by reference to the materials in the prosecution file, the description of the conduct is fair and accurate. In our view, although the language could have been expressed more precisely, it is clear what is being said, namely that Mr Assange had sexual intercourse with her when not using a condom when he knew she would not have sex with him unless he was using a condom which protected her from his ejaculate entering her. It seems to us immaterial to the fairness and accuracy of the description of the offence whether that lack of protection arose out of his failure to wear a condom or his tearing or damaging the condom deliberately.

96. In our view, therefore, the description was fair and accurate; the offence was, for the reasons we have given an offence under the law of England and Wales; the requirement of dual criminality was satisfied.

(e) Offence 3: Dual criminality: consideration of the accuracy and fairness by reference to extraneous material

97. It is conceded the description of offence 3 in the EAW discloses dual criminality. The position is therefore in that respect the same as for offence 1, as it was submitted that the statement of AA in the prosecution file showed that conduct had not been fairly and accurately described. If it had been, then the conduct alleged would not have been an offence under the law of England and Wales. Again it was said that viewed in the context of the parties' previous relationship, and conduct, important features were omitted from the statement of facts. Were they included, the necessary inference that AA did not consent or that Mr Assange had no reasonable belief that AA did consent to the sexual touching could not inevitably be drawn.

98. For the reasons we have given at paragraphs 68 and 71 as applied to this offence, we do not consider it apposite to take the statement of AA into account, but again as it was before the court *de bene esse*, we will express our view on the position.

99. In her statement describing offence 3, which is alleged to have occurred some days later on 18 August 2010 or (in the revised translation) on or about 18 August 2010, AA stated that after 12/13 August 2010 they did not have sexual intercourse again. AA said that Mr Assange tried to make sexual advances towards her every day thereafter. For example he had touched her breasts. She rejected him on all occasions. He accepted these rejections.

100. During this time, however, she continued to sleep in the same bed as Mr Assange. When they were in the same bed on 18 August 2010, he suddenly took all his clothes off from the lower part of his body and rubbed that part of his body and his erect penis against AA. She had felt this was very strange behaviour and awkward. After this, she no longer slept in the same bed as Mr Assange, but moved to a mattress on the floor.

101. The essential complaint made about the fairness and accuracy of the description of offence 3 is that it did not state that Mr Assange was sleeping in the same single bed as AA and that, understandably and without criminal intent, he might have had an erection in those circumstances.

102. We cannot accept that what is set out in the EAW in respect of offence 3 is not fair and accurate. It is clear that what AA complains of is that he deliberately took his clothes off the lower part of his body and rubbed that part of his body and his erect penis against AA. We do not consider the fact that the description in the EAW does not state that they were sleeping in the same bed as in anyway affecting the validity of the fairness of the description. The only point of referring to AA and Mr Assange being in the same bed would be to give rise to an inference of consent to his conduct or the acceptance of the risk of accidental contact with his lower body or his erect penis. However it seems to us clear from the statement of AA that her consent to allow him to share the same bed was not a consent to him removing his clothes from the lower part of his body and deliberately pressing that part and his erect penis against her. True it is that the context is not spelt out, but what is necessary for the prosecution to prove as the ingredients of the offence under the law of England and Wales are spelt out. The context relied on by Mr Assange does not show that the allegation is not one of an offence under the law of England and Wales, including the requisite *mens rea.*

103. We would therefore have reached the conclusion that dual criminality was made out, even if the additional material had been taken into account.

(f) Offence 4: A framework offence: fairness and accuracy of the description of the conduct

104. As we have set out at paragraph 59, offence 4 is the Framework Offence of rape. The provisions of Article 2.2 of the Framework Decision mark a departure from conventional extradition. It specifies a list of offences where it is not necessary to establish dual criminality. Rape is one of the offences listed. The article provides:

> "The following offences, if they are punishable in the issuing Member State by a custodial sentence or detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European Arrest Warrant."

105. It was contended that the offence as described in the EAW was not "rape"; if it had been fairly or accurately described in the EAW, it still would not have disclosed the offence of "rape".

106. It is necessary first to consider what is meant by rape.

(i) The meaning of rape

107. The contention advanced was that there had to be a description of what is recognisable as rape as that term is used "in the language and law of European countries".

108. If the proper approach is to consider whether what is set out in the EAW describes conduct amounting to rape as that is used in "the language and law of European countries", as submitted on behalf of Mr Assange, then it is necessary to consider what is meant by rape. There is, of course, no standard definition of rape. In *M.C. v Bulgaria* (2005) 40 EHHR 20, the Strasbourg Court considered a complaint that the law of Bulgaria did not sufficiently protect against rape, as it was only in those cases where the victim actively resisted that a prosecution was brought. The court held that although states had a significant margin of appreciation, a requirement that the victim must physically resist was no longer a requirement of most European countries. After referring to the position in common law states, the court continued:

> "159. In most European countries influenced by the continental legal tradition the definition of rape contains references to the use of violence or threats of violence by the perpetrator. It is significant, however, that in case law and legal theory, lack of consent, not force is seen as the constituent element of rape.
>
> 161. Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms and through a context sensitive assessment of the evidence."

The court went on to refer to the Recommendation Rec (2002) 5 of the Committee of Ministers of the Council of Europe on the protection of women against violence and the position in international law. It referred to *Prosecutor v Kunarac* (2002) IT 96-23/1, where the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia approved the definition of rape formulated by the Tribunal after a review of international jurisprudence. The definition given was that rape was constituted by intentional penetration without consent with knowledge that it was without consent (see paragraph 128). The Strasbourg Court concluded that the trend was towards "regarding lack of consent as the essential element of rape." This is confirmed by a more recent study: "*Different systems, similar outcomes? Tackling attrition in reported rape cases across Europe*" by Lovett and Kelly published by the Child and Women Abuse Studies Unit of London Metropolitan University in 2009. The definitions set out show a wide variation with coercion being required in some states and lack of consent in others.

109. On this approach, then intentional penetration achieved by coercion or where consent is lacking to the knowledge of the defendant would be considered to be rape. In our view on this basis, what was described in the EAW was rape. Coercion evidences knowledge of a lack of consent and lack of a reasonable belief in consent. A requirement of proof of coercion, if that is what Swedish law requires, is a more

onerous test for the prosecution to satisfy than the test for consent in the 2003 Act; it necessarily means however that the allegation that the defendant knew of the absence of consent or had no reasonable belief in consent, is made out in the description of the offence.

(ii) The effect of designation by the issuing judicial authority

110. However, it is not in our view necessary to approach the issue in this way. It is the law of the issuing state that governs: Article 2.2 of the Framework Decision (which we have set out at paragraph 104) clearly so provides.

111. The annex to the Framework Decision which sets out the template for an EAW contains the following statement prior to the list of the Framework Offences:

> "If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State."

The provisions of the Framework Decision appear to be reflected in s.64(2)(b) of the 2003 Act which provides as one of the conditions for extradition for a Framework Offence:

> "A certificate issued by an appropriate authority ... shows that the conduct falls within the European framework list."

112. Thus it seems to us that although the court executing the EAW must scrutinise the EAW to ensure that it complies with the requirements of particularity, it should ordinarily accept the classification of the issuing Member State, unless there is an obvious inconsistency which shows that the conduct alleged does not amount to the offence under the law of that state. This approach appears to be reflected in the approach of the Dutch and Irish courts. We were referred to two decisions of the District Court of Amsterdam; in the second, LJN BO 7884, the court concluded:

> "In principle it is up to the issuing judicial authority to judge whether an offence for which surrender is sought does fall under the list and which offence must be ticked. Only in those cases where there is evident inconsistency between the description of offence and the category ticked, should this lead to the conclusion that the issuing judicial authority has not in reasonableness indicated the offence for which the requirement of assessing double criminality does not apply."

113. Although the decision of the Amsterdam Court was not referred to, this approach is reflected in two decisions of the Irish Supreme Court. In *Minister of Justice, Equality and Law Reform v Desjatnikvos* [2008] IESC 53 it was made clear at paragraph 24.1 that the definition of Framework Offences is a matter for the issuing state. However, in a second case, *Minister of Justice v Tighe* [2010] IESC 61, it was held that the certification by the issuing Member State was not conclusive. The court held that an EAW issued by the United Kingdom was invalid where, although it was certified, and all the offences were within the Framework List, the EAW

described three offences as offences of conspiracy which were not Framework Offences. The court observed that the difficulty had arisen because the drafters of the EAW had failed to distinguish between the completed offence of cheating the revenue which might or might not be capable of being a Framework Offence and conspiracy. The fourth offence, "cheating the public revenue", gave as particulars failing to disclose the defendant's income to the Inland Revenue. The court concluded that this did not "obviously fall within" any of the headings within the Framework List, as fraud was not an ingredient of the offence and nothing was set out in the EAW which showed conduct described in the Framework List.

114. In two United Kingdom cases, the court did not need to go so far, reaching the conclusion on the basis of the adequacy of the particulars given. In *Palar v Court of First Instance of Brussels* [2005] EWHC 915 (Admin) to which we have referred at paragraph 65, the contention advanced by the defendant (that it was not a valid EAW as it did not set out particulars of the conduct alleged as required by s.2(4)(c)) was a contention made in respect of a Framework Offence. As we have set out, the court concluded that the warrant did not in fact specify conduct against the defendant and therefore no conduct reasonably capable of amounting to the Framework Offence was specified in the warrant. In *Kingdom of Spain v Arteaga* [2010] NIQB 23, a Divisional Court in Northern Ireland after an extensive citation of authority concluded that the EAW set out the conduct alleged in unacceptably vague and general terms; the failure to condescend to particularity was fatal to the EAW. Neither of these cases support the proposition advanced on behalf of Mr Assange that conduct, even for the Framework Offence of rape, must be conduct reasonably capable of amounting to rape as understood in England and Wales.

115. The Svea Court of Appeal, as we have explained at paragraph 51, has considered offence 4 and raised no objection to it. It can therefore be taken that, as other material confirms, rape can be committed according to the law of Sweden when a defendant has sexual intercourse with a woman in a helpless state. The particulars given in the EAW set out that helpless state as being asleep. There is no inconsistency between what is set out in the EAW and the classification of rape in Sweden.

(iii) The designation of the conduct under the law of England and Wales

116. If, contrary to our view, it was necessary to consider the law of England and Wales, the issue would relate to SW's lack of consent and Mr Assange's knowledge and belief. We have considered the general issue of consent at paragraphs 79 to 91. Our view is, as we have set out, that a jury would be entitled to find that consent to sexual intercourse with a condom is not consent to sexual intercourse without a condom which affords protection. As the conduct set out in the EAW alleges that Mr Assange knew SW would only have sex if a condom was used, the allegation that he had sexual intercourse with her without a condom would amount to an allegation of rape in England and Wales.

117. As the EAW sets out the circumstance that SW was asleep, s.75 which applies to rape is also material:

> (1) If in proceedings for an offence to which this section applies it is proved—

> (a) that the defendant did the relevant act,
>
> (b) that any of the circumstances specified in subsection (2) existed, and
>
> (c) that the defendant knew that those circumstances existed,
>
> the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
>
> (2)The circumstances are that—
>
> .....
>
> (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

118. As it is alleged SW was asleep, then she is to be taken not to have consented to sexual intercourse.

(iv) The fairness and accuracy of the description

119. For the reasons we have given at paragraphs 68 and 71 as applied to this offence, we do not consider it apposite to take the statement of SW into account.

120. However, as extraneous material was placed before the court *de bene esse*, we have considered the fairness and accuracy of the description in the light of that material. Offence 4 was based on the complaint of SW made at a hearing on 26 August 2010. The fairness and accuracy of Offence 4 related to SW's account of what happened on 17 August 2010. It was submitted that, if that part of her statement relating to 17 August 2010 was read in its entirety, a fair and accurate description of the conduct would have made clear her consent to sexual intercourse or alternatively a reasonable belief on his part that she consented.

121. In her statement SW said that she had been captivated by Mr Assange when she had seen him in a TV interview. She had attended a lunch with him and others on 14 August 2010. He had flirted with her over lunch and they had gone out together ending up in cinema where they kissed and fondled. She contacted him on 16 August 2010 and invited him to her house. In the bedroom he took her clothes off; they were naked together on the bed and engaged in sexual foreplay on the bed. He rubbed his penis against her. She closed her legs because she did not want to have intercourse with him unless he used a condom. After a period of some hours, he went to sleep. For a long time she had lain awake, but then she also fell asleep. They then had sexual intercourse with him using a condom. They fell asleep and woke and had sex again. They had breakfast. They had sex again with a condom only on the glans of his penis.

122. Her statement then describes in some detail the conduct that forms the basis of Offence 4. She fell asleep, but was woken up by his penetration of her. She immediately asked if he was wearing anything. He answered to the effect that he was not. She felt it was too late and, as he was already inside her, she let him continue. She had never had unprotected sex. He then ejaculated inside her.

123. The essential complaint made about the fairness and accuracy of the description of the offence is that it did not set out the context to which we have referred from which it was contended that the offence of rape could not be inferred. The context would have made clear that she either consented or he had reasonable belief in her consent.

124. We do not consider that the offence was not fairly and accurately described. It is quite clear that the gravamen of the offence described is that Mr Assange had sexual intercourse with her without a condom and that she had only been prepared to consent to sexual intercourse with a condom. The description of the conduct makes clear that he consummated sexual intercourse when she was asleep and that she had insisted upon him wearing a condom. "Consummated" refers to having intercourse, not to ejaculation. In our judgement it was not necessary to go further than was set out in the description of the conduct, as it is difficult to see how a person could reasonably have believed in consent if the complainant alleges a state of sleep or half sleep, and secondly it avers that consent would not have been given without a condom. There is nothing in the statement from which it could be inferred that he reasonably expected that she would have consented to sex without a condom.

125. Nor do the inconsistencies in her account and text messages relied upon by Mr Assange assist. In one sent by her she described herself as "half asleep" and she accepted in a further interview that she was not fast asleep. These are matters of evidence which would be highly relevant at trial. But it is not for this court to asses whether the allegations may fail. It was not therefore necessary to set the details of these out. There is, therefore, nothing in the particulars which is neither fair nor accurate.

126. The gravamen of Mr Assange's argument is that the description of the offence by the Prosecutor does not set out the continuum of events and the context, but seeks to isolate one aspect. That continuum and context showed that she agreed to sexual intercourse when she realised what was happening; it cannot therefore be alleged that he did not have a reasonable belief in consent. We accept Ms Montgomery's observations about how far it would be right to see what happened afterwards as consensual rather than reluctant submission. But the fact of protected sexual intercourse on other occasions cannot show that she was, or that Mr Assange could reasonably have believed that she was, in her sleep consenting to unprotected intercourse. The fact that she allowed it to continue once she was aware of what was happening cannot go to his state of mind or its reasonableness when he initially penetrated her. Once awake she was deciding whether to let him go on doing what he had started. However it is clear that she is saying that she would rather he had not started at all and had not consented. The prosecution case on rape is or includes the start of sexual intercourse: its references to "consummation" cannot in context be confined to its conclusion or to ejaculation. It is clear that the allegation is that he had sexual intercourse with her when she was not in a position to consent and so he could not have had any reasonable belief that she did.

(v) Conclusion

127. In our view, therefore, the objections raised on the second issue fail.

Issue 3: Was Mr Assange accused of an offence in Sweden?

(a) The provisions of the 2003 Act

128. It is a condition set out in s.2(2) of the 2003 Act that an EAW must contain the statement set out in s.2(3):

> "A Part 1 warrant is an arrest warrant ... which contains (a) the statement referred to in subsection (3)"

That sub-section then provides:

> "The statement is one that-
>
> (a) 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, and
>
> (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence."

This reflects in part Article 1.1 of the Framework Decision which specifies that extradition is for the purposes of conducting a criminal prosecution.

129. It was common ground that extradition is not permitted for investigation or gathering evidence or questioning to see if the requested person should be prosecuted.

(ii) The finding of the Senior District Judge

130. The Senior District Judge found that there was no ambiguity in the EAW. He was therefore required to look at the warrant alone. He was sure it was valid on its face; the surrender of Mr Assange was, as the warrant stated, requested for the purpose of being prosecuted for the offences. The Senior District Judge was satisfied, looking at the warrant as a whole, that Mr Assange was an accused person. However he went on to make findings on the extrinsic evidence, as we set out at paragraph 148 below.

(iii) The issue: was Mr Assange "accused"

131. It was accepted in oral submissions made on behalf of Mr Assange that the surrender of Mr Assange was sought for the purposes of conducting a criminal prosecution (satisfying 2(3)(b)), as the Senior District Judge had held. That concession was made because it was accepted that the words "for the purposes of being prosecuted" were broad enough to encompass a prosecution that would commence in the future. Under the Framework Decision which used that term the concepts of pre-charge investigation and post charge prosecution had been elided. An EAW could therefore

be issued under the Framework Decision prior to the point at which a criminal prosecution had commenced.

132. However it was contended that the 2003 Act imposed a further safeguard; by requiring the person to be "accused", it had to be clear that the criminal proceedings had in fact commenced. The 2003 Act separated the concepts of pre-charge investigation and post-charge prosecution in this way. The EAW did not contain a statement that Mr Assange was accused of the commission of an offence in Sweden; that was because he had not been accused of an offence, as criminal proceedings had not been commenced. The Senior District Judge was wrong so to have found. He should also have considered the evidence extraneous to the EAW. The 2003 Act had specifically included s.2(3)(a) so that an EAW could not be used for the purposes of conducting an investigation; it could only be used where a person had been charged. If an EAW was issued prior to the point at which a criminal prosecution had commenced and the person charged, it was not a valid EAW.

(iv) The meaning of "accused"

133. S.1 of the Extradition Act 1989 had provided for the extradition of a person who was "accused" in a foreign state of the commission of an extradition crime. *In Re Ismail* [1999] 1 AC 320, the defendant challenged his extradition to Germany on the basis that no decision had been taken in Germany to launch criminal proceedings and that in any event a formal charge was necessary before a suspect could be an "accused" person. Lord Steyn in giving the leading judgment set out his views on the meaning of "accused" at page 326. It is necessary to set this out at length because a passage upon which Mr Assange particularly relied must be seen in context.

> "It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of "accused" persons. It is also common ground that it is not enough that he is in the traditional phrase "wanted by the police to help them with their inquiries." Something more is required. What more is needed to make a suspect an "accused" person? There is no statutory definition. Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. For the same reason it would be unwise for the House to attempt to define the word "accused" within the meaning of the Act of 1989. It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in s.1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition ... It follows

> that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring an indictment. Moreover, it is important to note that in England a prosecution may also be commenced if a custody officer decides that there is sufficient evidence to charge an arrested person and then proceeds to charge him... Despite the fact that the prosecuting authorities and the court are not involved at that stage, the charging of an arrested person marks the beginning of a prosecution and the suspect becomes an "accused" person. And that is so even if the police continue to investigate afterwards."

He continued at page 327:

> "It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied. That such a broad approach to the interpretation of section 1 of the Act of 1989 is permissible is reinforced by the provisions of section 20. This provision deals with the reverse position of an extradition of a person "accused" in the United Kingdom and contemplates that "proceedings" against him may not be commenced ("begun") for six months after his return. This provides contextual support for a correspondingly broad approach to "accused" in section 1. *For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution.* But in the light of the diversity of cases which may come before the courts it is right to emphasise that ultimately the question whether a person is "accused" within the meaning of section 1 of the Act of 1989 will require an intense focus on the particular facts of each case." (The passage in italics is the passage particularly relied upon by Mr Assange.)

134. The decision of Parliament to insert into the 2003 Act the requirement that the person was "accused" of an offence in addition to the requirement under the Framework Decision that surrender was sought for the purpose of being prosecuted for the offence can be seen as an expression of Parliament's intention to add an additional requirement to the Framework Decision. It must also be borne in mind, however, that in examining the difference between the language of the 2003 Act and the Extradition Act 1989, the requirement that the surrender was sought for the

purpose of being prosecuted for an offence was an additional requirement to what was set out in the Extradition Act 1989.

135. Although, as we have explained at paragraph 9 and following, the 2003 Act generally must be construed as giving effect to the Framework Decision, a court has to take account of the fact that it had been open to Parliament to provide a greater measure of protection (see the passage in the judgment of Lord Hope in *Cando Armas* which we have set out at paragraph 12 above). Furthermore, as Parliament used the term "accused", it must have intended to use the term in the light of the guidance given in *Ismail;* we agree with the similar observations of Aikens LJ in *Asztaslos v The Szekszard City Court in Hungary* [2010] EWHC 237 (Admin) at paragraphs 16-19. We were referred to statements made in Parliament by Ministers, but we do not consider it necessary to refer to them as the language of the Act is clear.

136. It is not perhaps surprising that the courts have not found it easy to determine the circumstances in which the requirement in s.2(3)(b) (for the purpose of being prosecuted) is satisfied (as it is in this case) but not s.2(3)(a) ("accused"). In *Judicial authority of the Court of First Instance , Hasselt, Belgium v Bartlett* [2010] EWHC 1390 (Admin), Toulson LJ said at paragraph 52 that the EAW in that case complied with s2(3) even though the warrant did not contain the word "accused". He applied the approach in *Asztaslos* of examining the EAW without regard to evidence extraneous to the EAW to see if it was clear. He then adopted what Jack J had said in *Dabas v High Court of Madrid* [2006] EWHC 971 (Admin):

> "If [a person] is wanted for prosecution, and the warrant later describes the offence and sets out its circumstances and gives the statutory provision which he is alleged to have infringed, it is very difficult to see how he can be described other than as an "accused" even if there is no statement using that word. The subject of such a European arrest warrant is clearly more than a suspect or someone who is wanted for questioning."

The court should, in our view, be very careful in the context of the 2003 Act and the Framework Decision about giving to the word "accused" some technical procedural meaning which would amount to a hurdle which other Member States cannot match in their own procedures.

(v) The terms of the EAW.

137. As we have set out at paragraph 2 above, the EAW stated that it requested Mr Assange be surrendered for the purposes of conducting a criminal prosecution. It was in the standard form of the EAW in the annex to the Framework Decision. The Prosecutor had not adapted the wording to the case by deleting the reference to executing a custodial sentence, but this is not relevant. Although the EAW makes clear that the surrender is requested for the purpose of conducting a criminal prosecution, set out the offences and does refer to the warrant being based on the decision of the Svea Court of Appeal, there is nothing in the EAW that formally states he is accused of an offence in Sweden.

138. It is clear that the statements required by s.2(3) of the 2003 Act are essential requirements; they are not simple formalities: *Office of the King's Prosecutor, Brussels v Cando Armas,* (see the judgments of Lord Hope at paragraph 42 and Lord Scott at paragraph 56-7). In *Dabas* (to which we referred at paragraph 64 above), Lord Hope made clear at paragraph 50:

> "A warrant which does not contain the statements referred to in [s.2(2)] cannot be eked out by extraneous information. The requirements of s.2(2) are mandatory. If they are not met, the warrant is not a Part 1 warrant and the remaining provisions of that Part of the Act will not apply to it."

It follows that the Prosecutor must not have had its attention drawn to the further observations of Lord Hope in *Cando Armas* at paragraph 48:

> "The fact that Part 1 of the 2003 Act does not match the requirements of the Framework Directive is confusing to the unwary, and it appears likely that it will be a source of continuing difficulty. Steps should be taken to remind the authorities in the category 1 territories that the statements referred to in section 2(2) of the Act are a necessary part of the procedure that has been laid down in Part 1 of the Act."

139. It is not necessary for the statement to use the precise terms set out in the 2003 Act, so long as it is clear that that is what the EAW read as a whole is saying and that it complies with the requirements of s.2(3).

140. We agree with the approach of Toulson LJ in *Bartlett* that the language of the EAW should make clear that

> "The investigation must have reached the stage at which the requesting judicial authority is satisfied that he faces a case such that he ought to be tried for the specified offence or offences, and the purpose of the request for extradition must be to place him on trial." (paragraph 50)

In our view, the terms of the EAW read as a whole made clear that not only was the EAW issued for the purpose of Mr Assange being prosecuted for the offence, but that he was required for the purposes of being tried after being identified as the perpetrator of specific criminal offences. He was therefore accused of the offences specified in the EAW. Nothing in the EAW suggested he was wanted for questioning as a suspect.

(vi) The circumstances in which the extraneous evidence was adduced

141. However, the submissions made by Mr Assange were advanced, as we have mentioned, on the basis of extraneous evidence to which we must now refer.

142. Mr Assange contended prior to the hearing before the Senior District Judge that the warrant had been issued for the purpose of questioning Mr Assange rather than prosecuting him and that he was not accused of an offence. In response to that

contention, shortly before that hearing, Mrs Ny provided a signed statement dated 11 February 2011 on behalf of the Prosecutor:

> "6. A domestic warrant for [Julian Assange's] arrest was upheld [on] 24 November 2010 by the Court of Appeal, Sweden. An arrest warrant was issued on the basis that Julian Assange is accused with probable cause of the offences outlined on the EAW.
>
> 7. According to Swedish law, a formal decision to indict may not be taken at the stage that the criminal process is currently at. Julian Assange's case is currently at the stage of "preliminary investigation". It will only be concluded when Julian Assange is surrendered to Sweden and has been interrogated.
>
> 8. The purpose of a preliminary investigation is to investigate the crime, provide underlying material on which to base a decision concerning prosecution and prepare the case so that all evidence can be presented at trial. Once a decision to indict has been made, an indictment is filed with the court. In the case of a person in pre-trial detention, the trial must commence within 2 weeks. Once started, the trial may not be adjourned. It can, therefore be seen that the formal decision to indict is made at an advanced stage of the criminal proceedings. There is no easy analogy to be drawn with the English criminal procedure. I issued the EAW because I was satisfied that there was substantial and probable cause to accuse Julian Assange of the offences.
>
> 9. It is submitted on Julian Assange's behalf that it would be possible for me to interview him by way of Mutual Legal Assistance. This is not an appropriate course in Assange's case. The preliminary investigation is at an advanced stage and I consider that is necessary to interrogate Assange, in person, regarding the evidence in respect of the serious allegations made against him.
>
> 10. Once the interrogation is complete, it may be that further questions need to be put to witnesses or the forensic scientists. Subject to any matters said by him, which undermine my present view that he should be indicted, an indictment will be lodged with the court thereafter. It can therefore be seen that Assange is sought for the purpose of conducting criminal proceedings and that he is not sought merely to assist with our enquiries."

143. The language of paragraph 6 of the statement in terms made clear he was "accused" of an offence; the remainder of the statement explained the procedure. The Senior District Judge then heard evidence; his findings on that evidence are summarised by us at paragraph 148 below

(vii) The contention of Mr Assange on the extraneous evidence

144. Mr Assange's contention was that he had not been accused of an offence in Sweden. For that to happen a decision to prosecute had to be made and none had been. Criminal proceedings had not commenced. Lord Steyn, in *Ismail* in the passage at page 327 (which we have highlighted in italics at paragraph 133 above), had approved the approach of the Divisional Court in asking in that case whether the authorities had taken a step which could fairly be described as the commencement of proceedings. Reliance was placed on the following by Mr Assange:

i) The Senior District Judge, who had heard evidence of Swedish law, had found on the evidence before him that the proceedings were at the preliminary investigation stage; that the preliminary investigation did not come to an end until the evidence was served on Mr Assange or his lawyer and there had been an interrogation of him with the opportunity for further enquiries. Thereafter there would be a decision to charge; if charged, it was likely that the trial would take place shortly thereafter.

ii) There were numerous statements by Ms Ny that the proceedings were still at the investigative stage. She had said on 19 November 2010; "We have come to a point in the investigation where we cannot go further without speaking to Julian Assange." She had written to the Australian Ambassador in December 2010 making it clear that she was engaged in an "on going investigation". In a conversation with the Ambassador on 16 December 2010, she had confirmed that no decision had been made to prosecute Mr Assange. It was only when such a decision was made that Mr Assange would be granted access to all the documents in the case.

iii) In the Prosecutor's submission to the Svea Court of Appeal when it was considering the appeal of Mr Assange against the decision to issue a warrant for his arrest (to which we have referred at paragraph 51 above), the Prosecutor had stated that the reason for the arrest of Mr Assange was "in order to enable implementation of the preliminary investigation and possible prosecution". In rejecting the appeal the Court had stated in its reasons that Mr Assange was "suspected with probable cause of" the four offences to which we referred at paragraph 3.

iv) The translation of the EAW was wrong; the word translated as "criminal prosecution" was in Swedish "*för lagföring*". This was a general term relating to the entire process; it meant "legal proceedings". There were more precise words that should have been used such as *åtala* or *åklaga* which meant prosecute or indict.

(viii) Can extraneous evidence be examined?

145. There have been a number of cases where a challenge has been made to an EAW on the basis that it requested surrender of a person who neither was accused of an offence nor whose surrender was sought for the purposes of being prosecuted for the offence. The question arose in some of those cases as to whether the court could examine material extraneous to the EAW. The cases were considered in *Asztaslos v The Szekszard City Court in Hungary* [2010] EWHC 237 (Admin) where Aikens LJ, in

giving the judgment of the court, summarised the effect of the cases at paragraph 38 of his judgment in seven propositions. He concluded that the court should only examine extraneous evidence if the wording of the warrant was equivocal and then only as a last resort. It should be discouraged. The correctness of this conclusion was challenged on behalf of Mr Assange.

146. We were referred to a number of cases including the following. In *Vey v The Office of the Public Prosecutor of the County Court of Montlucon, France* [2006] EWHC 760 (Admin), the EAW referred to the defendant as an accused, but other statements made it unclear whether it was issued for the purposes of the defendant being prosecuted. The further information requested by the District Judge made matters less clear. The court (Moses LJ and Holland J) examined the procedure in France to determine whether extradition was sought for the purposes of a prosecution. In *McCormack v Tribunal de Grande Instance, Quimper, France* [2008] EWHC 1453 (Admin) the EAW described the stage in the investigation which had been reached; the court (Maurice Kay LJ and Penry-Davey J) received evidence of French criminal procedure to determine whether he was an accused and wanted for the purposes of prosecution. In *Thompson v Public Prosecutor of Boulogne sur Mer* [2008] EWHC 2787 (Admin), there was no extraneous material; the court (Scott Baker LJ and Aikens J) had to decide on the language of the warrant whether the conditions were met. In *R(Trenk) v District Court in Plzen-Mesto, Czech Republic* [2009] EWHC 1132 (Admin), the court (Davis J) reviewed extraneous materials in determining whether the case had crossed the boundary from investigation to prosecution. In *The Judicial Authority of the Court of First Instance, Hasselt, Belgium v Bartlett* [2010] EWHC 1390 (Admin), the EAW referred to the judicial investigation producing serious indications that the defendant was guilty and referred to the "facts of which he was charged"; expert evidence was heard by the District Judge. Although the court (Toulson LJ and Griffith Williams J) considered that extraneous evidence should not be admitted to contradict a warrant where it was clear, the court used the extraneous material, in the event, as the warrant contained an ambiguity.

147. The cases do show differing approaches. It is, however, not necessary for us to decide whether evidence extraneous to the EAW was admissible in order to determine this appeal. It is in those circumstances not desirable for us to consider the correctness of what was said by Aikens LJ said in *Asztaslos* (as we were invited to do by Mr Emmerson) or to state in our own words what approach should be adopted. We can determine the matter on the assumption that the EAW did not make clear Mr Assange was accused (contrary to the view we have expressed at paragraph 140) and that Mr Assange was entitled to rely on the extraneous evidence in relation to the question as to whether he was accused. We would simply emphasise our view that, although we have made the second assumption, cases where evidence extraneous to the EAW is admitted should be very few and far between.

(ix) Conclusion on the extraneous evidence

148. The Senior District Judge found on the basis of the extraneous evidence that the fact some further pre-trial evidential investigation might result in no trial taking place did not mean Mr Assange was suspected as opposed to accused; and the fact that under Swedish law a person had to be interrogated before a decision to charge was made was not determinative. Clear and specific allegations had been made against Mr Assange. Although he could not say when or what step had been taken which could

fairly be described as the commencement of the prosecution, the boundary between suspicion and investigation and prosecution had been crossed. Looking at the matter in the round, Mr Assange passed the threshold of being wanted for prosecution.

149. It is clear on the extrinsic evidence that a decision has not been taken to charge him. Under the law of Sweden that decision will only be made after he has been questioned again. Under Swedish procedure, that decision is made at the conclusion of the investigation and, according to the evidence before the Senior District Judge. The defendant will then be given the right to examine all the documents relating to the case.

150. In our judgment, the fact that under the criminal procedure of Sweden he may be required to answer further questions before a decision is made to charge him or that the fact that the full file has not yet been provided are not decisive. The former is not an uncommon procedure on the continent and many systems do not permit access to the file until sometime after it is clear the person is accused of an offence. The fact that the Court of Appeal of Svea used the word "suspected" or that the prosecutor in her supplemental material has said he is "accused" takes the matter no further. The real question is whether the fact that it is clear that a final decision has not been made to prosecute or charge Mr Assange means that he is not "accused of the offence". The questioning is not for the mere investigation of a suspect, but to ensure that there is no proper basis for the accusation not to proceed swiftly to trial, where the focus is likely to be on what is admitted, denied or put on a different light in the answers to the questions.

151. We do not see why looking at the matter through cosmopolitan eyes it cannot be said that a person can be accused of an offence even though the decision has not finally been taken to prosecute or charge; *Ismail* makes clear one cannot simply look at the matter as a common lawyer. In our judgment Mr Assange is on the facts before this court "accused" of the four offences. There is a precise description in the EAW of what he is said to have done. The extraneous evidence shows that there has been a detailed investigation. The evidence of the complainants AA and SW is clear as to what he is said to have done as we have set out. On the basis of an intense focus on the facts he is plainly accused. That is, as Lord Steyn said, decisive.

152. As it is common ground that a criminal investigation about someone's conduct is not sufficient to make a person an accused, a further way of addressing this broad question is to ask whether the case against him has moved from where he can be seen only as a suspect where proof may be lacking or whether there is an accusation against him supported by proof: cf the distinction made by Lord Devlin in *Hussein v Chong Fook Kam* [1970] AC 942 at 948. Plainly this is a case which has moved from suspicion to accusation supported by proof.

153. Although we have approached the matter by asking the broad question posed by Lord Steyn as to whether Mr Assange was accused, it was the submission of Mr Assange that the court should ask the question asked by the Divisional Court in *Ismail,* namely whether a step had been taken which could fairly be described as the commencement of the prosecution. It is, in our view, clear that whilst Lord Steyn approved that approach, it was not the only approach to the question of whether he was an accused. The issue was to be addressed broadly on the facts. But, even if the court was constrained to determine whether someone was an accused by solely considering the

question of whether the prosecution had commenced, we would not find it difficult to hold that looking at what has taken place in Sweden that the prosecution had commenced. Although it is clear a decision has not been taken to charge him, that is because, under Swedish procedure, that decision is taken at a late stage with the trial following quickly thereafter. In England and Wales, a decision to charge is taken at a very early stage; there can be no doubt that if what Mr Assange had done had been done in England and Wales, he would have been charged and thus criminal proceedings would have been commenced. If the commencement of criminal proceedings were to be viewed as dependent on whether a person had been charged, it would be to look at Swedish procedure through the narrowest of common law eyes. Looking at it through cosmopolitan eyes on this basis, criminal proceedings have commenced against Mr Assange.

154. In our view therefore, Mr Assange fails on the facts on this issue.

Issue 4: Proportionality

155. Mr Assange submitted that even if under the EAW he was technically a person accused of offences, it was disproportionate to seek his surrender under the EAW. That was because, as he had to be questioned before a decision was made on prosecution, he had offered to be questioned over a video link. It would therefore have been proportionate to question him in that way and to have reached a decision on whether to charge him before issuing the EAW.

156. It is clear from the Report of the European Commission on the Implementation of the Framework Decision (COM (2011) 175 Final, 11 April 2011), that there was general agreement between the Member States, as a result of the use of EAWs for minor offences technically within the Framework Decision, that a proportionality check was necessary before a judicial authority in a Member State issued an EAW. This statement was a strong reminder to judicial authorities in a Member State contemplating the issue of an EAW of the need to ensure that the EAW was not used for minor offences. It is not a legal requirement. There is, however, almost universal agreement among prosecutors and judges across Europe that this reminder to conduct a proportionality check should be heeded before an EAW is issued.

157. It was submitted on behalf of Mr Assange proportionality was also a requirement of the law on the following basis. The Framework Decision as an EU instrument is subject to the principle of proportionality; reliance was placed on the effect of the Charter of Fundamental Rights, *R(NS) v SSHD* [2010] EWCA Civ 990 and the decision of the Higher Regional Court in Stuttgart in *General Public Prosecution Service v C* (25 February 2010), as reported at [2010] Crim LR 474 by Professors Vogel and Spencer. We will assume that Mr Assange's argument that an EAW can only be used where proportionate, complex as it is, is well founded without lengthening the judgment still further to express a view on it.

158. However, the argument fails on the facts. First, in this case, the challenge to the issue of the warrant for the arrest of Mr Assange failed before the Court of Appeal of Svea. In those circumstances, taking into account the respect this court should accord the decision of the Court of Appeal of Svea in relation to proceedings governed by Swedish procedural law, we do not consider the decision to issue the EAW could be said to be disproportionate.

159. Second and in any event, this is self evidently not a case relating to a trivial offence, but to serious sexual offences. Assuming proportionality is a requirement, it is difficult to see what real scope there is for the argument in circumstances where a Swedish Court of Appeal has taken the view, as part of Swedish procedure, that an arrest is necessary.

160. We would add that although some criticism was made of Ms Ny in this case, it is difficult to say, irrespective of the decision of the Court of Appeal of Svea, that her failure to take up the offer of a video link for questioning was so unreasonable as to make it disproportionate to seek Mr Assange's surrender, given all the other matters raised by Mr Assange in the course of the proceedings before the Senior District Judge. The Prosecutor must be entitled to seek to apply the provisions of Swedish law to the procedure once it has been determined that Mr Assange is an accused and is required for the purposes of prosecution. Under the law of Sweden the final stage occurs shortly before trial. Those procedural provisions must be respected by us given the mutual recognition and confidence required by the Framework Decision; to do otherwise would be to undermine the effectiveness of the principles on which the Framework Decision is based. In any event, we were far from persuaded that other procedures suggested on behalf of Mr Assange would have proved practicable or would not have been the subject of lengthy dispute.

Conclusion

161. For the reasons we have set out, we would dismiss the appeal.