Easter Term
[2012] UKSC 22
On appeal from: [2011] EWHC Admin 2849

JUDGMENT

Assange (Appellant) *v* The Swedish Prosecution Authority (Respondent)

before

Lord Phillips, President
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Kerr
Lord Dyson

JUDGMENT GIVEN ON

30 May 2012

Heard on 1 and 2 February 2012

Appellant
Dinah Rose QC
Mark Summers
Helen Law
(Instructed by Birnberg Peirce and Partners)

Respondent
Clare Montgomery QC
Aaron Watkins
Hannah Pye
(Instructed by Special Crime Division, Crown Prosecution Service)

Interveners (Mr Gerard Batten MEP and Mr Vladimir Bukovsky)
Paul Diamond

(Instructed by Chambers of Paul Diamond)

Intervener (Lord Advocate)

P Jonathan Brodie QC

(Instructed by The Appeals Unit, Crown Office)

LORD PHILLIPS

Introduction

1. On 2 December 2010 the Swedish Prosecution Authority ("the Prosecutor"), who is the respondent to this appeal, issued a European Arrest Warrant ("EAW") signed by Marianne Ny, a prosecutor, requesting the arrest and surrender of Mr Assange, the appellant. Mr Assange was, at the time, in England, as he still is. The offences of which he is accused and in respect of which his surrender is sought are alleged to have been committed in Stockholm against two women in August 2010. They include "sexual molestation" and, in one case, rape. At the extradition hearing before the Senior District Judge, and subsequently on appeal to the Divisional Court, he unsuccessfully challenged the validity of the EAW on a number of grounds. This appeal relates to only one of these. Section 2(2) in Part 1 of the Extradition Act 2003 ("the 2003 Act") requires an EAW to be issued by a "judicial authority". Mr Assange contends that the Prosecutor does not fall within the meaning of that phrase and that, accordingly, the EAW is invalid. This point of law is of general importance, for in the case of quite a number of Member States EAWs are issued by public prosecutors. Its resolution does not turn on the facts of Mr Assange's case. I shall, accordingly, say no more about them at this stage, although I shall revert briefly to them towards the end of this judgment.

2. Part 1 of the 2003 Act was passed to give effect to the Council of the European Union Framework Decision on the European arrest warrant and surrender procedures between Member States of the European Union 2002/584/JHA ("the Framework Decision"). I annexe a copy of the English version of the Framework Decision to this judgment. As can be seen, the phrase "judicial authority" is used in a number of places in the Framework Decision. In particular it is used in article 6, which 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."

3. It is Mr Assange's primary case, as presented by Miss Dinah Rose QC, that "judicial authority" bears the same meaning in the Framework Decision as it bears in the 2003 Act, so that the Prosecutor does not fall within the definition of "issuing judicial authority" within article 6 of the Framework Decision. Alternatively Miss Rose submits that, if "judicial authority" in article 6 of the Framework Decision has a meaning wide enough to embrace the Prosecutor, it has

a different and narrower meaning in the 2003 Act. She seeks to support that meaning by reference to parliamentary material.

The issue

4. Miss Rose contends that a "judicial authority" must be a person who is competent to exercise judicial authority and that such competence requires impartiality and independence of both the executive and the parties. As, in Sweden, the Prosecutor is and will remain a party in the criminal process against Mr Assange, she cannot qualify as a "judicial authority". In effect, Miss Rose's submission is that a "judicial authority" must be some kind of court or judge.

5. Miss Clare Montgomery QC for the Prosecutor contends that the phrase "judicial authority", in the context of the Framework Decision, and other European instruments, bears a broad and autonomous meaning. It describes any person or body authorised to play a part in the judicial process. The term embraces a variety of bodies, some of which have the qualities of impartiality and independence on which Miss Rose relies, and some of which do not. In some parts of the Framework Decision the term "judicial authority" describes one type, in other parts another. A prosecutor properly falls within the description "judicial authority" and is capable of being the judicial authority competent to issue an EAW under article 6 if the law of the State so provides. Judicial authority must be given the same meaning in the 2003 Act as it bears in the Framework Decision.

The approach to the interpretation of Part 1 of the 2003 Act

6. Part 1 of the 2003 Act has unfortunately spawned more than its share of issues of law that have reached the highest level. In *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67; [2006] 2 AC 1 Lord Bingham of Cornhill remarked at para 8 that interpretation of Part 1 of the 2003 Act

> "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."

7. Lord Hope of Craighead at para 24 adopted what might appear to be a conflicting approach. He expressed the view that the task of interpreting Part 1 so as to give effect to the Framework Decision should be approached on the

assumption that, where there were differences, these were regarded by Parliament as a necessary protection against an unlawful infringement on the right to liberty. Both Lord Bingham and Lord Hope in *Dabas v High Court of Justice in Madrid, Spain* [2007] 2 AC 31 returned to this topic after the Grand Chamber of the European Court of Justice had commented on it when giving a preliminary ruling in *Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83, to which I shall shortly refer. The House was concerned with the effect of section 64(2)(b) of the 2003 Act, which on its face appears to require an EAW to be accompanied by a separate certificate that the conduct in respect of which surrender is sought falls within the Framework list. The issue was whether it was sufficient that the warrant itself so certified. In holding, in agreement with the rest of the House, that it was, Lord Hope, after citing from *Pupino,* referred with approval to Lord Bingham's statement in *Cando Armas* and remarked that the imposition of additional formalities not found in the Framework Decision by one member state to suit its own purposes would tend to frustrate the objectives of the Decision.

8. Article 34.2(b) of the EU Treaty provides:

> "Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect. "

In *Pupino* the European Court of Justice held at para 43:

> "When applying the national law, the national court that is called on to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34.2(b) EU."

9. In a well reasoned written joint intervention Mr Gerard Batten MEP and Mr Vladimir Bukovsky comment on the uncertainty of the scope of the phrases "result to be achieved", "purpose of the framework directive" and "result which it pursues". They argue that these should be treated as referring to the specific objectives of the particular Framework Decision and not the wider objectives of the EU Treaty that the specific objectives may be designed to serve. I have concluded that their interesting discussion does not bear on the issue that this Court has to resolve. What is in issue in respect of the construction of the 2003 Act is not a suggestion that the English Court ought, when interpreting the 2003 Act, to follow some general objective that the Framework Decision is designed to advance. It is the narrow issue of whether the words "judicial authority" in section 2(2) of the 2003 Act should, if possible, be accorded the same meaning as those two words bear in the parallel requirement in article 6 of the Framework Decision.

10. I have read with admiration Lord Mance's analysis of the effect of the decision in *Pupino* and I accept, for the reasons that he gives, that it does not *bind* this Court to interpret Part 1 of the 2003 Act, in so far as this is possible, in a manner that accords with the Framework Decision. I consider, none the less that it is plain that the Court should do so. This is not merely because of the presumption that our domestic law will accord with our international obligations. As Lord Mance himself acknowledges at para 201 of his judgment Part 1 of the 2003 Act was enacted in order to give effect to the Framework Decision. The immediate objective of that Decision is to create a single uniform system for the surrender of those accused or convicted of the more serious criminal offences. That objective will only be achieved if each of the Member States gives the same meaning to "judicial authority". If different Member States give different meaning to those two words, that uniformity will be destroyed. In these circumstances it is hard to conceive that Parliament, in breach of the international obligations of this country, set out to pass legislation that was at odds with the Framework Decision. It is even more difficult to conceive that Parliament took such a course without making it plain that it was doing so. For this reason it is logical to approach the interpretation of the words "judicial authority" on the presumption that Parliament intended that they should bear the same meaning in Part 1 of the 2003 Act as they do in the Framework Decision.

Parliamentary material

11. Counsel for both parties placed before us a substantial volume of parliamentary material without any close analysis as to whether this was admissible as an aid to interpretation of the 2003 Act under the doctrine of *Pepper v Hart* [1993] AC 593 or for any other reason. I add those last words because some of this material related to proceedings of the House of Commons European Scrutiny Committee and the House of Lords Select Committee on European Union which predated both the final Framework Decision and, of course, the Extradition Bill which became the 2003 Act. While this material may provide some insight into the approach of the United Kingdom in negotiations that preceded the Framework Decision and into the understanding of Members of Parliament as to the effect of that Decision, I do not see how it can be directly admissible under *Pepper v Hart*, save to the extent that it was referred to in parliamentary debate on the Bill.

12. More generally it is open to question whether there is room for the application of *Pepper v Hart* having regard to the requirement to give the words "judicial authority" the same meaning in the Act as they bear in the Framework Decision. That requirement should resolve any ambiguity in the language of the statute. Having said this I shall summarise shortly the effect of the parliamentary material. It evidences a general understanding and intention that the words "judicial authority" would and should bear the same meaning in the Act as they

bore in the Framework Decision. As to that meaning there are statements in debate in the House of Lords, on the part of both members and a minister, that appear to reflect an understanding that the "judicial authority" would be a court or judge. The clearest ministerial statement is, however, that of the Under Secretary of State, Mr Ainsworth, on 9 January 2003 to Standing Committee D (Hansard, col 48), referred to by the Divisional Court at para 26:

> "We expect that European arrest warrants will be issued in future by exactly the same authorities as issue warrants under the current arrest procedures. We intend to do that in the United Kingdom. There is no reason to suppose that our intentions are different from those of any other European country. The Bill is drafted in such a way as to include all those authorities that currently issue arrest warrants, as issuing authorities. I have yet to hear an argument that says that we should change that."

13. If the parliamentary material to which I have referred were admissible, I would find it inconclusive. For the reasons that I have given I approach the interpretation of the words "judicial authority" in Part 1 of the 2003 Act on the basis that they must, if possible, be given the same meaning as they bear in the Framework Decision. I turn to consider that meaning.

The meaning of "judicial authority" in the Framework Decision

14. It is necessary at the outset to decide how the task of interpreting the Framework Decision should be approached. *Craies on Legislation*, 9th ed (2008), remarks at para 31.1.21 that the text of much European legislation is arrived at more through a process of political compromise, so that individual words may be chosen less for their legal certainty than for their political acceptability. That comment may be particularly pertinent in the present context in that, as we shall see, an earlier draft of the Framework Decision left no doubt as to the meaning of "judicial authority" but a subsequent draft expunged the definition that made this clear. The reason for and effect of this change lies at the heart of the problem of interpretation raised by this appeal. How does one set about deciding on these matters?

15. The approach to interpretation must be one that would be acceptable to all the Member States who have to strive to identify a uniform meaning of the Decision. Craies rightly comments at para 32.5.1 that one cannot simply apply the canons for construction or even the principles that apply to interpreting domestic legislation. In the next paragraph Craies identifies the approach of the European

Court of Justice to interpreting European legislation as involving the following stages, to be followed sequentially in so far as the meaning has not become clear.

> "Start with the terms of the instrument in question, including its preamble;"
>
> "Turn to preparatory documents;"
>
> "Consider the usual meaning of expressions used and [compare] different language texts of the instrument;"
>
> "Consider the purpose and general scheme of the instrument to be construed."

While I shall consider these matters I propose to adopt a different order.

The natural meaning

16. As we are here concerned with the meaning of only two words, I propose at the outset to consider the natural meaning of those words. It is necessary to do this in respect of both the English words "judicial authority" and the equivalent words in the French text. Those words are "autorité judiciaire". In the final version of the Framework Decision the same weight has to be applied to the English and the French versions. It is, however, a fact that the French draft was prepared before the English and that, in draft, in the event of conflict, the meaning of the English version had to give way to the meaning of the French. The critical phrase does not bear the same range of meanings in the English language as in the French and, as I shall show, the different contexts in which the phrase is used more happily accommodate the French rather than the English meanings.

17. The first series of meanings of "judicial" given in the Oxford English Dictionary is:

> "Of or belonging to judgment in a court of law, or to a judge in relation to this function; pertaining to the administration of justice; proper to a court of law or a legal tribunal; resulting from or fixed by a judgment in court".

In the context of "a judicial authority" the more appropriate meanings are: "having the function of judgment; invested with authority to judge causes"; a public prosecutor would not happily fall within this meaning.

18. "Judiciaire" is capable of bearing a wide or a narrow meaning. *Vocabulaire Juridique* (6th ed, 1996) states that it can be used "(dans un sens vague). Qui appartient à la justice, par opp à legislative et administrative", or "(dans un sens précis). Qui concerne la justice rendue par les tribunaux judiciaires". A computer dictionary search discloses a number of examples of its use in the "sens vague", for instance "affaire judiciaire/legal case; aide judiciaire/legal aid; annonce judiciaire/legal notice; poursuite judiciaire/ legal proceedings" and last but not least, "autorité judiciaire/legal authority".

19. Having regard to the range of meanings that "autorité judiciaire" is capable of embracing, it is no cause for surprise that the phrase often receives some additional definition. Examples of particular relevance in the present context are found in the "Rapport explicatif" of the 1957 European Convention on Extradition – see para 26 below and in the definition of "autorité judiciaire" in article 3 of the first draft of the Framework Decision itself – see para 46 below. Another example is found in article 18.7 of the 1990 European Convention on money laundering: "…soit autorisée par un juge, soit par une *autre* autorité judiciaire, y compris le ministère public" (my emphasis). Miss Rose in her written case referred to a further example, in the English version, in the definition of an "issuing authority" in respect of a European Evidence Warrant under article 2(c) of the relevant Framework Decision (2008/978/JHA), namely :

> "…(i) a judge, a court, an investigating magistrate, a public prosecutor; or (ii) any *other* judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings…" (my emphasis)

20. These definitions demonstrate the width of meaning that "autorité judiciaire" is capable of bearing and the fact that the ambit of the phrase can vary according to its context.

21. Article 5.1(c) of the European Convention on Human Rights, in the English version, provides that deprivation of liberty may be lawful where it results from

> "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence… "

The French version of "legal authority" is "autorité judiciaire". Miss Rose submitted that a line of Strasbourg authority on the meaning of that phrase in the context of article 5 provided the key to its meaning in the context of the

Framework Decision. That submission calls for a comparison of the functions of the "autorité judiciaire" in the two different contexts. I shall postpone that exercise to later in this judgment. First I propose to consider the purpose and the general scheme of the Framework Decision and then the preparatory documents and their genesis.

The purpose of the Framework Decision

22. The purpose of the Framework Decision is stated in recital (5) of its preamble:

> "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 judicial decisions, within an area of freedom, security and justice."

23. What were "the present extradition procedures" that gave rise to "complexity and potential for delay"? They were those provided for by the European Convention on Extradition 1957. This was a Convention between members of the Council of Europe. As in the case of other post-war European Conventions the United Kingdom played a major role in its negotiation. The general scheme under this Convention was one whereby, after an antecedent process to which I shall return at a later stage, the executive of a requesting State would make a request for extradition to the executive of the requested State. The Convention laid down the criteria that had to be satisfied if the requested State was to be obliged to comply with the request. As to the procedure for considering whether or not to comply with a request, which I shall call the process of execution, the Convention provided by article 22 that this should be governed solely by the law of the requested State.

24. The complexities and potential for delay that the Framework Decision sought to avoid were those that arose out of the involvement of the executive in the extradition process. I do not believe that this had much relevance in this jurisdiction, for although the process of extradition had great potential for delay,

this was seldom attributable to the fact that the decision to extradite was ultimately political. A hint of the delays that were endemic on the Continent is given by a comment in the Explanatory Memorandum dated 25 September 2001 that accompanied the first draft of the Framework Decision, at 4.5.4:

> "The political phase inherent in the extradition procedure is abolished. Accordingly, the administrative redress phase following the political decision is also abolished. The removal of these two procedural levels should considerably improve the effectiveness and speed of the mechanism."

25. Thus the Framework Decision did not set out to build a new extradition structure from top to bottom, but rather to remove from it the diplomatic or political procedures that were encumbering it. The objective was that the extradition process should involve direct co-operation between those authorities responsible on the ground for what I have described as the antecedent process and those authorities responsible on the ground for the execution process. It is important for the purposes of this appeal, to consider the manner in which extradition used to work under the 1957 Convention and, in particular, to identify those who, under the operation of that Convention, were responsible for the antecedent process.

The 1957 Convention

26. Article 1 of the 1957 Convention provided that the contracting parties undertook to surrender to each other, subject to the provisions of the Convention, all persons against whom the "competent authorities" of the requesting party were proceeding for an offence or who were wanted by "the said authorities" for the carrying out of a sentence or detention order. I shall refer to such persons as "fugitives". The Council of Europe Explanatory Report commented:

> "Le terme "competent authorities" contenu dans le texte anglais correspond aux mots "autorités judiciaires" contenus dans le texte francais. Ces expressions visent les autorités judiciaires proprement dites et le Parquet à l'exclusion des autorités de police"."

27. Article 12.2 provided that a request for extradition should be supported by

> "(a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in

> accordance with the procedure laid down in the law of the requesting Party;
>
> (b) a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and
>
> (c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality."

28. Thus, where the fugitive was someone accused of a crime, the Convention required that there should have been an antecedent process that resulted in "a warrant of arrest or other order having the same effect". This had to be issued in accordance with the law of the requesting State. The Convention itself did not impose any specific requirement as to the status of the authority responsible for the "warrant of arrest or other order". As to this, the Council of Europe Explanatory Report commented:

> "Some of the experts thought that the warrant of arrest or any other order having the same effect should be issued by an authority of a judicial nature. This point arises from article 1, in which the Parties undertake to extradite persons against whom the *competent authorities* of the requesting Party are proceeding or who are wanted by them….During the discussion of article 12 it was found that most of the States represented on the Committee of Experts do not extradite a person claimed until after a decision by a judicial authority."

29. It is noteworthy that there was no requirement under the 1957 Convention for a requesting State to adduce any evidence to support the allegation that the fugitive had committed the crime in respect of which he was accused. This had never been a requirement that European States imposed, perhaps because they were not prepared to countenance the extradition of their own nationals. In contrast, when concluding bilateral extradition treaties, this country had always insisted on evidence being produced that would have been sufficient to lead to a defendant within the jurisdiction being committed for trial. According to *Jones on Extradition and Mutual Assistance*, 2nd ed (2001) at 10-004 the lack of any evidence requirement in the Convention was one of the reasons why the United

Kingdom allowed over 30 years to pass between signing the 1957 Convention and embodying its provisions in our domestic law.

30. The 1957 Convention contained provisions for provisional arrest, which had always been a feature of English extradition law. This important procedure enabled a fugitive to be apprehended and detained before the diplomatic formalities of inter State extradition were implemented. Thus article 16 provided:

> "1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.
>
> 2. The request for provisional arrest shall state that one of the documents mentioned in article 12, paragraph 2(a), exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.
>
> 3. A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request."

In contrast to article 1, the French version of "competent authorities" was "autorités compétentes".

31. The United Kingdom acceded to the 1957 Convention in 1991. By the European Convention on Extradition Order 2001 (SI 2001/962), passed pursuant to section 3(2) of the Extradition Act 1989, it was incorporated into domestic law. Para 3 of this Order removed the requirement to produce evidence of the commission of the offence in respect of which extradition was sought. By way of reservation the United Kingdom required foreign documents supplied pursuant to article 12 to be authenticated by being signed by a judge, magistrate or officer of the State where they were issued and certified by being sealed by a Minister of State.

32. Thus, when negotiations began in relation to the terms of the Framework Decision, the United Kingdom had given effect to a European Convention that required it to surrender fugitives on proof of an antecedent process, namely that there had been issued in the requesting State a warrant of arrest or other order having the same effect, notwithstanding that, at least in 1957 when the Convention was negotiated, this might not have resulted from a judicial process and where the authority initiating the request might be a court or a public prosecutor.

33. It is worth pausing at this point to consider the nature of the antecedent process. In this country the liberty of the subject has long been recognised as a fundamental right, as demonstrated by the remedy of habeas corpus. Save in the limited circumstances where arrest without warrant is lawful, arrest of a person suspected of a criminal offence has required a warrant of arrest issued by a magistrate. After arrest the suspect has had to be brought before a court. Detention before charge is only permitted for a very short period and remand in custody after charge will be pursuant to a court order.

34. These protections of the liberty of the subject did not exist in all Continental States and notably had not existed in those that were, or fell, under the domination of Germany before and during the Second World War. Article 5 of the European Convention of Human Rights was designed to make universal protections that already existed in this country. Article 5.1(c) permits the lawful arrest or detention of a person for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. "Lawful arrest or detention" is not defined. What this involves in other Member States was not explored in argument before us, but we were provided with Evaluation Reports in respect of the working of the EAW in 15 Member States prepared by the Commission pursuant to the requirement of article 34.4 of the Framework Decision. In the case of most of these the issue *by a court* of a domestic arrest warrant or a similar order, such as an order for detention in absentia, was a precondition to the issue of an EAW. It seems likely that these domestic procedures were in place when the Framework Decision was negotiated and that in the case of the majority of Member States, the power to arrest was subject to judicial safeguards similar to, or even more stringent than, our own.

35. As I have shown above, in 1957 a minority of the parties to the European Convention on Extradition had no judicial involvement in the issue of an arrest warrant. It may well be that, as a consequence of the ECHR and the series of Strasbourg decisions to which I refer below, this minority had reduced by the time that the Framework Decision was negotiated.

Public prosecutors

36. As the issue on this appeal is whether a public prosecutor constitutes a "judicial authority" under Part 1 of the 2003 Act, it is appropriate to consider the nature of that office. Public prosecutors as their name suggests are public bodies that carry out functions relating to the prosecution of criminal offenders. On 8 December 2009 the Consultative Council of European Judges and the Consultative Council of European Prosecutors published for the attention of the Committee of Ministers a joint Opinion (2009) that consisted of a Declaration, called the Bordeaux Declaration together with an Explanatory Note. This comments at para 6 on the diversity of national legal systems, contrasting the common law systems with the Continental law systems. Under the latter the prosecutors may or may not be part of the "judicial corps". Equally the public prosecutor's autonomy from the executive may be complete or limited. Para 23 of the Note observes:

> "The function of judging implies the responsibility for making binding decisions for the persons concerned and for deciding litigation on the basis of the law. Both are the prerogative of the judge, a judicial authority independent from the other state powers. This is, in general, not the mission of public prosecutors, who are responsible for bringing or continuing criminal proceedings."

37. A recurrent theme of both the Declaration and the Note is the importance of the independence of the public prosecutors in the performance of their duties. Para 3 of the Declaration states that judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear to be independent of each other. Para 6 states:

> "The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially."

The Note comments at paras 33 and 34 that public prosecutors must act at all times honestly, objectively and impartially. Judges and public prosecutors have, at all times, to respect the integrity of suspects. The independence of the judge and the prosecutor is inseparable from the rule of law.

38. Later the Note deals with the roles and functions of judges and public prosecutors in the "pre-criminal" procedures:

> "48 At the pre-trial stage the judge independently or sometimes together with the prosecutor, supervises the legality of the investigative actions, especially when they affect fundamental rights (decisions on arrest, custody, seizure, implementation of special investigative techniques, etc)."

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

The more recent genesis of the Framework Decision

39. Stepping stones towards the Framework Decision were the Convention of 10 March 1995 on a simplified extradition procedure between Member States of the EU and the Convention of 27 September 1996 relating to extradition between the Member States. Of more relevance in the present context was the integration into the European Union under the Amsterdam Treaty of 1997 of the Schengen Agreement of 1985. Title 1V of the 1990 Convention implementing the Schengen Agreement established the Schengen Information System ("SIS"). Article 95 provided for the "judicial authority" of a Member State to issue an alert requesting the arrest of a person for extradition purposes. This had to be accompanied by, inter alia, information as to whether there was "an arrest warrant or other document having the same legal effect". Article 98 made provision for the "competent judicial authorities" to request information for the purpose of discovering the place of residence or domicile of witnesses or defendants involved in criminal proceedings.

40. Article 64 provided that an alert under article 95 should have the same force as a request for provisional arrest under article 16 of the 1957 Convention. We were not provided with any information as to the nature of the "judicial authorities" who sought provisional arrest under article 95. We were, however, provided with a Report dated 13 October 2009 of the Schengen Joint Supervisory Authority on an inspection of the use of article 98 alerts. This provided the following answer to the question "which competent authorities may decide on an article 98 alert?"

> "While public prosecutors and judicial authorities obviously play a major role in the decision leading to article 98 alerts, in some

> Schengen States the police, security police, tax and customs authorities, border guard authorities and other authorities competent for criminal investigations are also competent to decide on article 98 alerts. ”

41. It seems certain that public prosecutors must, in some Member States, have been responsible for initiating an article 95 alert and not unlikely that some of the other authorities competent to decide on an article 98 alert may have done so.

42. On 15 and 16 October 1999 the European Council met at Tampere. Proposals made at this meeting under the heading of “Mutual recognition of judicial decisions” included that consideration should be given to fast track expedition procedures, without prejudice to the principle of fair trial. This led to the Commission submitting to the Council on 19 September 2001 a proposal for a Framework Decision. I shall call this the “September draft”. I propose to consider this in conjunction with the Explanatory Memorandum which accompanied it.

43. The Preamble stated that the EAW aimed to replace the traditional extradition arrangements and had to have the same scope of application as the system of extradition built on the 1957 Convention (recital 5). The EAW was based on the principle of mutual recognition. If a judicial authority requested a person for the purpose of prosecution for an offence carrying a sentence of at least twelve months detention, the authorities of other Member States should comply with the request (recital 7). The decision on the execution of the EAW required “sufficient controls” and had, in consequence, to be taken by a “judicial authority” (recital 8). The role of central authorities was limited to practical and administrative assistance (recital 9).

44. Article 1 of the September draft provided:

> “The purpose of this Framework Decision is to establish the rules under which a Member State shall execute in its territory a European arrest warrant issued by a judicial authority in another Member State.”

45. Article 2 provided:

> “A European arrest warrant may be issued for:

> (a) final judgments in criminal proceedings, and judgments in absentia, which involve deprivation of liberty or a detention order of at least four months in the issuing Member State;
>
> (b) other enforceable judicial decisions in criminal proceedings which involve deprivation of liberty and relate to an offence, which is punishable by deprivation of liberty or a detention order for a maximum period of at least twelve months in the issuing Member State."

Thus, so far as a fugitive from prosecution was concerned, this article envisaged that before the issue of the EAW there would be an enforceable "judicial" decision involving deprivation of liberty. The issue of an arrest warrant is an obvious example of such a decision.

46. Article 3 of the September draft included the following important definitions:

> "(a) '*European arrest warrant'* means a request, issued by a judicial authority of a Member State, and addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgment or a judicial decision, as provided for in article 2;
>
> (b) '*issuing judicial authority'* means the judge or the public prosecutor of a Member State, who has issued a European arrest warrant;
>
> (c) '*executing judicial authority'* means the judge or the public prosecutor of a Member State in whose territory the requested person sojourns, who decides upon the execution of a European arrest warrant."

In dealing with this article the Explanatory Memorandum made the following summary of the effect of the scheme

> "(a) The European arrest warrant is a warrant for search, arrest, detention and surrender to the judicial authority of the issuing country. In the previous system, under the 1957 Convention as implemented by the Schengen Convention, the provisional arrest

> warrant and the extradition request were two separate phases of the procedure. Pursuant to the principle of mutual recognition of court judgments, it is no longer necessary to distinguish the two phases. The arrest warrant thus operates not only as a conventional arrest warrant (search, arrest and detention) but also as a request for surrender to the authorities of the issuing State. ”

This provides an important insight as to the manner in which it was envisaged that the Framework Decision would alter the extradition process. The “judicial authorities” who were responsible for the article 95 alert requesting provisional arrest were those who might be expected to be responsible for the issue of the new EAW. As I have suggested above, it is not unlikely that in some Member States these included the police or other authorities who were responsible for article 98 alerts. If so, the definition of “issuing judicial authority” in article 3 of the September draft made it clear that this was not acceptable. As to this, the Explanatory Memorandum commented:

> “The procedure of the European arrest warrant is based on the principle of mutual recognition of court judgments. State-to-State relations are therefore substantially replaced by court-to-court relations between judicial authorities. The term ‘judicial authority’ corresponds, as in the 1957 Convention…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 authority to issue the European arrest warrant in the procedural system of the Member State.”

47. So far as the process of execution of the EAW was concerned, the Explanatory Memorandum made it plain that the nature of the judicial authority concerned would depend upon whether or not the fugitive was challenging extradition. If he was, the challenge would have to be resolved by a judge. If he was not, the judicial authority responsible for executing the warrant might be the prosecution service.

48. Article 4 of the September draft provided:

> “Each Member State shall designate according to its national law the judicial authorities that are competent to (a) issue a European arrest warrant…”

49. The Explanatory Memorandum commented:

> "The judicial authority having the power to issue a European arrest warrant is designated in accordance with the national legislation of the Member States. They will be able to entrust the decision either to the same authority as gave the judgment or the judgment referred to in article 2 or to another authority."

50. The position in respect of the issue of an EAW can be summarised as follows. Before the EAW was issued there would be an antecedent process that would result in an enforceable judicial decision involving deprivation of liberty. In most, but not necessarily all, Member States this would involve a judge. The Swedish process in the present case, which I shall consider in due course, provides a good example of this. The subsequent issue of the EAW would have to be done by a "judicial authority", but that term embraced both a judge and a public prosecutor. The judicial authority in question might or might not be that responsible for the antecedent process.

51. Article 6 of the September draft dealt with the contents of the EAW. These included "whether there is a final judgment or any other enforceable judicial decision, within the scope of article 2."

52. The provisions of the September draft in relation to issue provided a degree of safeguard that the EAW would only be issued in a proper case, but further safeguards were provided in relation to the execution of the EAW. It was, of course, at that stage that the process would result in deprivation of liberty. The Preamble to the September draft provided:

> "The decision 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 person has been arrested will take the decision whether to execute the warrant."

53. Articles 10 to 23 of the September draft dealt with execution of the EAW. As the Explanatory Memorandum explained when commenting on article 4 and repeated when dealing with the various articles in section 3, the nature of the judicial authority involved in the execution of the EAW could depend upon whether or not the fugitive was challenging surrender. In some cases it might be the prosecuting authority, in others it would be a court. Thus article 18 provided:

> "A court in the executing Member State shall decide on whether the European arrest warrant shall be executed after a hearing, held in accordance with the national rules of criminal procedure.

(a) if the requested person does not consent to his or her surrender;

(b) in cases referred to in articles 17(2) and (3).

The issuing Member State may be represented or submit its observations before the court."

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

55. Had the final Framework Decision followed the September draft, the issue that has led to this appeal could never have arisen. Article 3 expressly provided that the "issuing judicial authority" might be a public prosecutor. Elsewhere the "judicial authority" might or might not be a public prosecutor depending upon the function being performed. The September draft was, however, amended in a manner that obfuscated the position. The relevant changes appear to have been made in the course of discussion in the Council of Ministers. On 6 December the Presidency noted that fourteen delegations agreed on the new draft ("the December draft"), noting parliamentary scrutiny reservations from, inter alia, the United Kingdom. The December draft formed the basis of the final Framework Decision approved by the Council. I turn to consider the manner in which the Framework Decision differs from the September draft.

56. Article 1 of the Framework Decision begins by stating that the EAW is "a *judicial* decision issued by a Member State". The English version of the December draft read "a *court* decision issued by a Member State". The words that I have emphasised were both translations of the French "judiciaire" in the original text. The French version was the original and is to be preferred. Thus I do not consider that the use of the word "court" in the English version of the December draft is of any assistance in determining the meaning of "judiciaire".

57. Most significantly, for present purposes, the definitions of issuing judicial authority and executing judicial authority in the final version no longer define

these as being a judge or public prosecutor. The new definitions, now in article 6, are as follows:

> "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 the 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."

58. With the exception of article 19.1, the articles dealing with execution make no reference to a hearing before a court. The phrase "judicial authority" is used throughout. Article 19.3 does, however, give a hint that more than one type of judicial authority may be involved. The article provides:

> "The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this article and of the conditions laid down."

It is to be noted that article 19.1 refers to "requesting court". The French version of the word "court" is "juridiction". The two versions replicate the words used in the French and English versions of the equivalent provision of the December draft. The French draft was the original and it is hard to see any justification for translating "juridiction" as "court". In these circumstances, while the use of the phrase "requesting court" in the final version lend some support to Mr Assange's case on the meaning of "issuing judicial authority" it would not be safe to place much weight on that support.

59. The overall scheme of the EAW did not change from that proposed in the September draft. In particular there remained a requirement for an antecedent process before the issue of the EAW. Article 2, under the heading "Scope of the European arrest warrant" set out the offences in respect of which an EAW could be issued. Article 8 specified the content of the warrant, which included

> "(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of articles 1 and 2.

This simplified the description of the antecedent process in articles 2 and 6 of the September draft. It adopted the description of the antecedent process in the 1957 Convention.

The critical question

60. The critical question is whether the changes made to the draft Framework Decision between September and December altered the meaning of "judicial authority" so as to exclude a public prosecutor from its ambit. There would seem to be two possible reasons for removing the precise definition of "judicial authority" that had been included in article 3 of the September draft. The first was to restrict the meaning by excluding from its ambit the public prosecutor. The second was to broaden the meaning so that it was not restricted to a judge or a public prosecutor. For a number of reasons I have reached the firm conclusion that the second explanation is the more probable.

61. *In the first place*, had the intention been to restrict the power to issue an EAW or to participate in its execution to a judge, I would expect this to have been expressly stated. The change would have been radical, and would have prevented public prosecutors from performing functions that they had been performing in relation to the issue of provisional arrest warrants since 1957.

62. *In the second place* it is hard to see why the majority of Member States would have wished to restrict the ambit of the issuing judicial authority in this way. The significant safeguard against the improper or inappropriate issue of an EAW lay in the antecedent process which formed the basis of the EAW. If there had been concern to ensure the involvement of a judge in relation to the issue of an EAW, the obvious focus should have been on this process. The function of the issuing authority was of less significance. That fact is underlined by the only case outside the United Kingdom to which we have been referred where a challenge was made to the issue of an EAW by a public prosecutor. In *Piaggio (Germany)* (14 February 2007, Court of Cassation Sez 6 (Italy)) the appellant challenged the issue by the Hamburg Public Prosecutor's Office of an EAW on the ground that it should have been issued and signed by a judge. The Court rejected this contention for the following reasons:

"The claim alleging breach of article 1(3) of Law no 69 of 2005 on the ground that the EAW was not signed by a judge is completely unfounded.

The provision allegedly requiring signature by a judge does not refer to the EAW, as the appellant mistakenly claims, but to the precautionary measure on the basis of which the warrant was issued: in the present case, it is in fact the arrest warrant issued by the Hamburg District Magistrate's Court on 24 August 2005, regularly signed by Judge Reinke.

The guarantee specified in the aforesaid article1(3) does not relate to the act requesting the Member State to grant extradition but is directly connected with the custodial measure, that is to say it is a substantial guarantee concerned with the basic conditions underlying the EAW, which must be subject to jurisdiction. In this procedure, the true guarantee of personal freedom is not the fact that the EAW is issued by a judicial authority but the fact that the warrant is based on a judicial measure.

Moreover, article 6 of the framework decision leaves to the individual Member State the task of determining the judicial authority responsible for issuing (or executing) a European Arrest Warrant, and the Italian implementing law, with regard to the active extradition procedure, provides for certain cases in which the Public Prosecutor's office is to be responsible for issuing the EAW (article 28 of Law no 69/2005).

Essentially, the alleged breach of the law in respect of the fact that the EWA was signed by the Hamburg Public Prosecutor's Office, must be excluded."

63. On 23 February 2009 this decision was acknowledged with approval in the Experts' Evaluation Report on Italy's procedures in relation to the EAW (5832/2/09 REV 2) The final comment made at 7.3.2.6 is of particular significance:

"Under article 1(3) of the Italian implementing law, *'Italy shall implement the EAW … as long as the preventative remedy on the basis of which the warrant has been issued has been signed by a Judge and is adequately motivated'.*

> The expert team notes that this provision gave rise to at least two difficulties:
>
> > (a) the requirement that the domestic arrest warrant must be signed by a 'judge' could wrongly be interpreted in the sense that the Italian executing authority should refuse the execution of an EAW if the domestic arrest warrant on which it was based is issued by a judicial authority other than a judge, in particular by a prosecutor;
> >
> > (b) the requirement that the domestic arrest warrant must be adequately motivated could be interpreted in the sense that the Italian executing authority should proceed to a factual verification of the case it is not supposed to do. On this point, the requirement seems in contradiction with the principle of mutual recognition on which the Framework Decision is based.
> >
> > *However, the Court of Cassation has given an interpretation of this provision in line with the Framework Decision"* (my emphasis).

64. Miss Rose suggested that the issuing judicial authority had a role to play in ensuring that it was proportionate to issue the EAW. Since the EAW was introduced there has been concern that some EAWs are being issued in respect of trivial offences. The Council, in a note dated 28 May 2010 (8436/2/10 REV 2) commented on the need for Member States to conduct a proportionality check before issuing an EAW. It stated, however

> "It is clear that the Framework Decision on the EAW does not include any obligation for an issuing Member State to conduct a proportionality check…"

In the light of this statement it would not be right to infer that when the EAW was being negotiated Member States agreed to restrict its issue to a judge in order to ensure that proportionality received proper judicial consideration.

65. *In the third place* I find it likely that the removal of the definition of judicial authority as being a "judge or public prosecutor" was not because Member States wished to narrow its meaning to a judge, but because they were not content that its meaning should be restricted to a judge or a public prosecutor. Member States had

existing procedures for initiating an extradition request and for requesting provisional arrest in another Member State which involved their domestic arrest procedures. They also had existing procedures for giving effect to extradition requests. The authorities involved in these procedures were not restricted to judges and prosecutors. It seems to me likely that the removal of a precise definition of judicial authority was intended to leave the phrase bearing its "sens vague" so as to accommodate a wider range of authorities.

66. *In the fourth place* aspects of the December draft suggest that the meaning of judicial authority was not restricted to a court or judge. The requirement that became article 6.3 of the final version to inform the General Secretariat of the Council of "the competent judicial authority under its law" makes more sense if there was a range of possible judicial authorities. And, as I have pointed out in para 58 above, article 19.3 of the final version suggests the co-operation of different types of judicial authority in the execution process.

67. *In the fifth place* the manner in which not merely the Member States but also the Commission and the Council acted after the Framework Direction took effect was in stark conflict with a definition of judicial authority that restricted its meaning to a judge. Article 31.3(b) of the 1969 Vienna Convention on the Law of Treaties permits recourse, as an aid to interpretation, to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". The EAW processes of the Member States were subject to Reports by the Commission and Evaluation Reports on the working of the EAW were prepared by experts and submitted to the Council (see below). The practices of the Member States in relation to those they appointed as issuing and executing "judicial authorities" coupled with the comments of the Commission and the Council in relation to these, provide I believe a legitimate guide to the meaning of those two words in the Framework Decision.

Implementation of the Framework Decision by the Member States

68. Had the omission of the definition of "judicial authority" in the final version of the Framework Decision reflected an intention on the part of the Member States that negotiated it that only a judge or court could act as an issuing or executing authority, I would have expected the Member States to have implemented that intention when giving effect to the Framework Decision. I would equally have expected Reports published by the Commission and the Experts' Evaluation Reports for the Council to have commented critically on any failure by a Member State to appoint a court or judge as the issuing and executing judicial authority. This was far from the case. 11 Member States designated a prosecutor as the issuing judicial authority in relation to fugitives sought for prosecution and 10, not in every case the same, designated a prosecutor as the issuing judicial authority in

respect of fugitives who had been sentenced. 10 Member States designated a prosecutor as the executing judicial authority. Some of these had designated a judge or court as the issuing judicial authority. A handful of Member States had designated the Ministry of Justice as the issuing or executing judicial authority

69. Article 34 of the Framework Decision required the Commission to submit a report to the European Parliament and to the Council on the operation of the Framework Decision. We have been provided with two such reports, the First Report dated 24 January 2006 and the Second Report dated 11 July 2007. These Reports commented adversely on the appointment by a small minority of Member States of executive bodies as judicial authorities but made no adverse comment on the use of public prosecutors as judicial authorities.

70. Mutual Evaluation Reports into "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" were made to the Council by experts nominated by Member States. We have been provided with 15 Reports from the fourth round of these mutual evaluations. Once again, while the Reports contain adverse comment on the use of Ministries of Justice as issuing or executing judicial authorities, there is no adverse comment on the use of prosecutors in this role. Indeed, as I have pointed out in para.63 above, in the case of Italy the report commended this practice.

71. On 28 May 2009 the Council published a Final Report on the fourth round of mutual evaluations. Its Conclusions included, in para 3.1, comments on "the role of the judicial authorities". These commented that in some Member States non-judicial central authorities continued to play a role in cardinal aspects of the surrender procedure. This was criticised as "difficult to reconcile with the letter and the spirit of the Framework Decision." No criticism was made of the use of prosecutors as judicial authorities. The Council went on to call on Member States to provide "judges, prosecutors and judicial staff" with appropriate training on the EAW. There is once again a clear inference, this time in relation to the Council, that there was no objection to prosecutors performing the role of issuing judicial authorities.

Conclusions on the Framework Decision

72. I turn now to Miss Rose's reliance on the meaning of "autorité judiciaire" ("legal authority") in the context of article 5, to which I referred at para 21. I there set out article 5.1(c). Article 5.3 provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time…"

73. Miss Rose referred us to a series of 17 decisions of the Strasbourg Court which establish that the "competent legal authority" referred to in article 5.1(c) is shorthand for the "judge or other officer authorised by law to exercise judicial power" in article 5.3. These start with *Schiesser v Switzerland* (1979) 2 EHRR 417 and finish with *Medvedyev v France* (2010) 51 EHRR 899. They are, for the most part, cases where prosecutors or those subject to their control, authorised the detention of suspects during pre-trial investigations on the basis that they were "competent legal authorities" within the meaning of that phrase in article 5.1(c). The Strasbourg Court made it plain that those involved in the prosecution of a defendant lacked the necessary independence to qualify as "competent legal authorities". In *Medvedyev* the Grand Chamber held at paras 123-124:

> "Since article 5.1(c) forms a whole with article 5.3, 'competent legal authority' in para 1 (c) is a synonym, of abbreviated form, for 'judge or other officer authorised by law to exercise judicial power' in para 3.
>
> The judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention."

74. Miss Rose submitted that this line of authority conclusively established the meaning of "judicial authority" in the Framework Decision. This was coupled with the submission that those two words had to be given the same meaning wherever they appeared in the Decision. I consider that both submissions are unsound. The article 5 authorities apply to the stage of pre-trial proceedings at which the suspect has to be afforded the opportunity to challenge his detention. They have direct application to the stage of the execution of an EAW for which articles 14, 15 and 19 of the Framework Decision make provision. At this stage the "competent judicial authority" must have the characteristics identified in the Strasbourg decisions relied upon. Those decisions do not, however, apply to the stage at which a request is made by the issuing State for the surrender, or as the English statute incorrectly describes it, the extradition, of the fugitive. That is not a stage at which there is any adversarial process between the parties. It is a stage at which one of

the parties takes an essentially administrative step in the process. That is a step that it is appropriate for a prosecutor to take.

75. When considering the meaning of a word or phrase that is used more than once in the same instrument one starts with a presumption that it bears the same meaning wherever it appears. That is not, however, an irrebuttable presumption. It depends upon the nature of the word or phrase in question and the contexts in which it appears in the instrument. In the Framework Decision the same phrase is used to describe different authorities performing different functions at different stages of the overall process. The phrase is capable of applying to a variety of different authorities. The contexts in which it is used in the Framework Decision do not require that all the authorities have the same characteristics. On the contrary the contexts permit the issuing judicial authority to have different characteristics from the executing judicial authority and, indeed, for the phrase judicial authority to bear different meanings at the stage of execution of the EAW dependent upon the function being performed.

76. The purpose of the Framework Decision, its general scheme, the previous European extradition arrangements, the existing procedures of the Member States at the time that the Framework Decision was negotiated, the preparatory documents and the variety of meanings that the French version of the phrase in issue naturally bears, the manner in which the Framework Decision has been implemented and the attitude of the Commission and the Council to its implementation all lead to the conclusion that the "issuing judicial authority" bears the wide meaning for which Miss Montgomery contends and embraces the Prosecutor in the present case. All that weighs the other way is the narrower meaning that the English phrase naturally bears. That does not begin to tilt the scales in favour of Miss Rose's submission. For this reason I conclude that the Prosecutor in this case fell within the meaning of "issuing judicial authority" in the Framework Decision.

The 2003 Act

77. It is necessary, if possible, to give "judicial authority" the same meaning in the 2003 Act as it bears in the Framework Decision. Is it possible? The manner in which the Act sets out to give effect to the Framework Decision has been vigorously criticised by Professor John Spencer in "Implementing the European Arrest Warrant: A Tale of How Not to Do it" (2009) 30(3) Statute Law Review 184. This appeal will afford him additional grounds of attack. The Act does not make clear the overall nature of the EAW scheme for which the Framework Decision provides. It does not make clear the vital part that the antecedent process plays in the scheme. The scheme is founded on the mutual recognition of the decision that is taken in that process. Article 8 of the Framework Decision

provides that the EAW must contain evidence of "an enforceable judgment, an arrest warrant or other enforceable judicial decision having the same effect". Section 2 of the 2003 Act requires the arrest warrant to give "particulars of *any other warrant* issued in the category 1 territory for the person's arrest in respect of the offence" (my emphasis). I am not surprised that this provision has given rise to some judicial confusion, as evidenced by the series of decisions that culminated in the decision of the House of Lords in *Louca v Public Prosecutor, Bielefeld, Germany* [2009] UKSC 4; [2009] 1 WLR 2550. Only in that case was it appreciated that the provision referred to "any domestic warrant on which the European warrant is based" per Lord Mance at para 15.

78. Because the 2003 Act does not make clear the importance of the antecedent decision, it can give the impression that the decision to issue the EAW is the step in the procedure at which are considered all the matters that will be taken into account in the course of the antecedent process. This, in its turn, can lead to the conclusion that the decision to issue the EAW is of such importance that Parliament must have intended it to be taken by a judge, and that "judicial authority" must be interpreted as meaning a judge. As I have sought to demonstrate this reasoning is unsound.

79. Under the scheme of the Framework Decision the safeguard against the inappropriate issue of an EAW lies in the process antecedent to the issue of the EAW. I have drawn attention to the uncertainty on the material before us as to whether a court is involved in that process in all Member States, though this material indicates that it is in at least most States. No material has been put before us that suggests that EAW's are being issued on the basis of an antecedent process that is unsatisfactory for want of judicial involvement. The scheme does not provide for a second judicial process at the stage of the issue of the EAW. To interpret "issuing judicial authority" as meaning a court or judge would result in a large proportion of EAWs being held to be ineffective in this country, notwithstanding their foundation on an antecedent judicial process.

80. For these reasons I can see no impediment to according to "judicial authority" in Part 1 of the 2003 Act the same meaning as it bears in the Framework Decision. On the contrary there is good reason to accord it such meaning. I have concluded that the Prosecutor who issued the EAW in this case was a "judicial authority" within the meaning of that phrase in section 2 of the 2003 Act and that Mr Assange's challenge to the validity of the EAW fails.

The Lord Advocate's intervention

81. The Lord Advocate for Scotland, in a written intervention, submitted that the 2003 Act did not permit the Court to look behind a designation of a judicial authority made by a Member State under article 6.3 of the Framework Decision and accepted by the certificate of the designated authority under section 2 of the 2003 Act. This submission challenged the finding of the Divisional Court in this case that neither the designation by Sweden of its "issuing judicial authority" nor the issue of a certificate under section 2 barred Mr Assange from contending that his EAW had not been issued by a "judicial authority". This did not discourage Miss Montgomery from aligning herself with the Lord Advocate's submission at the ninth hour.

82. Miss Rose made written submissions after the hearing supporting the reasoning of the Divisional Court. While I found this reasoning persuasive, I was none the less impressed by the opposite view expressed in Sir Scott Baker's Report, to which I refer below. In the circumstances I think that it would be better not to express a final opinion on the point, leaving it open for oral argument on a future occasion.

The facts of this case

83. The point on the meaning of "judicial authority" taken in this case has been technical, in as much as there has been no lack of judicial consideration of whether there is a case that justifies the prosecution of Mr Assange for the offences in respect of which his extradition is sought. I shall give a bare outline of events in Sweden. The proceedings against Mr Assange are founded on complaints made by two women on 20 August 2010. A Preliminary Investigation conducted by the Chief Officer, in which Mr Assange co-operated, concluded that there was no case against him in respect of the alleged rape. The complainants appealed against this decision to the Prosecutor, who re-opened the full Preliminary Investigation. Mr Assange instructed counsel to represent him. He then left the country, which he was free to do. On 18 November the Prosecutor applied to the Stockholm District Court for a domestic detention order in absentia. The Stockholm District Court granted the order. The following day Mr Assange, by his counsel, appealed to the Svea Court of Appeal against the order on the grounds that the domestic arrest was not proportionate and was not based on sufficient evidence to give rise to probable cause. The Prosecutor informed the Court of Appeal that she intended to issue an EAW. The Court of Appeal dismissed Mr Assange's appeal on the papers and without an oral hearing on 24 November. On 26 November the Prosecutor issued an EAW. This was submitted to SOCA and rejected because it failed to specify the potential sentences in respect of the offences alleged. A replacement EAW was

issued on 2 December 2010 and this was certified by SOCA under section 2(7) and (8) of the 2003 Act on 6 December 2010.

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

Proportionality

85. On 30 September 2011 a Committee chaired by the Rt Hon Sir Scott Baker presented a report to the Home Secretary that reviewed the United Kingdom's extradition arrangements. At paras 5.106 to 5.119 the Report considers a criticism that it is possible for an EAW to be issued by non-judicial authorities, most often by public prosecutors. It makes the following comment:

> "The rationale which underpins both article 6 and section 2(7) is the obvious need for an internationalist or cosmopolitan approach to the interpretation of the term '*judicial authority*': it is for the domestic law of each Member State to decide which body or authority is responsible for issuing warrants and it is not for other Member States to question the competence of the body in question, or the institutional arrangements for the issuing of warrants."

86. The Report gave a number of reasons for concluding that this position was satisfactory, not least of which was the statement that the panel was not aware of any cases in which EAWs issued by designated prosecuting authorities had led to oppression or injustice.

87. The Report went on, in considerably greater detail, to consider the importance of proportionality. This had been considered in the Council's Report to which I have referred at para 71 above. The 9th recommendation of this Report was that there should be continued discussion on the institution of a proportionality requirement for the issue of any EAW with a view to reaching a coherent solution at European Union level. The Scott Baker Report agreed that proportionality should be considered at the stage of issuing an EAW. It did not recommend that the question of proportionality should be reviewed as part of the process of execution.

88. There are three principal areas of judgment that may be involved in issuing and executing an accusation EAW. The first involves consideration of whether there are reasonable grounds for arresting the fugitive for the purpose of prosecuting him. Under the scheme consideration of this question should form part of the antecedent process. It should not be repeated at the stage of execution. The second involves consideration of whether surrender of the fugitive will involve an infringement of his human rights. This issue will not often arise, and when it does it is likely to involve considering proportionality. Under the scheme of the EAW, consideration of any human rights issue should take place at the extradition hearing, which will necessarily involve a judge.

89. The third area of judgment involves consideration of whether, quite apart from any discrete human rights issues, the alleged offence is sufficiently serious to justify the draconian measure of removing the fugitive from the country in which he is living to the country where he is alleged to have offended. The Framework Decision dealt with this to a degree in as much as it provides that an accusation EAW can only be issued where the offence for which the fugitive is to be prosecuted must carry a maximum sentence of at least 12 months. It has become clear that this is insufficient to prevent the issue of an EAW in respect of an offence that is too trivial to justify the process. It seems that EAW's are being issued in some cases for offences as trivial as stealing a chicken. This reflects the fact that in some States such as Poland, under a constitutional principle of legality, the prosecutor has an obligation to prosecute a person who is reasonably suspected of having committed a criminal offence, however trivial the offence.

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

91. For the reasons that I have given I would dismiss this appeal.

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2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision

Official Journal L 190 , 18/07/2002 P. 0001 - 0020

Council Framework Decision

of 13 June 2002

on the European arrest warrant and the surrender procedures between

Member States

(2002/584/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(a) and (b) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

(2) The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000(3), addresses the matter of mutual enforcement of arrest warrants.

(3) All or some Member States are parties to a number of conventions in the field of extradition, including the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.

(4) In addition, the following three Conventions dealing in whole or in part with extradition have been agreed upon among Member States and form part of the Union acquis: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders(4) (regarding relations between the Member States which are parties to that Convention), the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union(5) and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union(6).

(5) 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.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(8) 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.

(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance.

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

(11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

(14) Since all Member States have ratified the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, the personal data processed in the context of the implementation of this Framework Decision should be protected in accordance with the principles of the said Convention,

HAS ADOPTED THIS FRAMEWORK DECISION:

CHAPTER 1

GENERAL PRINCIPLES

Article 1

Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Scope of the European arrest warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a 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:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,

- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

Article 3

Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 4

Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Article 5

Guarantees to be given by the issuing Member State in particular cases

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

2. if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

Article 6

Determination of the competent judicial authorities

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 the 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.

Article 7

Recourse to the central authority

1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.

Article 8

Content and form of the European arrest warrant

1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

(d) the nature and legal classification of the offence, particularly in respect of Article 2;

(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

(g) if possible, other consequences of the offence.

2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

CHAPTER 2

SURRENDER PROCEDURE

Article 9

Transmission of a European arrest warrant

1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.

2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).

3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).

For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.

Article 10

Detailed procedures for transmitting a European arrest warrant

1. If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network(8), in order to obtain that information from the executing Member State.

2. If the issuing judicial authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.

3. If it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit a European arrest warrant.

4. The issuing judicial authority may forward the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity.

5. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

6. If the authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly.

Article 11

Rights of a requested person

1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.

2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

Article 12

Keeping the person in detention

When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent

authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.

Article 13

Consent to surrender

1. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the "speciality rule", referred to in Article 27(2), shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State.

2. Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel.

3. The consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State.

4. In principle, consent may not be revoked. Each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law. In this case, the period between the date of consent and that of its revocation shall not be taken into consideration in establishing the time limits laid down in Article 17. A Member State which wishes to have recourse to this possibility shall inform the General Secretariat of the Council accordingly when this Framework Decision is adopted and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them.

Article 14

Hearing of the requested person

Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

Article 15

Surrender decision

1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

Article 16

Decision in the event of multiple requests

1. If two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

2. The executing judicial authority may seek the advice of Eurojust(9) when making the choice referred to in paragraph 1.

3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.

4. This Article shall be without prejudice to Member States' obligations under the Statute of the International Criminal Court.

Article 17

Time limits and procedures for the decision to execute the European arrest warrant

1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute a European arrest warrant.

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

Article 18

Situation pending the decision

1. Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must:

(a) either agree that the requested person should be heard according to Article 19;

(b) or agree to the temporary transfer of the requested person.

2. The conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities.

3. In the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

Article 19

Hearing the person pending the decision

1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.

3. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down.

Article 20

Privileges and immunities

1. Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived.

The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.

2. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.

Article 21

Competing international obligations

This Framework Decision shall not prejudice the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by provisions of the arrangement under which he or she was extradited concerning speciality. The executing Member State shall take all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited so that he or she can be surrendered to the Member State which issued the European arrest warrant. The time limits referred to in Article 17 shall not start running until the day on which these speciality rules cease to apply. Pending the decision of the State from which the requested person was extradited, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

Article 22

Notification of the decision

The executing judicial authority shall notify the issuing judicial authority immediately of the decision on the action to be taken on the European arrest warrant.

Article 23

Time limits for surrender of the person

1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.

3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.

Article 24

Postponed or conditional surrender

1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant.

2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

Article 25

Transit

1. Each Member State shall, except when it avails itself of the possibility of refusal when the transit of a national or a resident is requested for the purpose of the execution of a custodial sentence or detention order, permit the transit through its territory of a requested person who is being surrendered provided that it has been given information on:

(a) the identity and nationality of the person subject to the European arrest warrant;

(b) the existence of a European arrest warrant;

(c) the nature and legal classification of the offence;

(d) the description of the circumstances of the offence, including the date and place.

Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the Member State of transit, transit may be subject to the condition that the person, after being heard, is returned to the transit Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

2. Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. Member States shall communicate this designation to the General Secretariat of the Council.

3. The transit request and the information set out in paragraph 1 may be addressed to the authority designated pursuant to paragraph 2 by any means capable of producing a written record. The Member State of transit shall notify its decision by the same procedure.

4. This Framework Decision does not apply in the case of transport by air without a scheduled stopover. However, if an unscheduled landing occurs, the issuing Member State shall provide the authority designated pursuant to paragraph 2 with the information provided for in paragraph 1.

5. Where a transit concerns a person who is to be extradited from a third State to a Member State this Article will apply mutatis mutandis. In particular the expression

"European arrest warrant" shall be deemed to be replaced by "extradition request".

CHAPTER 3

EFFECTS OF THE SURRENDER

Article 26

Deduction of the period of detention served in the executing Member State

1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender.

Article 27

Possible prosecution for other offences

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;

(b) the offence is not punishable by a custodial sentence or detention order;

(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;

(d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;

(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;

(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as

referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.

Article 28

Surrender or subsequent extradition

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to a European arrest warrant issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. In any case, a person who has been surrendered to the issuing Member State pursuant to a European arrest warrant may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant issued for any offence committed prior to his or her surrender in the following cases:

(a) where the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it;

(b) where the requested person consents to be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant. Consent shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's national law. It shall be drawn up in such a way as to make clear that the person concerned has given it voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel;

(c) where the requested person is not subject to the speciality rule, in accordance with Article 27(3)(a), (e), (f) and (g).

3. The executing judicial authority consents to the surrender to another Member State according to the following rules:

(a) the request for consent shall be submitted in accordance with Article 9, accompanied by the information mentioned in Article 8(1) and a translation as stated in Article 8(2);

(b) consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision;

(c) the decision shall be taken no later than 30 days after receipt of the request;

(d) consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4.

For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein.

4. Notwithstanding paragraph 1, a person who has been surrendered pursuant to a European arrest warrant shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law.

Article 29

Handing over of property

1. At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

(a) may be required as evidence, or

(b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated.

Article 30

Expenses

1. Expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State.

2. All other expenses shall be borne by the issuing Member State.

CHAPTER 4

GENERAL AND FINAL PROVISIONS

Article 31

Relation to other legal instruments

1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

(a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

(b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

(c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;

(d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;

(e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.

Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, in particular by fixing time limits shorter than those fixed in Article 17, by extending the list of offences laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

The agreements and arrangements referred to in the second subparagraph may in no case affect relations with Member States which are not parties to them.

Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in the first subparagraph which they wish to continue applying.

Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second subparagraph, within three months of signing it.

3. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, these instruments shall continue to govern the relations existing between those territories and the other Members States.

Article 32

Transitional provision

1. Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the Official Journal of the European Communities. It may be withdrawn at any time.

Article 33

Provisions concerning Austria and Gibraltar

1. As long as Austria has not modified Article 12(1) of the "Auslieferungs- und Rechtshilfegesetz" and, at the latest, until 31 December 2008, it may allow its executing judicial authorities to refuse the enforcement of a European arrest warrant if the requested person is an Austrian citizen and if the act for which the European arrest warrant has been issued is not punishable under Austrian law.

2. This Framework Decision shall apply to Gibraltar.

Article 34

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 31 December 2003.

2. Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. When doing so, each Member State may indicate that it will apply immediately this Framework Decision in its relations with those Member States which have given the same notification.

The General Secretariat of the Council shall communicate to the Member States and to the Commission the information received pursuant to Article 7(2), Article 8(2), Article 13(4) and Article 25(2). It shall also have the information published in the Official Journal of the European Communities.

3. On the basis of the information communicated by the General Secretariat of the Council, the Commission shall, by 31 December 2004 at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

4. The Council shall in the second half of 2003 conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States as well as the functioning of the Schengen Information System.

Article 35

Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Done at Luxembourg, 13 June 2002.

For the Council

The President

M. Rajoy Brey

LORD WALKER

92. In agreement with Lord Phillips, Lord Brown, Lord Kerr and Lord Dyson, I would dismiss this appeal. The reasoning of the majority that I find most compelling is that on the application of the Vienna Convention (Lord Phillips paras 67 to 76; Lord Brown para 95; Lord Kerr paras 106 to 109; Lord Dyson paras 127 to 141) and on the non-application of the principle in *Pepper v Hart* [1993] AC 593 (Lord Phillips paras 11 to 13; Lord Brown paras 96 to 98; Lord Kerr paras 114, 115, 118 and 119; Lord Dyson paras 160 to 170).

93. The parliamentary material, as set out in paras 247 to 264 of Lord Mance's powerful judgment, is certainly disturbing. But I consider that it would be at least one step too far, in constitutional terms, for this court to treat it as determinative.

94. If the parliamentary material is disregarded, as I think it must be, the Vienna Convention point is to my mind determinative. It would serve no useful purpose for me to express my opinion on other points on which different members of the majority may take rather different views.

LORD BROWN

95. I too conclude, in common with the great majority of the Court, that the term "judicial authority" within the meaning of the Framework Decision is properly to be understood as including public prosecutors. Although, like some others, I am inclined to base this conclusion principally upon the fifth of Lord Phillips' reasons (paras 67-71 of his judgment), I would certainly not discount entirely the various other strands of reasoning on which he relies. On this first (and, to my mind ultimately critical) issue in the appeal there is nothing more I wish to say.

96. I do, however, wish to address Lord Mance's judgment, in favour of allowing the appeal, on the second issue, the true construction of the Extradition Act 2003, much of the reasoning underlying which I confess that at one time I too found attractive. It rests above all on a close analysis of the parliamentary material surrounding the enactment of the 2003 Act and Lord Mance's conclusion based on this material – a conclusion with which I entirely agree – firstly, that "ministers repeatedly gave assurances or endorsed assumptions that an issuing judicial authority would have to be a court, judge or magistrate", and "did so moreover in contexts where a judicial authority was being contrasted by other speakers with the police and prosecutors" and, secondly, that "ministers also gave these assurances with the understanding that the implementation of the Framework Decision by the

2003 Act would not in this respect lead to any change by comparison with previous practice" (Lord Mance, paras 261, 262).

97. Whereas, however, it is Lord Mance's judgment that by operation of the rule in *Pepper v Hart* [1993] AC 593, this conclusion requires the "uncertainty … [and] ambiguity about what Parliament meant" (Lord Mance, para 246) by the term "judicial authority" in the 2003 Act to be given a more restricted meaning than the majority of the Court (including in this instance Lord Mance himself) would give the term in the Framework Decision, I for my part have arrived clearly at the opposite conclusion.

98. To my mind, once one recognises that a "judicial authority" within the meaning of the Framework Decision is properly capable of encompassing a public prosecutor, this Court, the parliamentary material notwithstanding, is inexorably bound to construe the identical term in the 2003 Act no less widely. Certainly the term in the 2003 Act can be regarded as uncertain and ambiguous. But the interpretative guide here is not, in the context of legislation implementing a Framework Decision, *Pepper v Hart*; rather it is *Criminal proceedings against Pupino* (Case-105/03) [2006] QB 83, a decision of the Court of Justice consistently applied in a series of later House of Lords decisions to construe the 2003 Act so as to attain the ends sought by the Framework Decision. Indeed, even were the *Pupino* imperative not in play (which now appears may well be the correct view), the general presumption that the United Kingdom legislates in compliance with its international obligations would produce the same result. True it is that on the Second Reading of the Bill on 1 May 2003 Lord Filkin confirmed that Parliament is indeed sovereign and so can if it wishes legislate inconsistently with the United Kingdom's treaty obligations (see para 204 of Lord Mance's judgment). But it is not as if in the various exchanges relied upon by the appellant here ministers were saying to Parliament: whatever may be the true meaning of "judicial authority" in the Framework Decision, we are assuring you that in the 2003 Act it is to be confined to courts, judges and magistrates. There was here no hint of a suggestion by ministers that, in so construing the term "judicial authority" in the 2003 Act, the United Kingdom might not be fully implementing its obligations under the Framework Decision. The plain (and, if the Bill of Rights permits the Court to say so, regrettable) fact is that the ministers were mistaken about the true scope of the term in the Framework Decision (just as they were as to the practice which had operated throughout the earlier extradition regime).

99. Where, as here, Parliament uses the very same term as appears in the Framework Decision, in my judgment that term could only legitimately be given a different and narrower meaning than it bears in the Framework Decision if it were absolutely plain that Parliament had intended to legislate inconsistently with the United Kingdom's international obligations. All that is plain here is that certain

members of the respective Houses were at various times unintentionally misled as to just what those obligations were.

100. I too would dismiss this appeal.

LORD KERR

101. The expression "judicial authority", if removed from the extradition (or, more properly, surrender) context, would not be construed so as to include someone who was a party to the proceedings in which the term fell to be considered. A judicial authority must, in its ordinary meaning and in the contexts in which the expression is encountered in this jurisdiction other than that of surrender, be an authority whose function is to make judicial decisions. The essence of a judicial decision (in the normal use of that term) is that it should have the attributes of independence and impartiality. If one were approaching the question free from the terms of the Framework Decision and without the background that many civil law systems regard prosecutors as part of the judicial cadre (which must have been in the contemplation of those who drafted the Framework Decision), the question whether "judicial authority" meant someone who was neutral and disinterested in the outcome of the dispute would scarcely need to be asked.

102. The central issues on this appeal are, therefore, 1. whether the Framework Decision in its use of the term must be taken to have intended that those who decided whether a European Arrest Warrant should be issued did not require to have the attributes of independence and impartiality; and 2. whether the 2003 Act can and must be read so as to reflect that intention.

103. As Lord Phillips has pointed out, had the Framework Decision been made in the terms of the September 2001 draft, there could have been no debate as to whether public prosecutors came within the rubric, "judicial authority". How is the removal of the definition from the final draft to be approached? Lord Phillips has concluded that the more probable explanation is that the removal of the definition was prompted by a desire to broaden the possible embrace of the expression so as to extend it beyond judges and prosecutors. If it were otherwise, it would have been, he has said, a radical change and would have prevented public prosecutors from carrying out functions that they had been performing in relation to the issue of provisional arrest warrants since 1957. Lord Dyson has suggested that the fundamental change in the system of extradition that had been introduced by the Framework Decision makes it difficult to reach any conclusion as to whether it was intended that the role for prosecutors of issuing extradition arrest warrants

should be preserved or abandoned. Lord Mance felt that the Court of Justice of the European Union would be hesitant about speculating as to the reasons for the differences between the Commission's original proposal and the 10 December 2001 text. On that account, Lord Mance suggests, it is at least as likely that the removal of the definition reflected a lack of consensus and that it was intended to leave the matter open for subsequent decision by the Court of Justice.

104. For the reasons given by Lord Mance, a decision by the Court of Justice as to the significance of the omission cannot be obtained at present and this court must therefore confront that question directly. I can see force in all three views as to the importance (or lack of it) to be attached to possible reasons for the alteration of the September draft. But the inescapable fact is that public prosecutors in many of the member states had traditionally issued arrest warrants to secure extradition for many years. This was a firmly embedded practice in many jurisdictions. To bring that practice to an end would indeed have wrought a radical change. A substantial adjustment to administrative practices in many countries would have been required. It may well be, as Lord Mance has suggested, that agreement on this intensely controversial subject could not be reached. But the consequence of that must surely be that there was no accord as to the removal of prosecutors from that role.

105. Lord Mance has said that the Court of Justice would (in these circumstances) "focus on the final Framework Decision and seek to make sense of its text in the light of its purpose, the principles underlying it and general principles of European law" (para 233). I respectfully agree but would add that the court would surely not ignore what had gone before or the major modification of the hitherto well-entrenched arrangements in many jurisdictions that would be required to bring about an end to the issue of arrest warrants by prosecutors. If it had been intended that those arrangements were to be swept away, one would have expected that this would have been more explicitly stated. I accept, of course, that the absence of such an explicit statement does not finally determine the question but it would be incongruous that it be left to member states under article 6 of the Framework Decision to determine which body or person should constitute a judicial authority within its legal system for the purpose of issuing a European arrest warrant. I agree with Lord Mance that the object of this provision is to require member states to identify which judicial authority is competent, rather than to confer on them the power to assign judicial status to persons or bodies that would not otherwise possess it. But if the effect of the Framework Decision were to be that only persons or bodies possessed of the attributes of impartiality and independence were to be considered as eligible judicial authorities, the need for the article 6 power is not easy to find. If *only* an independent and impartial body or person could fulfil that role, the purpose in allowing member states to identify such a person or body seems otiose.

106. It seems to me likely, therefore, that the Court of Justice would find that the role of prosecutors in issuing arrest warrants for those whose extradition was sought, traditional in many member states before the introduction of the Framework Decision, was not extinguished by its provisions. That preliminary conclusion is strongly fortified by the consideration that a significant number of member states have nominated public prosecutors as issuing judicial authorities since the Framework Decision has come into force. Once again I agree with Lord Mance that, alone, this is not a conclusive factor. Article 31.3(b) of the Vienna Convention on the Law of Treaties requires that subsequent practice in the application of the treaty "which *establishes the agreement* of the parties regarding its interpretation" (emphasis supplied) is to be taken into account.

107. In the passage from Villiger in *Commentary on the 1969 Vienna Convention on the Law of Treaties,* (Leiden, 2009) quoted by Lord Dyson at para 130 of his judgment, it is suggested that what is required to establish the agreement of the parties is that there should be active practice on the part of at least some of the parties to the treaty; that this should not be haphazard; and it must have been acquiesced in or – at least – not objected to by the other parties. Lord Dyson considered that the practice of appointing prosecutors as judicial authorities was sufficiently widespread and free from objection to meet these criteria and, in so far as this conclusion relates to judicial authorities who issue European Arrest Warrants, I agree. Lord Mance has suggested, however, that the appointment by some member states of prosecutors to the role of executing judicial authorities is "suspect" and that therefore the requirements of article 31.3(b) had not been fulfilled so far as those appointments are concerned.

108. It is, I think, unnecessary for the purposes of this appeal to decide whether the nomination of prosecutors as competent to perform some of the functions of the executing judicial authorities is capable of prompting the invocation of article 31.3(b). I certainly agree with Lord Mance that some of those functions could only be discharged by a judicial figure or body such as a judge or a court. The appointment of a prosecutor as the *exclusive* executing judicial authority is, therefore, of dubious validity. That does not mean (or, at least, does not necessarily mean) that the fact that some member states have included prosecutors among the judicial authorities that could discharge *some* of the executing functions is irrelevant to the possible use of article 31.3(b) in relation to those functions which need not be carried out by a judge or court. But that does not need to be decided now. The critical question in the present appeal is whether there is a sufficiently widespread and uncontroversial practice in relation to issuing authorities to allow that provision to come into play in the case of prosecutors who issue European Arrest Warrants. As I understand it, Lord Dyson's conclusion that there is has been accepted by Lord Mance and I agree with both.

109. Even if I had been of the view that the necessary pre-conditions for the activation of article 31.3(b) were not present, the possible relevance of such practice as exists would not have ended there. As Lord Mance has pointed out, Brownlie in *Principles of Public International Law*, 7th ed (2008), suggests that subsequent practice by individual parties, falling short of showing that there has been universal agreement as to the propriety of the nomination of judicial authorities, is nevertheless of "some probative value". The continuing widespread use of prosecutors as issuing judicial authorities, without demur from the European Commission, and with apparent acceptance by member states who have nominated only judges or courts as their own issuing judicial authorities must, on any showing, indicate strongly that the Framework Decision does not exclude prosecutors from the category of issuing judicial authorities.

110. Lord Mance has concluded that the "European legal answer" is obscure. The legal answer in this context is, presumably, that to be given to the question, may a prosecutor be an issuing judicial authority for the purposes of the Framework Decision. While I am prepared to accept that the answer to that question is not immediately obvious, I would certainly not be disposed to agree that the answer is obscure, if by that term it is meant that its meaning is uncertain or doubtful. In my view there really can be no doubt that the Framework Decision permits prosecutors to be issuing judicial authorities for European Arrest Warrants and must therefore be taken as having intended that prosecutors should fulfil that role. That being the case, must the Extradition Act 2003 be interpreted in a way that will accord with that intention?

111. In *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, Lord Bingham said that the interpretation of the 2003 Act "must be approached on the twin assumptions that Parliament did not intend the provisions of Part 1 [of the Act] to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of co-operation by the United Kingdom than the Decision required, it did not intend to provide for less". Lord Mance has identified a possible tension between this approach and that of Lord Hope in the same case where the latter said, at paras 20, 24, that the introduction of the European arrest warrant system was highly controversial and that there were limits to the principle that extradition treaties and statutes should receive "a broad and generous construction", because the liberty of the subject was at stake. These considerations led Lord Hope to the view that where there were differences between the Framework Decision and the 2003 Act, it was to be assumed that Parliament had introduced those differences in order to protect against unlawful interference with the right to liberty.

112. It had been assumed that the decision of the Court of Justice of the European Union in *Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83 would require national courts, in applying national law which purported to

give effect to the Framework Decision, to do so in a manner that will "attain the result which it pursues" (para 43), Lord Mance has now authoritatively demonstrated that this is not the case. But of the proposition that the 2003 Act was enacted in order to give effect to the Framework Decision there can be no doubt. The domestic law presumption that Parliament did not intend to legislate contrary to the United Kingdom's international obligations under the Framework Decision may not be as strong in terms of injunctive force as the *Pupino* prescription but it is nevertheless a factor of considerable potency in determining the proper interpretation to be given to the 2003 Act.

113. This is particularly so in light of the scheme of surrender that the Framework Decision introduced. As Lord Dyson has pointed out, the "twin assumptions" referred to by Lord Bingham in *Cando Armas* did not depend on the *Pupino* principle. Importantly, Lord Bingham considered it clear that Parliament must be taken to have intended that the 2003 Act would provide a measure of co-operation by the United Kingdom which at least matched that provided for in the Framework Decision. To give the expression "judicial authority" a different meaning and scope for the purpose of the 2003 Act from that in the Framework Decision would reduce significantly the level of co-operation by the United Kingdom from that intended by the Framework Decision. This would, at a stroke, prevent extradition to the significant number of member states who have nominated public prosecutors as issuing judicial authorities.

114. Lord Mance has painstakingly analysed much of the legislative history of the 2003 Act and has concluded that ministers gave repeated assurances or allowed assumptions to be made that an issuing judicial authority would have to be a court, judge or magistrate before a surrender warrant could be executed in the United Kingdom. I agree with Lord Dyson that the various utterances and statements made by ministers do not partake of the clear and unequivocal character that would permit a confident view to be performed that it was *Parliament's intention* (as opposed to an individual minister's aspiration) that an issuing judicial authority must be a court. Quite apart from this, however, there are compelling reasons for concluding that, whatever may have exercised individual ministers or members during the passage of the Bill which became the 2003 Act, Parliament cannot be taken as having intended to legislate in a way that confined judicial authority to the scope of application for which the appellant contends.

115. For this to be the parliamentary intention, rather than the hope and expectation of some Members of Parliament or even ministers, an unambiguous intent would have had to be formed that the new surrender scheme would be severely curtailed in terms of its operation in the United Kingdom. It would be surprising, not to say astonishing, if it was considered that such a radical circumscription of the operation of the new scheme could be achieved by using the same term as was employed in the Framework Decision, "judicial authority". This

would involve giving the term a significantly more restricted meaning than that it enjoyed in the Framework Decision context. Why would precisely the same expression be used by Parliament if it was meant to have a markedly different connotation? If it was intended that judicial authority should mean a court, why should that not be made unmistakably clear? Finally, Parliament's intention to depart from the Framework Decision's meaning of the term judicial authority would involve a rebuttal of the strong presumption that it would legislate in a way that would fulfil its international obligations. It cannot have been lost on legislators here that, if the United Kingdom was prepared only to execute warrants from judicial authorities that were courts or the like, there was at least a distinct possibility that warrants from a significant number of countries would not be executed. I cannot believe that Parliament could have intended to espouse an interpretation which would effectively debar extradition from a number of the subscribing states to the Framework Decision.

116. Returning to the theme of the possible tension between the views of Lord Bingham and Lord Hope on the possible significance in differences between the 2003 Act and the Framework Decision, it is true , as Lord Mance has pointed out in para 205 of his judgment, that Lord Hope repeated what he had said in *Cando Armas* in para 35 of his speech in *Dabas* but this must be viewed in light of the subsequent case of *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] UKHL 51, [2008] 1 WLR 1724 in which Lord Hope expressed unqualified agreement with the opinion of Lord Bingham. At para 23 of Lord Bingham's speech he said:

> "Providing as they do for international co-operation between states with differing procedural regimes, the Framework Decision and the 2003 Act cannot be interpreted on the assumption that procedures which obtain in this country obtain elsewhere. The evidence may show that they do not. Such was the case in *In re Coppin* LR 2 Ch App 47, where Lord Chelmsford LC considered a form of judgment unknown in this country, and in R *v Governor of Brixton Prison, Ex p Caborn-Waterfield* [1960] 2 QB 498, where the court examined and contrasted the legal effect, in France, of on the one hand a jugement par défaut and an arrêt de contumace and on the other a jugement itératif défaut: the latter was final, the former were not. The need for a broad internationalist approach signalled by Lord Steyn in *In re Ismail* [1999] 1 AC 320, 326-327 is reinforced by the need to pay close attention to whatever evidence there is of the legal procedure in the requesting state."

117. It would be destructive of the international co-operation between states to interpret the 2003 Act in a way that prevented prosecutors from being recognised as legitimate issuing judicial authorities for European Arrest Warrants, simply

because of the well-entrenched principle in British law that to be judicial is to be impartial.

118. Lord Mance has suggested that Parliament had correctly identified that the Framework Decision was not conclusive. This was a reference to general observations by the minister, Lord Filkin, during the passage of the Bill through the House of Lords, to the effect that Parliament had the power to amend laws, notwithstanding the expectation that, where the government had been a party to a "framework agreement", it would give effect to this in national law.

119. Lord Filkin's comments do not provide the basis for a conclusion that the meaning of the Framework Decision is obscure or that there is any ambiguity as to the meaning of "judicial authority" in this instrument and the 2003 Act. If, as I consider it to be, the purpose of the Framework Decision is to sanction the issue of European Arrest Warrants by persons who did not possess the attributes of impartiality and independence by recognising that they may qualify as judicial authorities, there is no difficulty as a matter of textual analysis in ascribing the same meaning to section 2(2). As Lord Filkin said, Parliament is sovereign. As a matter of constitutional theory, it could decide to restrict the meaning of judicial authority to a narrower compass than that intended by the Framework Decision. In my view, there is no reason to conclude that it did so. I would therefore dismiss the appeal.

LORD DYSON

Introduction

120. On 27 September 2010, the Swedish Prosecution Authority ordered the arrest of Mr Assange in respect of complaints by two women of rape and sexual molestation. The lawfulness of the order was challenged Mr Assange in the Svea Court of Appeal in Sweden. The Court of Appeal upheld the arrest warrant and on 2 December 2010 a European Arrest Warrant ("EAW") was issued by Marianne Ny, a Director of Public Prosecutions with the Swedish Prosecution Authority, seeking the arrest and surrender of Mr Assange who was in England at the time. The EAW described four offences of rape and sexual assault alleged to have been committed by him. The issue that arises in these proceedings is whether an EAW issued by a public prosecutor is a valid warrant issued by a "judicial authority" within the meaning of sections 2(2) and 66 of the Extradition Act 2003 ("the EA"). The Divisional Court (Sir John Thomas P and Ouseley J) held that it was.

The aim and objective of the Framework Decision

121. It is common ground that the EA was enacted in order to give effect to the Framework Decision on the European Arrest Warrant 2002/584/JHA ("the Framework Decision"). I agree with Lord Mance that, for the reasons that he gives at paras 207-217 below, the duty of conforming interpretation under European law, which the European Court of Justice held in *Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83 to exist in the context of framework decisions, does not apply in relation to the Framework Decision.

122. But there is no doubt that there is a "strong presumption" in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations: see, for example, per Lord Hoffmann in *R v Lyons* [2003] 1 AC 976, para 27. It is worth repeating what Lord Bingham said in *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1 at para 8, because his comments about the correct approach to the interpretation of the EA do not seem to have been influenced by the *Pupino* principle. He said:

> "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."

123. I would approach the correct interpretation of the EA in the same way. But before I reach the EA, I need to consider the meaning of the "issuing judicial authority" in article 6.1 of the Framework Decision.

124. It is important to start with the background to the Framework Decision which Lord Phillips has set out at paras 26 to 35 and 39 to 42. Its object was to replace the existing political state to state process of extradition with a simplified system of surrender involving judicial authorities. The new scheme was based on the principle that the Member States had mutual trust and confidence in the integrity of their legal and judicial systems and would therefore respect and recognise each other's judicial decisions. The preamble to the Framework Decision makes this clear:

> "(5) 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.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation."

125. The nature of the change was described well by Adv-Gen Ruiz-Jarabo Colomer in his opinion in *Advocaten voor de Wereld VZW v Leden van de Ministeraad* (Case C-303/05) [2007] ECR I-3633, 3651-3652:

"41. The move from extradition to the European arrest warrant constitutes a complete change of direction. It is clear that both concepts [extradition and surrender under an EAW] serve the same purpose of surrendering an individual who has been accused or convicted of an offence to the authorities of another State so that he may be prosecuted or serve his sentence there. However, that is where the similarities end.

42. In the case of extradition, contact is initiated between two sovereign States, the requester and the requested, each of which acts from an independent position. One state asks for the cooperation of the other State which decides whether to provide that cooperation on a case-by-case basis, having regard to grounds which exceed the purely legal sphere and enter into the scope of international relations, where the principle of opportuneness plays an important role. Accordingly, the intervention of politicians and criteria such as reciprocity and double criminality are justified because they have their origins in different spheres.

43. The nature of the situation changes when assistance is requested and provided in the context of a supranational, harmonised legal system where, by partially renouncing their sovereignty, States

devolve power to independent authorities with law-making powers."

The meaning of "judicial authority" in article 6.1

126. With this introduction, I can turn to the question of interpretation: what does the phrase "judicial authority" in article 6.1 of the Framework Decision mean? Clearly, it includes a judge. But is it limited to a judge? In answering these questions, it is necessary to bear in mind that the Framework Decision is a European instrument which was agreed by states which have different legal systems and traditions. As the Divisional Court pointed out, we should be careful not to be overly influenced by the legal systems and traditions of the United Kingdom with its long-established and deeply-rooted common law ideas of the essential characteristics of a judicial authority.

127. The language of the text is the correct starting point. But one immediately runs into the problem that the phrase "judicial authority" in the French version is "autorité judiciaire" and that "judiciaire" is capable of bearing a narrow meaning (which would coincide with the English common law idea of "judicial") and a wider meaning (pertaining to law or the legal system): see para 18 above. It follows that the use of the phrase "judicial authority" does not of itself provide the answer to the question of interpretation. It is necessary to look elsewhere.

128. Article 3(b) of the September 2001 draft Framework Decision provided that an "issuing judicial authority" means "the judge or the public prosecutor of a Member State, who has issued a[n EAW]". Lord Phillips suggests that there are two possible explanations for the decision to exclude the definition from the final version of the Framework Decision. The first is that it was to restrict the meaning of the phrase by removing the public prosecutor from the definition. The second is that it was to enlarge its meaning so as not to restrict it to a judge or public prosecutor. We have seen no material which explicitly shows why the Member States agreed to make the change. Lord Phillips has given a number of inferential reasons for concluding that the second explanation is the more probable. Rather than seeking to infer the reason why the Member States changed the definition, I prefer to concentrate on how the relevant part of the Framework Decision has been applied and viewed in practice.

129. I agree with Lord Phillips that the manner in which the Member States, the Commission and the Council acted after the Framework Decision took effect was in stark conflict with a judicial authority being restricted to a judge. The statistics are that in relation to accusation EAWs, in 11 Member States the issuing authority is a public prosecutor, in 17 it is a judge and in 2 it is the Ministry of Justice. In

relation to conviction EAWs, in 10 Member States the issuing authority is a public prosecutor, in 14 it is a judge and in 6 it is the Ministry of Justice or National Police Board.

130. Article 31.3 of the Vienna Convention on the Law of Treaties provides that, in interpreting a treaty, "there shall be taken into account, together with the context:…..(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation….." In his *Commentary on the 1969 Vienna Convention on the Law of Treaties*,(Leiden, 2009) Villiger states of article 31.3(b):

> "…it requires active practice of some parties to the treaty. The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must **establish the agreement of the parties regarding its interpretation.** Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection. "

131. The fact that it is only in the majority (and not all) of the Member States that the issuing judicial authority is a judge is not inconsistent with the existence of an agreement established by subsequent practice that a public prosecutor may be a judicial authority within the meaning of the Framework Decision. There is nothing to suggest that Member States which do not have public prosecutors as their issuing judicial authorities criticise those that do. More particularly, we have been shown no evidence that, until the present case, any executing state objected to surrendering a person on the grounds that the EAW was issued by a public prosecutor. In my view, this is powerful evidence that even those Member States whose issuing judicial authorities are judges acquiesce in EAWs being issued in other Member States by public prosecutors. That is a sufficient practice to establish agreement by the Member States.

132. As regards the Council, article 34.4 of the Framework Decision requires it to conduct a review of the practical application of the provisions of the Framework Decision by the Member States. The fourth round of mutual evaluations was assigned "to the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States." The evaluation process was conducted between March 2006 and April 2009. It is a striking feature of the evaluation reports that they contain no criticism of those states that have designated prosecutors as competent to issue EAWs; and the article 34 reports dated 24 January 2006 and 11 July 2007 contain no criticism of the use of public prosecutors as judicial authorities either. They do, however, find "regrettable" the fact that an "executive" body has been appointed as the competent judicial

authority by a number of Member States. This is clearly a reference to the designation of their Ministry of Justice by those states.

133. The Council's Final Report on the fourth round of mutual evaluations dated 28 May 2009 contains a complaint that in some Member States "non-judicial central authorities continue to play a role in cardinal aspects of the surrender procedure far beyond the administrative tasks assigned in the Framework Decison". This is clearly a reference to those states where the role of the judicial authority is assigned to the Minister of Justice or some emanation of the police. But I agree with Lord Phillips that there is no indication in this report either that it was objectionable for a public prosecutor to issue an EAW.

134. Denmark, Estonia, Finland, Germany and Lithuania all designated their Ministry of Justice as the issuing judicial authority. The evaluation reports on Denmark, Germany and Lithuania criticised these designations, although the reports did not criticise the Estonian or Finnish designations. Miss Rose QC submits that these omissions suggest that caution should be exercised in attaching too much significance to what is *not* stated in evaluation reports. The reports cover a great deal of ground and their main concern is to see what problems are occurring in relation to the application of the EAW system as a whole. It can also be said that these reports contain little criticism of those states that have designated prosecutors to *execute* EAWs either. And yet, as was recognised by the Divisional Court and as is common ground, only a judge is a judicial authority for the purpose of executing an EAW.

135. I would, therefore, accept that the evaluation reports and the article 34 reports should be treated with some caution. They do not purport to be authoritative rulings on the implementation of the Framework Decision. But they do contain some criticisms of the practice of the Member States. It is striking that there is no criticism of the use of public prosecutors as judicial authorities. In my view, they provide support for the view that a public prosecutor can be an issuing judicial authority within the meaning of article 6.1 of the Framework Decision.

136. A further point made by Miss Montgomery QC is that in *Criminal proceedings against Leymann and Pustovarov* (Case C-388/08) [2008] ECR I-8983, the ECJ made no adverse comment on the fact that the case concerned proceedings in Finland resulting from the issue of an EAW by the Helsinki District Public Prosecutor. But in my view, it would be wrong to make too much of this point, since it is not discussed in the judgment of the court.

137. Apart from the way in which the relevant provision of the Framework Decision has been applied in practice by the Member States and viewed by the

Council and the Commission, there is further support for the view that the Member States considered that a public prosecutor could be an issuing judicial authority. First, as we have seen, an issuing judicial authority was defined in the September 2001 draft as meaning "the judge or the public prosecutor of a Member State". Miss Rose submits that the withdrawal of this definition shows that the Member States decided that a public prosecutor would *not* be included in the definition of an issuing judicial authority. As I have said, there is no evidence as to why they decided to abandon this definition. But more important for present purposes is the fact that, at one stage in the negotiations, the Member States were willing to countenance the idea that an issuing judicial authority should include a public prosecutor. If they had been of the view that a judicial authority could not in any circumstances be a public prosecutor, it is remarkable that they were willing to include a public prosecutor in the definition at any stage of the negotiations. In my view, the inclusion of a public prosecutor in the definition of a judicial authority in the September 2001 draft shows that the Member States did not regard it as objectionable in principle to treat a public prosecutor as a judicial authority.

138. Secondly, it is instructive to consider other instances where the term "judicial authority" has been adopted in other analogous EU instruments which (like the Framework Decision) seek to further a system of "free movement of judicial decisions … within an area of freedom, security and justice": see recital 5 of the preamble to the Framework Decision. Among the other Framework Decisions based on the Tampere Proposals (to which Lord Phillips refers at para 42 above) is the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant ("EEW") for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Recital 8 of the preamble sets out the meaning of "judicial authority" in these terms:

> "The principle of mutual recognition is based on a high level of confidence between Member States. In order to promote this confidence, this Framework Decision should contain important safeguards to protect fundamental rights. The EEW should therefore be issued only by judges, courts, investigating magistrates, public prosecutors and certain other judicial authorities as defined by Member States in accordance with this Framework Decision."

139. It goes on to provide at article 2:

> "(c) 'issuing authority' shall mean:
>
> (i) a judge, a court, an investigating magistrate, a public prosecutor or

(ii) any other judicial authority……"

140. The Explanatory Memorandum to the proposal for the EEW Framework Decision explained at para 47: "In the issuing State, the issuing judicial authority is limited to judges, investigating magistrates or prosecutors".

141. Similarly, the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement agencies of the Member States in defining a "criminal investigation" refers to "a procedural stage within which measures are taken by competent law enforcement or judicial authorities, including public prosecutors…."

142. There are other examples to similar effect, but it is unnecessary to refer to any more. Miss Rose submits that these examples show that, where an EU mutual recognition instrument intends to empower a public prosecutor to exercise functions that are to be mutually recognised, it says so. By way of contrast, she points to other Framework Decisions where the term "judicial authority" is not defined, for example, the Framework Decision on the execution in the European Union of orders freezing property or evidence, 22 July 2003 (2003/577/JHA) and the Framework Decision on the application of the principle of mutual recognition to confiscation orders, 6 October 2006 (2006/783/JHA). She submits that the scheme of these instruments (and others like the Framework Decision), where the judicial authority is not defined, is that Member States may select from within their pool of judicial authorities, as defined by human rights norms and jurisprudence, the subset which are competent to perform the allotted task. But the important point for present purposes is that it can be seen that there are EU instruments, whose aim is to promote co-operation and mutual recognition by Member States in criminal matters within the EU area, which define a judicial authority as including a public prosecutor. This is further evidence that there is a common understanding among the Member States that, at any rate in the context of instruments whose purpose is to promote such an aim, a public prosecutor may be a judicial authority.

143. In my view, the material that I have set out at paras 129 to 140 above provides formidable support for the respondent's case. The principal argument that Miss Rose advances the other way is that, since there is no definition of "judicial authority" in the Framework Decision, the expression should be construed in accordance with established EU law norms. She argues as follows. All EU Member States are High Contracting Parties to the European Convention on Human Rights (ECHR") and it is a fundamental norm of EU law that EU measures should not be construed in a manner which is inconsistent with the ECHR: see, for example, *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforasiss* (Case C-260/89) [1991] ECR I-2925. Article 6 of the Treaty on European Union ("TEU") provides:

> "(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties….
>
> (2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms….
>
> (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

144. I accept that the EAW system was always intended to comply with the ECHR. Thus recital 12 to the preamble to the Framework Decision provides that "This Framework Decision respects fundamental rights and observes the principles recognised by article 6 of the [TEU] and reflected in the Charter of Fundamental Rights of the European Union....". Article 1.3 of the Framework Decision states: "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the [TEU]..."

145. The importance of upholding fundamental rights has been repeatedly emphasised by the Commission. It is sufficient to refer to its *Green Paper on Strengthening mutual trust in the European judicial area* (2011) COM/2011/ 0327 which confirms at para 3.1:

> "While the EAW has proved to be a very useful tool to ensure that criminals cannot use borders to evade justice, particularly in relation to serious and organised crime with a cross-border dimension, its implementation, including the core principle of mutual recognition on which it is based, must respect fundamental rights…."

146. Moving from the general to the particular, Miss Rose relies on the jurisprudence of the European Court of Human Rights ("the ECtHR") to support the proposition that public prosecutors cannot be "officer[s] authorised by law to exercise judicial power" within the meaning of article 5(3) of the ECHR. There is no doubt that this proposition is correct. The leading authority is *Schiesser v Switzerland* (1979) 2 EHRR 417. An officer authorised by law to exercise judicial power must be independent of the executive and of the parties. This principle was

applied in *Skoogström v Sweden* (1983) 6 EHRR 77 where it was held that a Swedish prosecutor could not be a judge or other officer authorised by law to exercise judicial power. This was not because the prosecutor was part of the executive. That fact alone did not mean that the public prosecutor was not independent for the purposes of article 5.3, because the public prosecutor enjoyed a "personal independence". But the court held that the Swedish public prosecutor did not satisfy the requirements of article 5.3 because he or she was not independent of the parties. Miss Rose places particular reliance on *Skoogström* because it is a decision about the Swedish public prosecutor.

147. In short, therefore, she submits that a construction of "judicial authority" in the Framework Decision which conforms to ECHR principles must lead to the conclusion that a public prosecutor does not satisfy the definition. The decisions of the ECtHR on article 5.3 are determinative.

148. I cannot accept this argument. As we have seen, the Framework Decision "respects fundamental rights" and "shall not have the effect of modifying the obligation to respect fundamental rights". But as Miss Montgomery points out, there is no principle of ECHR law which requires decisions to arrest to be made by an impartial judge. Arrests may be ordered and effected by persons (such as police officers) who are not judges and who are not impartial. The lawful arrest or detention of a person effected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence is specifically authorised by article 5.1(c) of the ECHR. There is no requirement that the person authorising the arrest should be a judge or be impartial. The protection provided by article 5 is that the individual arrested is brought promptly before a judge or other officer authorised by law to exercise judicial power and that he is able to take proceedings by which the lawfulness of his detention is decided quickly by a court and his release ordered if the detention is not lawful.

149. It can, therefore, be seen that the premise on which the appellant's argument is based, namely that article 5.3 of the ECHR applies to the issue of an EAW, is without foundation. Article 5.3 of the ECHR cannot be used as a basis for the argument that "judicial authority" in article 6 of the Framework Decision should be interpreted as limited to a judge. That is not to say that the rights protected by the ECHR are irrelevant to the Framework Decision. That would be quite wrong: see para 144 above. It is unnecessary to explore the reach of the ECHR as regards the implementation of the Framework Directive. It is sufficient to say that article 5.3 sheds no light on the meaning of "judicial authority".

150. The other argument advanced by Miss Rose is that "judicial authority" in article 6.1 must be given the same meaning as it bears in article 6.2 and that, since

in article 6.2 it is limited to a judge, it must similarly be limited in article 6.1. I would reject this argument for the reasons given by Lord Phillips at para 75 above.

151. I would, therefore, dismiss this appeal. To interpret an issuing judicial authority as including a public prosecutor gives a meaning to that phrase which (i) accords with the interpretation repeatedly applied and acquiesced in by the Member States and approved by the Council and the Commission, (ii) is supported by other analogous texts and (iii) promotes rather than frustrates the principle of mutual recognition and trust which underpins the Framework Decision. On the other hand, the only arguments advanced by Miss Rose in support of the contrary interpretation are, for the reasons that I have given, without foundation.

152. There was some discussion before us as to the essential characteristics of an issuing judicial authority. Miss Montgomery suggested that it is sufficient that the person or body is authorised to perform some function in the judicial process. But that is too wide. Without descending to the absurdity of including court ushers and other similar court officials, it seems to me that this definition would certainly be wide enough to include the police and officials employed by a Ministry of Justice. And yet it seems to be accepted (at any rate as revealed by the Council reports) that neither the police nor a Ministry of Justice official can be an issuing judicial authority, although, so far as I am aware, the reasons for this have not been articulated. The Divisional Court said at para 47 of its judgment that a warrant issued by a Ministry of Justice which the Member State had designated as an authority under article 6 would not be a valid EAW. Such a warrant would "self-evidently not have been issued by a body which, on principles universally accepted in Europe, was judicial". They did not, however, explain what these principles are or why, notwithstanding that in a number of Member States the Ministry of Justice has been designated as their judicial authority, these designations are of no effect.

153. I think that the Divisional Court were wise not to attempt a comprehensive definition. I am inclined to think that the essential characteristics of an issuing judicial authority are that it should be functionally (but not necessarily institutionally) independent of the executive. As we have seen, the fundamental objective of the Framework Decision was to replace a political process with a non-political process. This could only be achieved if the new "judicialised" system was operated by persons who de facto operated independently of the executive. But it is not necessary to explore this question further, since, for the reasons that I have given, I am satisfied that a public prosecutor is an issuing judicial authority within the meaning of article 6.1.

154. The reasons that I have given coincide with the fifth reason given by Lord Phillips (paras 67 to 71). I would, however, like to comment on the other reasons given by Lord Phillips for dismissing the appeal.

Lord Phillips's other reasons

155. Lord Phillips's first reason (para 61) is that, if it had been intended to restrict the power to issue an EAW to a judge, he would have expected this to be expressly stated. It would have been a radical change and would have prevented public prosecutors from performing functions that they had been performing in relation to the issue of provisional arrest warrants since 1957. As we have seen, the Framework Decision ushered in a fundamentally different regime from its predecessor. Under the European Convention on Extradition 1957 ("the ECE"), the act of extradition was an inter-governmental act. The "judicialisation" of the extradition process was accompanied by a number of substantive changes whereby the circumstances in which surrender could take place were expanded. Thus, for example, a substantial number of serious offences (defined in article 2 of the Framework Decision) would give rise to surrender pursuant to an EAW "without verification of the double criminality of the act". This was an important relaxation of the conditions for surrender. I acknowledge that article 16.1 of the ECE provided that "in case of urgency, the competent authorities of the requesting Party may request the provisional arrest of the person sought" and that the term "competent authorities" included public prosecutors (see para 26 above). But I doubt whether much can be made of this. The point can also be made that in some Schengen States, the police, security police, tax and customs authorities are competent to decide on article 98 alerts (see para 40 above). And yet nobody suggests that this means that these authorities may be judicial authorities within the meaning of the Framework Decision. In my view, the fact that the two regimes were so different means that the arrangements that were made pursuant to the ECE cast little light on the proper interpretation of the Framework Decision. I do not consider that there is any real significance in the fact that the Framework Decision did not explicitly state that only a judge had the power to issue an EAW.

156. Lord Phillips's second reason (paras 62 to 64) is that there was no need to restrict the ambit of the issuing judicial authority. This is because the significant safeguard against the improper or inappropriate issue of an EAW lay in the antecedent process which formed the basis of the EAW. The EAW was of less significance than the enforceable judgment, arrest warrant or other enforceable judgment having the same effect on which the EAW is based: see article 8.1(c) of the Framework Decision.

157. But an EAW is defined by article 1.1 as a "judicial decision" and article 8.1(c) requires evidence of "an enforceable judgment, an arrest warrant or any other enforceable *judicial decision* having the same effect, *coming within the scope of articles 1 and 2"* (emphasis added). As Miss Rose pointed out in her reply, if an EAW is a judicial decision which may be issued by a public prosecutor, then so may an arrest warrant or other enforceable judicial decision be issued or made by a public prosecutor. It is impossible to give the phrase "judicial decision" different

meanings in article 1.1 and article 8.1(c). In any event, even if the antecedent warrant or other judicial decision is issued or made by a judge, I would not agree that the subsequent issue of an EAW is or should be regarded as "an essentially administrative step in the process" (para 74 above). Of course, the issue of a domestic arrest warrant is a serious matter. But a person who is arrested will often be able to apply for bail so that the consequences for him of the arrest may be limited. He may be able to continue in his employment and to live in his home. The implications of an EAW are likely to be more serious. Unless he can rely on the limited grounds for resisting surrender in the executing state, he will be removed to a different state, possibly many hundreds of miles away. In short, I do not think that the nature of the antecedent process provides support for the view that a public prosecutor is an issuing judicial authority.

158. The third reason given by Lord Phillips (para 65) is that the removal of the definition of a "judge or public prosecutor" was not because Member States wished to narrow its meaning to a judge, but because they were not content that its meaning should be restricted to a judge or public prosecutor. There is nothing in the considerable documentation that has been placed before us which indicates that the Member States decided to enlarge the scope of an issuing judicial authority or why they should have wished to do so. We know that the definition of an *executing* judicial authority in the Framework Decision (ie limited to a judge) was *narrower* than that contained in the September 2001 draft. But our knowledge of that fact is based solely on an examination of the wording of the two documents. We do not know why the Member States made this change either. In my view, there is no secure basis for reaching any conclusion as to the reasons why the definition of issuing and executing judicial authorities was changed.

159. The fourth reason given by Lord Phillips (para 66) is that the requirement in article 6.3 of the Framework Decision to inform the General Secretariat of the Council of "the competent judicial authority under its law" makes more sense if there is a range of possible judicial authorities. I agree that article 6.3 envisages the possibility of a range of different judicial authorities. But I do not see how this sheds light on whether a public prosecutor may be one of them. A Member State may choose to give the power to issue an EAW to a particular judge or a judge of a particular court. It makes perfectly good sense for it to be known by the executing state which judge or which court is authorised to issue an EAW. In short, I consider that article 6.3 is consistent with either of the two competing interpretations.

The meaning of issuing judicial authority in the EA

160. The "strong presumption" to which I have referred at para 122 above suggests that the phrase "judicial authority" should bear the same meaning in

section 2(2) of the EA as it does in article 6.1 of the Framework Decision. In my view, the presumption is all the stronger where (as here) the language of the implementing national law is the same as that of the corresponding provision of the international instrument to which it gives effect. There is nothing in the language of the EA itself which indicates that Parliament intended that an issuing "judicial authority" in section 2(2) should bear a different meaning from the counterpart phrase in article 6.1. Lord Mance appears to accept this. But he has subjected certain ministerial pre-enactment statements to close scrutiny and has concluded that ministers "repeatedly gave assurances or endorsed assumptions that an issuing judicial authority would have to be a court, judge or magistrate" (para 261) and that these assurances "should control [the] meaning [of the phrase "judicial authority"] (para 264).

161. I would not go so far as to say that it is impossible to invoke the doctrine of *Pepper v Hart* [1993] AC 593 in a context such as this. But at first sight, it seems extraordinary to do so if the consequence is that a phrase in an implementing national law bears a different meaning from the same phrase in the international instrument to which it gives effect. The suggestion that the phrase in the implementing law bears a different meaning invites the obvious comment that, if the same meaning had not been intended, surely different language would have been used.

162. I accept that there are some passages in the parliamentary exchanges in relation to what was to become the EA in which ministerial assurances were given that an issuing judicial authority would be a "court". But some of the statements were by no means entirely clear. On 10 December 2001, Mr Ainsworth, when pressed by Mrs Dunwoody, said that the only people who would be allowed to issue an arrest warrant would be "*a judicial authority as recognised normally within either the issuing* or the executing state.....In [countries other than this country], there are various different authorities *such as* magistrates and judges who normally issue extradition warrants. Those are the people who will execute a European arrest warrant" (emphasis added). As I have already said, in a substantial number of these other countries, public prosecutors had been issuing provisional arrest warrants since 1957.

163. On 9 January 2002, Mr Ainsworth said that the issuing authority "will have to be that, a judicial authority and a court, so it will not be for the British authorities to say what is and what is not a court in another European state, but it will not be possible for authorities that *clearly* are not courts, that are not judicial authorities to issue requests...." (emphasis added). Later, he said that a warrant "shall be a court decision" and "it cannot be a police authority, but it must be a court, a judicial authority". Later still, he said: "there are different legal systems that apply in different parts of the European Union, but there are clear judicial authorities who apply for extradition and who will be the authorities that have the

power to apply for a European arrest warrant." Two points emerge from these statements: (i) a police authority was not a judicial authority, but some European systems were different from ours and it was not for the United Kingdom to say what was a court in other countries (although an authority that was *clearly* not a court was not a judicial authority); and (ii) the judicial authorities who issued warrants under the existing system would issue European arrest warrants under the new one.

164. On 9 January 2003**,** Mr Ainsworth made the important statement which is set out by Lord Mance at para 253 of his judgment. The minister said "We expect that European arrest warrants will be issued in future by exactly the same authorities as issue warrants under the current arrest procedures....The Bill is drafted in such a way as to include all those authorities that currently issue arrest warrants, as issuing authorities. I have yet to hear argument that says that we should change that." He went on to say that extradition requests come from "a variety of sources" and that there would be no change: "the framework document insists on no widening outwith the judicial authorities in the Part 1 countries.....The current system works well and has not given rise to any problems in the recent past stemming from an inappropriate request from a European partner for extradition. I see no reason to change the system".

165. On 9 June 2003, Lord Wedderburn said that he understood that the Government did not intend "that a public prosecutor should just be able to demand of someone who is on the list of designated judicial authorities that an arrest warrant be issued" and, if that was so, this should be made clear in the Bill. The minister's response was that he could not see what this would add, since, as he had already explained, "all warrants will have to be issued by a judicial authority". A little later, Lord Bassam said that he expected the judicial process in other countries to be "very similar to ours and as robust as ours" (Hansard (HL Debates) (GC) cols 34-37).

166. What is one to make of all these exchanges? In my view, the assurances that an issuing judicial authority would be a "court" did not clearly rule out the possibility that a judicial authority could include a public prosecutor. First (and crucially), the minister stated several times that European arrest warrants would be issued by the same authorities as issued arrest warrants under the existing system and that it was not intended to change that. I cannot agree with Lord Mance (para 262) that this does not undermine the force of the assurances given in relation to the new and more radical procedures being introduced by the EA. The statements that European arrest warrants would be issued by the same authorities as issued arrest warrants under the existing regime were inconsistent with an assurance that they could not be issued by public prosecutors. I do not see how these statements can be swept aside as Lord Mance seeks to do.

167. Secondly and in any event, it is not at all clear precisely what Mr Ainsworth meant by a "court" in his statement on 9 January 2002, except that it did not include a police authority. He said nothing about public prosecutors. But he did say that there were different European court systems and it was not for the United Kingdom to say what a court was; and that it would not be possible for any authority that was *clearly* not a court (in the eyes of the relevant European state) to be a judicial authority. It is at least uncertain whether a public prosecutor was a court in the eyes of some European states.

168. At the very least, I find it impossible to spell out of what was said by Mr Ainsworth in the passages to which I have referred at paras 161 to 163 a clear assurance that an issuing judicial authority could only be a court (as we understand that word), judge or magistrate.

169. Was this changed by what was said on 9 June 2003 and the subsequent amendments to which Lord Mance refers? It is clear that Lord Wedderburn was of the view that an issuing judicial authority should not include a public prosecutor and asked for it to be clarified in the Bill that a public prosecutor could not insist that a judicial authority issue an arrest warrant. I have referred to the minister's response which was merely that all warrants wild have to be issued by a judicial authority. In the light of all the exchanges during the preceding 18 months, I do not consider that this answer (or the subsequent amendments to which Lord Mance has referred) amounted to a clear assurance that, even if a public prosecutor was an issuing "judicial authority" within the meaning of the Framework Decision, it was not an issuing "judicial authority" in the corresponding provision in the EA.

170. I would, therefore, hold that the strong presumption that the phrase "judicial authority" bears the same meaning in section 2(2) of the EA as it does in article 6.1 of the Framework Decision was not rebutted by any assurances given by the minister during the progress of the Bill through Parliament. Taken as a whole, the minister's statements did not amount to assurances that were sufficiently clear to justify the conclusion reached by Lord Mance.

Conclusion

171. It follows that, for the reasons that I have given earlier (which coincide with Lord Phillips's fifth reason), I would dismiss this appeal.

DISSENTING JUDGMENTS

LADY HALE

172. I would allow this appeal for the reasons given by Lord Mance. My reasons for preferring his view to that of the majority can be briefly stated.

173. We are construing an Act of the United Kingdom Parliament. It is that Act which gives the courts the power to order the arrest, remand, and eventual extradition of an individual named in a European Arrest Warrant (EAW). Without the authority of an Act of Parliament it would not be possible to employ the coercive power of the state to deprive an individual of his liberty in this way. We are not here concerned with the reverse situation, where European law may have direct effect, irrespective of United Kingdom law, to confer rights against the state upon individuals or entities. Direct effect is expressly precluded by article 34.2(b) of the Treaty on European Union.

174. But community law goes further than that. It imposes an obligation on member states to interpret legislation in conformity with community law, even if on ordinary principles of statutory interpretation, this would not be possible. In *Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83, the Court of Justice made it clear that the principle of interpretation in conformity with Community law applies to the interpretation of framework decisions adopted under Title VI of the Treaty on European Union (para 43). But this obligation is limited by general principles of law (para 44). These include the principle that criminal liability cannot be determined or aggravated on the basis of a framework decision, independently of an implementing law (para 45). Further, the obligation ceases when national law cannot be applied compatibly with the result envisaged by the framework decision. In other words, the principle cannot serve as the basis for an interpretation of national law contra legem (para 47). As Paul Craig puts it, the domestic court is not required to give the legislation an interpretation "it cannot bear" (*Craig and De Burca, EU Law: Text, Cases and Materials*, 5th ed (2011), p 203).

175. In *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31 and *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] UKHL 51, [2008] 1 WLR 1724, it was assumed without argument that *Pupino* applied to the construction of the provisions of the Extradition Act 2003 implementing the Framework Decision on the European Arrest Warrant in United Kingdom law. However, as Lord Mance has convincingly shown, the source of that obligation in United Kingdom law lies in

section 2(1) of the European Communities Act 1972. This refers to obligations created or arising by or under "the Treaties" as defined in section 1 of the 1972 Act and it is now common ground between the parties that the Framework Decision falls outside this definition for the reasons explained by Lord Mance. Nor can section 3 of the 1972 Act affect the matter, again for the reasons given by Lord Mance. Section 3 is about the way in which the rule established in section 2 is to be put into effect, not about the extent of that rule.

176. It follows that the Framework Decision and the Court's decision in *Pupino* are not part of United Kingdom law. The principle of conforming interpretation does not apply. The Framework Decision is, of course, an obligation undertaken by the United Kingdom in international law. There is a long-standing presumption in common law that Parliament intends to give effect to the United Kingdom's obligations in international law. It has also been said that "extradition treaties, and extradition statutes, ought . . . to be accorded a broad and generous construction so far as the texts permit it": *In re Ismail* [1999] 1 AC 320, 327, per Lord Steyn. But that is only one among many canons of statutory construction. As Lord Hope pointed out in *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, para 24, "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". This is not, as he explained, an easy task, as the wording of Part I of the Extradition Act 2003 does not match that of the Framework Decision in every respect. He had earlier pointed out that the language of extradition is inappropriate to what is, in reality, a system of backing of warrants (para 22). But he concluded that "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" (para 24).

177. In this case, we have a situation where Parliament did use the same wording as the Framework Decision ("judicial authority"). But we also have a situation where the words in the Act of Parliament have (at least in my view) a clear meaning in United Kingdom law, while the words of the Framework Decision do not (at least in my view) have a clear meaning in Community law. Are we to disregard the clear meaning of the United Kingdom statute in order to conform to some unclear meaning of a European instrument which is only part of United Kingdom law to the extent that the 2003 Act makes it so? Given that we are concerned with a serious interference with the right to liberty, I take the view that we should apply the clear intention of the United Kingdom legislature.

178. I regard the point at issue in this case very differently from the points at issue in some of the other cases under this legislation. If a foreign judicial authority has faithfully followed the wording of the European Arrest Warrant annexed to the Framework Decision, we should do our utmost to hold that it

complies with our legislation. That authority cannot reasonably be expected to know what our legislation says. Furthermore, it is issuing a warrant which might be executed anywhere within the territories of the member states, so it cannot pander to the peculiar demands of one of those states. But the question of who is to issue a warrant which we are bound to execute is in a different category. This goes to the heart of the protection given to the individual against unwarranted interference with his right to liberty.

179. There is no authoritative interpretation of "judicial decision" or "judicial authority" in Community law. The United Kingdom has not accepted the jurisdiction of the Court of Justice in relation to the Framework Decision on the European Arrest Warrant so we cannot refer the question to the Court. Nor can the Commission take enforcement proceedings against the UK in respect of a perceived failure to implement it.

180. The Court of Justice would not give much weight to the travaux préparatoires (non-papers). In any event they are inconclusive. As Lord Mance points out, dropping the proposed definition of a judicial authority which included public prosecutors is consistent with (a) narrowing it so as to exclude prosecutors, (b) widening it so as to include others, or (c) a lack of consensus thus leaving it to the ECJ to interpret as a matter of principle.

181. As a matter of principle, it is apparent that prosecutors do enjoy a special status in many European countries. In particular they are expected to take their decisions independently of the executive. However, even in countries where they do enjoy such status, a principled distinction could be drawn between a prosecutor who is independent of the prosecution in the particular case and a prosecutor who is in fact a party to the case in question. The Framework Decision defines a European Arrest Warrant as a "judicial decision" and by no stretch of language could a decision taken by a party to the case be termed "judicial".

182. There are also several good reasons to conclude that it was not intended that "judicial authority" should bear the much wider meaning contended for by Miss Montgomery on behalf of the prosecutor in this case. First, objection has been taken both by the Commission and the Council to the police and the Ministry of Justice being designated as competent judicial authorities. But if it is permissible to go beyond a court, tribunal, judge or magistrate, on what principled basis does one stop at prosecutors rather than any other public official who is in some way associated with the administration of justice? Would it include prosecutors in this country, where they do not enjoy the special status of prosecutors in some (but by no means all) European countries, or would it depend upon their particular status in the country in question? If so, what would the characteristics of that status be?

183. Second, it is clear that many of the functions of an executing authority are only appropriate to a court, yet article 6.1 and 6.2 use the same phrase – "judicial authority" – in relation to both. It does contemplate different authorities being designated as competent in relation to the different functions, but both must be a "judicial authority". Are we to take it that a different definition of "judicial" is appropriate to the choice of issuing authority than is appropriate to the choice of executing authority? Why should the meaning of "judicial" be different in each case?

184. Thirdly, in the initial draft it was possible to see the issue of an EAW as an administrative step following an earlier court decision. There had to be a prior judgment or enforceable judicial decision, after which a "request" for assistance was issued by a judicial authority in one member state and addressed to any other member state. The structure is different in the eventual Framework Decision. The European arrest warrant is a "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person" (article 1.1). The warrant has to contain "evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect" (article 8.1(c)). Thus the underlying process has been widened and cannot be read as requiring greater independence or affording greater protection than the "judicial decision" to issue the European arrest warrant.

185. In those circumstances it is difficult to predict what the Court of Justice would decide if the point were to be raised with them. It may be right that they would recognise some prosecutors as judicial authorities but if so it is not clear on what basis they would distinguish between those prosecutors and others or between prosecutors and other bodies. Nor is it clear whether they would distinguish between a prosecutor with conduct of the case and a prosecutor who is independent of it. It is difficult, therefore, to know how we are to interpret the Act consistently with Community law when it is not clear – and under the present arrangements cannot be made clear to us – what Community law is on this point.

186. Lord Phillips gives five reasons for concluding that the changed draft Framework Decision was intended to broaden the meaning from judge or prosecutor (para 60). Lord Dyson (with whom Lord Walker agrees) disagrees with four of them. First, Lord Phillips would have expected the restriction to a judge to be expressly stated because it was a radical change from the position under the European Convention on Extradition, where prosecutors had been able to issue provisional arrest warrants (para 61). Lord Dyson rejects this reason as the two regimes are so different and the European arrest warrant regime is notably wider in scope than the earlier Convention (doing away with double criminality for framework offences and, I would add, requiring states to extradite their own nationals**)** (para 155). Furthermore it does little to support the suggestion that it was intended to go further than prosecutors. I agree.

187. Second, why would they wish to limit the issue of the European arrest warrant when the significant safeguard against improper issue lies in the antecedent process (paras 62 to 64)? Lord Dyson rejects this as article 8.1(c) refers to "an enforceable judgment, an arrest warrant or any other enforceable judicial decision" and "judicial decision" cannot mean something different in articles 1.1 and 8.1(c) (paras 156-157**).** I agree with that, but observe that both are happy to give "judicial authority" a different meaning in article 6.1 and 6.2.

188. Third, it was likely that they removed the definition because they were not content to limit it to judges and prosecutors (para 65). That is not a reason independent of his conclusion. Lord Dyson rejects it because we do not know why the change was made **(**para 158). Furthermore, it is difficult to reconcile the even broader meaning with the objections taken to other authorities being designated competent authorities. Again, I agree.

189. Fourth, the requirement to notify the Council which are the competent judicial authorities under the law of the member state makes more sense if there is a range (para 66). But as Lord Dyson points out (para 159) it also makes perfect sense if a member state wishes to designate a particular court as the competent authority. For England and Wales, of course, the competent judicial authority is a district judge sitting in the Westminster Magistrates' Court. The executing state will need to be able to check whether the issuing authority is competent to issue. It says nothing about the nature of that authority. Again, I agree.

190. However, Lord Dyson does agree with Lord Phillips' fifth reason: that the manner in which member states, the Commission and the Council acted after the Framework Decision took effect is "in stark conflict" with restricting a judicial authority to a judge (para 67). What this amounts to is that some member states have designated prosecutors and sometimes other bodies for the purpose of article 6.1 and/or 6.2. No objection has been taken by the Council or the Commission to designating prosecutors but objection has been taken to designating the police or the Ministry of Justice. This is an odd reason to conclude that the *change* was intended to *broaden* the scope of "judicial authority" beyond prosecutors. It is more plausibly a reason for concluding that no change was intended. The real relevance, as Lord Kerr and Lord Dyson see it, is as evidence of subsequent state practice.

191. Article 31.3(b) of the Vienna Convention on the Law of Treaties provides that there shall be taken into account, along with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". While the *practice* need not be that of all the parties to the treaty (as in this case it obviously is not) the practice has to be such as to establish the *agreement* of all the parties as to its interpretation. Given the

lack of common or concordant practice between the parties, is the failure to date of those countries which do not authorise prosecutors and other bodies to object to those who do sufficient to establish their agreement? Nobody in this country seems to have addressed their mind to the issue until it arose in this case. Failure to address minds to an issue is not the same as acquiescence in a particular state of affairs. Subsequent practice does not give support to the respondent's extreme position and there has been no consideration of the principles which might distinguish some prosecutors from others. This seems to me to be a rather flimsy basis on which to hold that we are obliged to construe a United Kingdom statute contrary both to its natural meaning and to the clear evidence of what Parliament thought that it was doing at the time.

192. We have to interpret the Act of Parliament. Even without reference to the parliamentary materials, it seems clear that the term "judicial authority" is restricted to a court, tribunal, judge or magistrate. First, that is the natural meaning of "judicial" in United Kingdom law. We may talk about the "legal system" or the "justice system" when we mean, not only the courts, but those involved in the administration of justice. But when we use the word "judicial" we mean a court, tribunal, judge or magistrate. Second, the Act uses the same term in relation to both the issuing and executing "judicial authority". The executing judicial authority undoubtedly has to be a court. There is a strong presumption that the same words in the same statute – especially in the same place – mean the same thing. Third, the point about the European Convention on Human Rights is not that article 5.3 applies to the issue of a European arrest warrant. It clearly does not. The point is that it uses the word "judicial" ("other officer authorised by law to exercise judicial power") in a sense which is clearly only compatible with a court, tribunal, judge or magistrate who is independent of the parties to the case. It could not include the prosecutor who is conducting the case. This indicates a European understanding of the word "judicial" which coincides with ours.

193. It is also quite clear from the parliamentary history detailed by Lord Mance that "judicial" was deliberately inserted into the Bill in order to limit the authorities who could issue European arrest warrants to bodies which we would recognise as judicial. In this respect, I would place more weight on the parliamentary history – in terms of the changes made to the Bill during its passage through Parliament – than on the assurances given by ministers. Why make the amendments eventually made unless to make the matter clear?

194. As Lord Filkin said to the House of Lords (Hansard (HL Debates), 1 May 2003, col 858), Parliament is sovereign. This is not a case where Parliament has told us that we must disregard or interpret away the intention of the legislation. I would therefore have allowed this appeal.

LORD MANCE

Introduction

195. The appellant, Mr Assange, is wanted in Sweden on allegations of sexual molestation and rape being pursued against him by the respondent, the Swedish Prosecution Authority. Mr Assange is in England. On 18 November 2010 Marianne Ny, the prosecutor handling the case against Mr Assange, obtained from the Stockholm District Court a domestic detention order against Mr Assange in absentia, and on 24 November 2010 this was upheld by the Svea Court of Appeal, following written argument as to whether it was proportionate and based on sufficient evidence. On 2 December 2010 Mrs Ny herself then issued on the respondent's behalf a warrant seeking Mr Assange's surrender pursuant to the arrangements put in place under the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). In the United Kingdom, these arrangements are found in Part 1 of the Extradition Act 2003. Under section 2(2) of that Act:

> "A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory ….".

Sweden and other Member States are all "category 1 territories".

196. Section 2(7) to (9) further provide that a designated authority (in England, SOCA, the Serious Organised Crime Agency) may, "if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory" issue a certificate that that authority has that function. SOCA issued a corresponding certificate in respect of the respondent. Under Swedish law the respondent is the only authority authorised to issue a European arrest warrant seeking surrender for trial. Under section 3 of the 2003 Act, the issue of a (valid) certificate under section 2 brings the remaining machinery of Part 1 into play.

197. The issue which the Administrative Court rightly identified as being of general public importance for the purposes of an appeal to the Supreme Court is whether a warrant of this nature issued by a public prosecutor is "a valid Part 1 warrant issued by a 'judicial authority' within the meaning of sections 2(2) and 66 of the Extradition Act 2003". On appeal, a preliminary issue has also been raised, whether it is open to Mr Assange to question the warrant's validity having regard to section 2(7) to (9) and SOCA's certificate.

The status of the Framework Decision

198. The Framework Decision on the European arrest warrant was a "third pillar" measure agreed under Title VI of the Treaty on European Union ("TEU") in the form that Treaty took before the Treaty of Lisbon. Third pillar measures in the criminal area required unanimity, and article 34.2(b) of the Treaty on European Union provided that they were "binding … as to the result to be achieved but shall leave to the national authorities the choice of form and methods" and that "[t]hey shall not entail direct effect". Member States were not obliged to accept the jurisdiction of the European Court of Justice or the preliminary ruling system in regard to them, and the United Kingdom did not do so. The European Commission had and has no power to take enforcement measures against Member States in respect of any perceived failure to implement domestically the requirements of a Title VI measure.

199. Under Protocol No 36 to the Treaty of Lisbon this position continues. The relevant text of this protocol is, for convenience, set out in an annex to this judgment. Article 9 provides that the legal effects of agreements concluded between Member States on the basis of the TEU prior to the entry into force of the Treaty of Lisbon shall be preserved until such agreements are repealed, annulled or amended in implementation of the Treaties. Article 10 provides that, as a transitional measure and with respect to acts of the Union in the field of police co-operation and judicial co-operation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the Commission and Court of Justice remain the same, unless and until the relevant Title VI measure is by agreement repealed, annulled or amended or a period of five years has elapsed after the date of entry into force of the Treaty of Lisbon (ie until 1 December 2014). This transitional provision was designed to give the opportunity for any textual, institutional and procedural adjustments necessary at a European and/or national level, on moving from an inter-governmental framework to a harmonised and enforceable European system. The present appeal highlights points that could deserve attention in that context. When the House of Lords European Union Committee wrote its 10th Report of Session 2007-2008 entitled "The Treaty of Lisbon: an impact assessment", the expectation was that the European Commission would "introduce measures to convert some of the more significant Title VI instruments, such as the European Arrest Warrant, soon after the Treaty of Lisbon enters into force" (para 6.323). This has evidently not occurred, at least so far, in relation to the Framework Decision on the European arrest warrant.

200. Failing their repeal, annulment or amendment, the position in respect of Title VI measures remaining in force unamended at the end of the five year period is that the United Kingdom has, under article 10.3 to 10.5 of Protocol No 36, an option to notify a blanket opt-out as from 1 December 2014, with an

accompanying right to apply to opt back in selectively to individual measures. If the United Kingdom decides not to notify the blanket opt-out or if, having notified one, it applies successfully to opt back in to the Framework Decision on the European arrest warrant, it must accept the jurisdiction of the Court of Justice and the Commission's right of enforcement.

The proper interpretative approach and the status of Pupino

201. The issues on the present appeal thus involve consideration of the interface between the European Framework Decision operating at an inter-government level and the United Kingdom's domestic legislation in the form of the Extradition Act 2003. The Act was introduced to give effect to the Framework Decision. There are two different bases upon which this may be relevant. The first basis is the common law presumption that the Framework Decision gave effect to the United Kingdom's international obligations fully and consistently (see *Bennion's Statutory Interpretation*, 5th ed (2008), sections 182 and 221). However, the Act was and is in noticeably different terms, and it is not axiomatic that it did so in every respect. The presumption is a canon of construction which must yield to contrary parliamentary intent and does not exclude other canons or admissible aids. As Lord Bridge of Harwich said in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 748B-C:

> "When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field."

202. The second basis upon which the Framework Decision may be relevant is the duty of conforming interpretation, which the Court of Justice in *Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83 held to be incumbent on domestic courts in the context of framework decisions. It did so in these terms:

> "43 In the light of all the above considerations, the court concludes that the principle of interpretation in conformity with Community law is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called on to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34.2(b) EU.

…..

> 47 The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of interpretation in conformity with Community law cannot serve as the basis for an interpretation of national law contra legem."

203. In relation to European Treaty law falling within the scope of the European Communities Act 1972, the European legal duty of conforming interpretation has been understood by United Kingdom courts as requiring domestic courts where necessary to depart "from a number of well-established rules of construction": *Pickstone v Freemans plc* [1989] AC 66, 126B, per Lord Oliver of Aylmerton; and "to go beyond what could be done by way of statutory interpretation where no question of Community law or human rights is involved": *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2010] EWCA Civ 103, [2010] STC 1251, paras 97 and 260, per Arden LJ. See also *Litster v Forth Dry Dock Co Ltd* [1990] 1 AC 546, 576H-577A, per Lord Oliver; *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] EWCA Civ 29, [2006] STC 1252, paras 67-92, per Arden LJ. An analogy has been drawn between the positions under the European Communities Act 1972 and under section 3 of the Human Rights Act 1998: see the *IDT Card Services* case, paras 85-90, per Arden LJ and *Vodafone 2 v Revenue and Customs Comrs* [2009] EWCA Civ 446; [2010] Ch 77; [2009] STC 1480, paras 37-38, per Sir Andrew Morritt C. Pursuant to the resulting duty, domestic courts may depart from the precise words used, eg by reading words in or out. The main constraint is that the result must "go with the grain" or "be consistent with the underlying thrust" of the legislation being construed, that is, not "be inconsistent with some fundamental or cardinal feature of the legislation": *Vodafone 2*, para 38, per The Chancellor and *Test Claimants in the FII Group Litigation*, para 97, per Arden LJ, in each case citing *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. In this light, considerable significance may attach to whether the European legal duty of conforming interpretation applies or whether the case is subject only to the common law presumption that Parliament intends to give effect to the United Kingdom's international obligations.

204. The force of the common law presumption in the context of the Extradition Act 2003 has itself been addressed with differing emphases. In *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, Lord Bingham said that the interpretation of the 2003 Act "must be approached on the twin assumptions that Parliament did not intend the provisions of Part 1 [of the Act] to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of co-operation by the United

Kingdom than the Decision required, it did not intend to provide for less" (para 8). In contrast, Lord Hope, recognising that the introduction of the European arrest warrant system was "highly controversial" (para 20), noted that there were limits to the principle that extradition treaties and statutes should receive "a broad and generous construction", in so far as "the liberty of the subject is at stake here", and said that the task of giving effect to Part 1 of the 2003 Act in the light of the Framework Decision had 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" (para 24).

205. In *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31, Lord Hope, with whose speech the three other members of the majority agreed, repeated at para 35 what he had said in para 24 in *Cando Armas*. However, in common with the majority he found on examination that the defendant's argument in that case (that the Act required a separate certificate as to the category of offence involved) "was much more about form than it was about substance", and rejected it. More recently still, in *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] UKHL 51, [2008] 1 WLR 1724, Lord Bingham, with whose speech Lord Hope, Lady Hale and Lord Carswell all agreed, noted, at para 23, that

> "Providing as they do for international co-operation between states with differing procedural regimes, the Framework Decision and the 2003 Act cannot be interpreted on the assumption that procedures which obtain in this country obtain elsewhere. The evidence may show that they do not. …. The need for a broad internationalist approach signalled by Lord Steyn in *In re Ismail* [1999] 1 AC 320, 326-327 is reinforced by the need to pay close attention to whatever evidence there is of the legal procedure in the requesting state."

206. While the common law presumption will therefore readily overcome apparent formal or procedural inconsistencies, it does not exclude the possibility that Parliament may deliberately have intended a result differing from that inherent in the United Kingdom's international obligations. Lord Hoffmann described the legal position as follows in *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976, para 27:

> "Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so.

> Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation."

207. Returning to the duty of conforming interpretation under European law, the Court of Justice's decision in *Pupino* was not cited in *Cando Armas*, although *Cando Armas* was decided some five months after *Pupino*. But *Pupino* was extensively relied upon in *Dabas* and *Caldarelli*. It was assumed without argument in each case that *Pupino* was directly applicable and binding under domestic law in the United Kingdom: see in particular *Dabas*, para 5 per Lord Bingham, paras 38-40 per Lord Hope, para 69 per Lord Scott, para 75-79 per Lord Brown (referring to it as of "considerable importance" and as the decision on which the respondent authority principally relied on that appeal) and para 81 per Lord Mance (agreeing with the other speeches), and *Caldarelli*, para 22 per Lord Bingham, with whose reasoning Lord Hope, Lady Hale and Lord Carswell agreed.

208. Whether the assumption made in *Dabas* and *Caldarelli* was correct has, however, been examined at the Supreme Court's instance in submissions invited and received after the hearing of the present appeal. This involves considering the history of the European Treaties, and the extent to which they and instruments under them have been incorporated or referred to in domestic law under the European Communities Act 1972 and the European Union (Amendment) Act 2008.

209. Title VI measures in the field of criminal law were introduced under the third pillar of the Treaty of Maastricht 1992. Amendments to the scope and terms of the third pillar were made by articles 1 of, successively, the Treaty of Amsterdam 1997 and the Treaty of Nice 2001. Section 2 of the 1972 Act provides that:

> "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly, and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies".

Section 1 of the 1972 Act defines "the Treaties" for present purposes as including in relation to the Treaty of Maastricht 1992 only Titles II, III and IV, and in relation to the Treaties of Amsterdam 1997 and Nice 2001 various articles other than article 1. The definition also includes the Treaty of Lisbon 2007 "together with its Annex and Protocols" with a presently immaterial exception relating to the Common Foreign and Security Policy.

210. Having regard to this, and to article 9 of Protocol No 36 to the Treaty of Lisbon, the Framework Decision on the European Arrest Warrant remains to be regarded as a Title VI measure and as falling outside the definition of "the Treaties" or "the Community Treaties" contained in section 1 of the European Communities Act 1972, and so outside the scope of section 2 of that Act. This is now, rightly, common ground between all parties to the present appeal. It is a constitutional point (see *Thomas v Baptiste* [2000] 2 AC 1, 23A-C) and it has been overlooked in the previous case law.

211. Although Title VI measures in the criminal law field are outside the scope of the "the Treaties" for the purposes of the 1972 Act, the respondent submits that "instruments" under them have become part of domestic law under section 3 of the 1972 Act. Since 1 December 2009, section 3 reads:

> "Decisions on, and proof of, Treaties and EU instruments etc.
>
> (1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court.
>
> (2) Judicial notice shall be taken of the Treaties, of the Official Journal of the European Union and of any decision of, or expression of opinion by, the European Court on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of the EU or of any EU institution .
>
> (3) Evidence of any instrument issued by a EU institution, including any judgment or order of the European Court , or of any document in the custody of a EU institution, or any entry in or extract from such a document, may be given in any legal proceedings by production of a

copy certified as a true copy by an official of that institution; and any document purporting to be such a copy shall be received in evidence without proof of the official position or handwriting of the person signing the certificate.

(4) Evidence of any EU instrument may also be given in any legal proceedings—

(a) by production of a copy purporting to be printed by the Queen's Printer;

(b) where the instrument is in the custody of a government department (including a department of the Government of Northern Ireland), by production of a copy certified on behalf of the department to be a true copy by an officer of the department generally or specially authorised so to do;

and any document purporting to be such a copy as is mentioned in paragraph (b) above of an instrument in the custody of a department shall be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his authority to do so, or of the document being in the custody of the department.

(5) In any legal proceedings in Scotland evidence of any matter given in a manner authorised by this section shall be sufficient evidence of it."

212. The respondent submits that, although Title VI framework decisions continue to fall outside "the Treaties", United Kingdom courts are under section 3 bound, since 1 December 2009, by Court of Justice decisions on their validity, meaning or effect. The submission is in my judgment incorrect for several reasons. First, it is section 2, read with section 1, that defines the extent to which European law has domestic effect. Section 3, as its heading and text indicate, regulates the manner in which and principles by which European law is to be given effect, not the extent to which European law applies.

213. Secondly, although section 3 refers since 1 December 2009 to any "EU" instrument or "EU" institution, before that date it referred to any *Community* instrument or *Community* institution. It had therefore no relevance to decisions on or proof of framework decisions, which were not European Community instruments. The reference to any "EU" instrument or institution as from 1

December 2009 was to give effect to the unified terminology introduced by the Treaty of Lisbon, amalgamating for the future the previously separate pillars. However, article 9 of Protocol No 36, which is part of domestic law under section 1 of the 1972 Act, provides that for the time being the legal effects of measures adopted on the basis of the old TEU shall be preserved. Title VI measures such as the framework decision remain therefore for the time being Title VI measures and not "EU instruments" within section 3.

214. Thirdly and more generally, it would be inconsistent with the carefully limited scope of sections 1 and 2 of the 1972 Act and with the whole thrust of Protocol No 36 to treat Title VI measures or Court of Justice decisions in respect of them as acquiring with effect from 1 December 2009 a domestic force which they never had before. It would bizarre to provide that Title VI should not be domestically binding, but that instruments enacted under it should be. It would be equally bizarre to provide for United Kingdom courts to be bound by principles established and any decision reached by the Court of Justice in cases which happened to be referred by courts of other member states, but to have no power to refer themselves: see article 10 of the Protocol. (Indeed, the reference in section 3 to questions of law "if not referred to the European Court" being for determination in accordance with such principles and any such relevant decision is itself another indication that section 3 was not conceived with the intention of covering Title VI measures which could not be so referred.)

215. The respondent submits, further or alternatively, that the principle of conforming interpretation established in *Pupino* finds domestic force through the duty of sincere co-operation found in article 10 of the former Treaty on the European Community ("TEC"). Article 10 TEC was mentioned by Lord Hope in *Dabas*, para 38. But it is a duty on the United Kingdom as a state, not on its courts, and in any event it can have had no application, prior to 1 December 2009, to Title VI measures agreed under the former TEU, rather than under the European Community Treaty. Post-Lisbon, the duty of co-operation is found in article 4(3) TEU. But again it is not a principle of domestic interpretation, and again it would be contrary to Protocol No 36 to treat Title VI measures as being in a different position now to that in which they were before 1 December 2009.

216. Finally, the respondent notes that, unless United Kingdom courts interpret domestic legislation to match precisely the true European legal interpretation of any relevant Title VI measure, there will exist a discrepancy which would involve the United Kingdom in breach of its international obligations. That is so. But it is a position which even the Court of Justice in *Pupino* accepted could in some circumstances occur. The risk is one which, even on the respondent's case, must always have existed prior to 1 December 2009. In preserving the existing legal effect of Title VI measures by article 9 of Protocol No 36, the United Kingdom preserved that possibility, if and when it had any reality. In fact, the risk of

infraction proceedings by the Commission under article 258 TFEU (ex article 226 TEC) to which the respondent refers is effectively non-existent, since under article 10 of Protocol No 36 the Commission continues for the time being to have no power to bring any such proceedings.

217. The framework decision, the Court of Justice's decision in *Pupino* and the European legal principle of conforming interpretation are not therefore part of United Kingdom law under the 1972 Act. The only domestically relevant legal principle is the common law presumption that the Extradition Act 2003 was intended to be read consistently with the United Kingdom's international obligations under the framework decision on the European arrest warrant. But this presumption is subject always to the will of Parliament as expressed in the language of the Act read in the light of such other interpretative canons and material as may be relevant and admissible.

218. In this light, it is also relevant to record the basis upon which the British Government promoted the Bill leading to the Extradition Act. Asked by Lord Lamont on its second reading on 1 May 2003 to confirm that it was open to the House to amend the provisions of the Bill and arrest warrant, the minister, Lord Filkin, replied (Hansard (HL Debates), col 858):

> "My Lords, the constitutional position is clear. On framework agreements to which the Government have been a party and have signed with other member states, there is an expectation that member states will put them into effective law in their own countries. However, as I am sure the noble Lord, Lord Lamont, knows, the position is that Parliament is sovereign and Parliament can do what it wishes in this respect. Clearly, if there were to be a discontinuity between our treaty obligations and our own law, that is another issue that goes further. But Parliament is sovereign."

That also reflects my view of the domestic legal position.

The Framework Decision and its interpretation under European law

219. On this basis, I turn to the Framework Decision. Article 1 provides:

> "Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the Treaty on European Union."

220. Article 6 provides:

"Determination of the competent judicial authorities

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 the 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."

221. Both the Framework Decision and the 2003 Act provide that a European arrest warrant is to be issued by a judicial authority. Under both, the question arises what is meant by a "judicial authority". For Mr Assange, Ms Dinah Rose QC submits that the phrase refers under both to an authority which is not only vested with responsibility for issuing such a warrant, but is independent of the executive and of the parties and impartial in the same sense as the "competent legal authority" or the "court" referred to in article 5.1(c) and 5.4 of the European Convention on Human Rights. For the Swedish Prosecution Authority, Miss Clare Montgomery QC submits that it means no more than an authority which is vested with responsibility for issuing such a warrant and which the issuing Member State

has notified to the General Secretariat of the Council of Ministers under article 6 of the Framework Decision as competent to do this under its own domestic law.

222. A second point is that, on Ms Rose's case, it is for the courts of the executing state to determine whether the criteria of independence which she advances have been met. On Miss Montgomery's case, the courts of the executing state have no role to play, save, under sections 2 and 3 of the United Kingdom's 2003 Act, to check that SOCA has in fact issued a certificate in the terms required by section 2(8); the only possible qualification, again under domestic law, is that a defendant might be able to seek judicial review of SOCA's conduct in issuing a certificate, if it could be shown that SOCA had no rational basis for believing that the issuing authority had the function of issuing warrants in the issuing state.

223. Each interpretation faces problems. Ms Rose's interpretation of the phrase "judicial authority" has the merit, noted by Lord Phillips at para 76, that it corresponds naturally to expectations derived from the English text. But the position may be cloudier if one looks behind the language of the English statute and the English version of the framework decision to other language texts of the framework decision, particularly the French (autorité judiciaire) and German (Justizbehörde). The parallel that Ms Rose draws with article 5.1(c) and 5.4 of the Convention on Human Rights also faces a difficulty. It is well established that the "competent legal authority" and "court" there mentioned must have the qualities on which Ms Rose relies: see eg *Schiesser v Switzerland* (1979) 2 EHRR 417, *Skoogström v Sweden* (1983) 6 EHRR 77 and *Medvedyev v France* (2010) 51 EHRR 899. In *Skoogström v Sweden* the court was, as in the present case, concerned with the position of a Swedish prosecutor. The court noted, at paras 77, 78, that there was in Sweden "no question of a distinction between investigating and prosecuting authority", and that the organisation of the prosecuting functions was hierarchical; the public prosecutor was responsible for investigating a matter, for deciding whether to institute a prosecution, for drawing up an indictment and for pursuing the prosecution in the courts and "was not independent of the parties". But the cases on article 5.1(c) and 5.4 concern the "competent legal authority" and "court" before which a person must be brought after arrest, not the authorities by which an arrest may be authorised. In the present context, their most natural analogues are the magistrates' court responsible for executing the warrant in England, before which Mr Assange has been brought, and/or the Swedish court, before which Mr Assange would have to be brought following any surrender to Sweden. A domestic arrest, for the purpose of bringing a defendant before such a court, is commonly made at the instance of the police or a prosecution service not possessing the full qualities of independence and impartiality which Ms Rose invokes.

224. Despite this and despite the principle of mutual recognition which underpins the Framework Decision, Ms Rose is correct to question whether there

is a complete equation between domestic arrest and international "surrender". A European arrest warrant seeking the surrender of a defendant by one state to another to face charges is a generally speaking more intrusive measure than a domestic warrant. In many cases (though not the present) surrender between European Union member states will uproot a defendant from his or her familiar and personal environment. It may therefore engage human rights issues, eg under article 8 of the European Convention on Human Rights (as indeed section 21 of the 2003 Act recognises from the point of view of the United Kingdom as an executing state). If (again, unlike Mr Assange) the defendant is a national of the executing state, then such a warrant may also deprive him or her of the customary international right to remain within the jurisdiction of that state. Lord Hope's statement in *Cando Armas* that "the liberty of the subject is at stake here" (para 204 above) reflects such considerations. The Framework Decision's insistence in articles 1 and 6 that a European arrest warrant should be a "judicial decision" taken by an "issuing judicial authority" can only have been intentional, designed to allay fears that the measure might be excessively or inappropriately deployed. But there is as yet no authority, in Strasbourg or in Luxembourg, as to the precise nature of the "judicial decision" and "judicial authority" to which these articles refer.

225. Miss Montgomery's submission that these words refer to no more than an authority which is, and which a state notifies to the Council as being, vested with responsibility for issuing such a warrant is also open to objection. It means that any member state could notify any body or person to the Council as the authority responsible for issuing an European arrest warrant, and thereby clothe that body or person with the mantle of a "judicial authority" making a "judicial decision". Miss Montgomery does not shrink from this conclusion: she submits that "judicial" means no more than "appertaining to the administration of justice", and that the mere assignation to an authority of the role of issuing a European arrest warrant makes that authority "judicial". Accordingly, it was and is, she submits, perfectly permissible for countries to assign as their relevant "judicial authority" their Ministry of Justice or their police. A number of states have indeed taken this view: eg in relation to the issue of both accusation and conviction warrants, Denmark where the Ministry of Justice is the only relevant authority and Germany where the Ministry is a relevant authority alongside the State prosecution service (Staatsanwaltschaft) and courts and in relation to the issue of conviction warrants, Estonia, Finland and Lithuania, where the Ministry is the only relevant authority and Sweden, where the National Police Board is the only relevant authority.

226. The background to the proposal for the Framework Decision can be shortly stated. Under the European Convention on Extradition 1957 (to which the United Kingdom adhered on 14 May 1991 and to which effect was given domestically in the Extradition Act 1989), extradition was effected by and between states in respect of persons against whom the competent authorities of the requesting state were proceeding or who they wanted for the carrying out of a sentence or detention

order. There was a requirement of double criminality and states had the right to refuse extradition of their nationals. The 1957 Convention was supplemented by a Council Act of 27 September 1996 (96C 313/02). This retained the requirement of double criminality with modifications (articles 2 and 3), and it provided for the extradition of nationals, but at the same time it gave states the right not to extradite their own nationals by successive five year reservations (article 7). States were also given the right to provide on a mutual basis for requests for supplementary information to be handled directly between "judicial authorities or other competent authorities" which they authorised and specified for that purpose (article 14). Various authorities, including prosecutors, the Ministry of Justice and police, were specified for this limited purpose by some countries.

227. The third instrument requiring mention is the Schengen Convention of 19 June 1990, which implemented the Schengen Agreement of 14 June 1985 between the Benelux countries, Germany and France and to some parts of which, including article 95, the United Kingdom later acceded by 2003. Articles 39 and 53 of the Schengen Convention distinguish between on the one hand the police and Ministries of Justice and on the other judicial authorities in the context of mutual assistance. Article 95 provides for data on persons wanted for arrest for extradition purposes to be "entered at the request of the judicial authority of the requesting" state, and for such "alert" to be sent "by the quickest means possible" to the requested state with information as to the authority issuing the request for arrest, as to "whether there is an arrest warrant or other document having the same legal effect, or an enforceable judgment" and as to the nature, circumstances and consequences of the offence. Unless the requested state refused on exceptional grounds, or because the person wanted was one of its nationals, article 95 alerts would lead to arrest of the wanted person in the requested state, to enable extradition proceedings to take place. Otherwise, they would be treated as a request for information as to that person's place of residence (article 95(5)). Article 98 also addressed the provision "at the request of the competent judicial authorities" of information as to place of residence of a wanted person. A report dated 13 October 2009 by the Joint Supervisory Authority of Schengen states that: "[w]hile public prosecutors and judicial authorities obviously play a major role in the decision leading to article 98 alerts, in some Schengen States the police, security police, tax and customs authorities, border guard authorities and other authorities competent for criminal investigations are also competent to decide on article 98 alerts" (para V.I.A.1). If the same applied or applies to the more coercive article 95 alerts, that, as will appear, was certainly not what Parliament understood when it passed the Extradition Act 2003, incorporating section 212 (see para 258 below).

228. The Framework Decision was designed to introduce a new era. First, the surrender of requested persons between member states was to become "entirely" or "basically" judicial. So the Commission wrote in a first report on the Framework

Decision, although noting that certain states including Sweden had designated an executive body as the relevant authority for all or some aspects. Second, the requirement of double criminality was to go. Third, the surrender of nationals was now to be required – a "major innovation" as the Commission described it in its report.

229. The correct interpretation of the Framework Decision is a matter of European Union law. The Court of Justice may one day have to adjudicate upon it, either at the instance of a member state which has already accepted the court's jurisdiction in respect of third pillar instruments or, after 1 December 2014, at the instance of a state remaining party to the Framework Decision. The Court of Justice's general interpretational approach has been described by Professor Anthony Arnull of the University of Birmingham, as "teleological and contextual": *The European Union and its Court of Justice*, 2nd ed (2006), pp 612 and 621; Professor Arnull goes on to note that the recourse to travaux préparatoires contemplated as a secondary source of assistance in other international contexts under article 32 of the Vienna Convention on the Law of Treaties "is not a method which has in the past commended itself to the Court in cases concerning the interpretation of the Treaties themselves": p 614. This is for a good reason, which applies in the present context. Such travaux (or, in the European jargon, non-papers) relating to matters decided in preparatory working groups, are not made generally available (although a facility to seek access to them under certain conditions is available in Council Regulation (EC) No 1049/2001).

230. This is relevant because of the striking differences between the original Commission proposal of 25 September 2001 (COM(2001) 522 final/2) and the redraft which was agreed by the Council of Ministers at a meeting of 6-7 December 2001, recorded on 10 December 2001 as Council document 14867/1/01 Rev 1 and agreed by the European Parliament on 6 February 2002. Article 3 of the original Commission proposal defined a "European arrest warrant" as a

> "request, issued by a judicial authority in a Member State, and addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgment or a judicial decision, as provided for in article 2".

It defined "issuing judicial authority" as "the judge or the public prosecutor of a Member State, who has issued a European arrest warrant" and "executing judicial authority" as "the judge or the public prosecutor of a Member State … who decides upon the execution of a European arrest warrant". Article 4 provided that each member state "shall designate according to its national law the judicial authorities that are competent to (a) issue a European arrest warrant and (b) take

decisions" under the provisions dealing with execution of such a warrant. Article 2 provided that a European arrest warrant may be issued for "(a) final judgements in criminal proceedings, and judgements in absentia which involve deprivation of liberty or a detention order of at least four months" or "(b) other enforceable judicial decisions in criminal proceedings" which involve deprivation of liberty and relate to an offence punishable by a sentence or detention order of at least twelve months. Any European arrest warrant had under article 6 to contain information as to "whether there is a final judgement or any other enforceable judicial decision, within the scope of article 2". Under this scheme, there would have been no doubt that a member state could designate either a court or a public prosecutor as competent to issue a European arrest warrant. But it would have been open to doubt in accusation cases what sort of "enforceable judicial decision" taken by whom would have had to *precede* the issue of such a warrant. And "enforceable judicial decision" in that context might or might not have been limited to a court decision.

231. The Council redraft of 10 December 2001 elevated to article 1 the description of a European arrest warrant as (in the original French text) "une décision judiciaire émise par un État membre en vue de l'arrestation et de la remise par un autre État membre d'une personne recherchée pour l'exercice de poursuites pénales ou pour l'exécution d'une peine ou d'une mesure de surêté privatives de liberté". The English and German versions, described as liable to revision in the light of the French original, spoke of "a court decision" and (the German text being in this respect consistent with the English) "eine gerichtliche Entscheidung". Article 2(1) followed the same scheme as article 2 of the September draft, but article 2(2) introduced a long list of offences punishable by sentences of at least three years which were to give rise to surrender "without verification of … double criminality". Article 6 was in substantially the terms that became article 6 of the Framework Decision, but the Council redraft did not attempt to define "judicial authority". Article 9 required the European arrest warrant to contain "evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, within the scope of articles 1 and 2". This redraft left unclear both what was meant by "judicial authority" and whether the prior domestic "arrest warrant or any other enforceable judicial decision" on which a European arrest warrant was to be based had to involve a court decision.

232. The Framework Decision recites the Commission proposal and the European Parliament's opinion, but is closely based on the Council redraft. The Council redraft must, in the ordinary course, have followed the circulation, under the aegis of the Belgian presidency of the Council, of "non-papers" which could, if available, shed light on the drafting history. The United Kingdom government made a preliminary presidency text of this nature available to the House of Lords European Union Committee: see Lord Brabazon of Tara's letter to the minister at Appendix 3 to the committee's 6th Report of Session 2001-02. Lord Brabazon's

letter records that the preliminary presidency text included an article 24 (left blank in the version of 10 December 2001) enabling a member state to suspend the application of the Framework Decision in relation to states not complying with article 6.1 TEU, that the minister had also stated that it was implicit that national authorities would apply the European Convention on Human Rights, and that the committee inferred but wished to have expressly stated that an executing authority could refuse execution in the case of a request which "came from a 'judicial authority' not possessing the degree of independence needed to satisfy article 5 ECHR". That latter thought, that a judicial authority should have that independence, is reflected in Ms Rose's current submissions.

233. For present purposes, the content and thinking of any non-papers remain (in the absence of any request to see them under Regulation (EC) No 1049/2001 of 30 May 2001) unknown. Even if they were now known, it seems unlikely that the Court of Justice would attach any weight to them. Equally, the Court would I think be hesitant about speculating in their absence as to the reasons for the differences between the Commission's original proposal, on the one hand, and the 10 December 2001 text and the final Framework Decision, on the other. Lord Phillips suggests two possible reasons for the absence from the Council redraft of any definition of judicial authority: one, to restrict the meaning to a judicial authority in the strict court sense; the other, to broaden it beyond judge or prosecutor. He favours the latter (paras 60 and 65). But it is also possible that there was no consensus, and that the removal of any definition left the matter open, in effect for whatever the Court of Justice might decide. In any event, I doubt whether the Court of Justice would speculate in this area either. Rather, it would focus on the final Framework Decision and seek to make sense of its text in the light of its purpose, the principles underlying it and general principles of European law. Under article 6.3 of the Treaty on European Union in its current form, these include "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States".

234. In this connection, it is notable that the Framework Decision draws no explicit distinction between the qualities which must be possessed by an issuing and an executing judicial authority. Nor in fact did either the Commission proposal or the Council redraft draw any such distinction – the former contemplated that a judge or a prosecutor could fulfil either role, the latter is silent as to the qualities required. Yet it seems clear that executing authorities have adjudicative responsibilities which can only be fulfilled by a judicial authority in the strict court sense – in other words, complying with the requirements laid down by the Strasbourg court in the cases cited in para 223 above. Adjudicative responsibilities of this nature can arise for example under each of articles 11, 12, 13 (where the words "before the executing judicial authority" underline the point), 14, 15, 16, 17, 18 and 19 of the Framework Decision. One very possible reason for the removal

from the Council redraft of any definition is that it was appreciated that the Commission definition was, at least in this respect, inappropriately wide. That does not necessarily mean that the meaning of "judicial authority" in the Council redraft was itself narrowed - it may simply have been left to member states, pursuant to article 1.3, to comply with their Convention obligations by nominating appropriately independent and impartial courts as executing authorities. But it does mean that it is unsafe to approach the present appeal on the basis that the absence of a definition of "judicial authority" was intended to broaden or relax, rather than tighten, the meaning of a "judicial authority" (compare Lord Phillips, para 60).

235. What is striking is in my view the emphasis placed in article 1 of the Framework Decision on a European arrest warrant being "a judicial decision". Returning to the Commission proposal and Council redraft, it was the Council redraft that insisted on a *judicial decision* by the issuing judicial authority to issue such a warrant. The Commission proposal had spoken simply of a *request* issued by a judicial authority for assistance in respect of a person subject to a domestic sentence or "other enforceable judicial decisions in criminal proceedings which involve deprivation of liberty and relate to an offence, which is punishable by deprivation of liberty or a detention order for a maximum period of at least twelve months…". Under the Commission proposal a European arrest warrant could be requested without more, once there was a domestic sentence or judicial decision of this nature. Under the Council redraft and the Framework Decision, there are two separate stages, and the focus is on the first, the judicial decision involved in the issue of the European arrest warrant. The prior stage, at which there must exist "an enforceable judgment, an arrest warrant or any other enforceable judicial decision" on which the European arrest warrant is based is no more than additional "information" to be mentioned in the European arrest warrant: see article 8 of and Annex (b) to the Framework Decision and *Louca v Public Prosecutor, Bielefeld, Germany* [2009] UKSC 4; [2009] 1 WLR 2550.

236. Lord Phillips describes the second stage as involving "an essentially administrative step in the process" and the first stage as "the significant safeguard against the improper or inappropriate issue of an EAW" (paras 62, 74 and 79). To my mind, this considerably downplays the significance which must have been attached to the introduction of the requirement of a "judicial decision" by an issuing "judicial authority" to issue a European arrest warrant. Further, in so far as it is implicit in his description and Miss Montgomery's case that there must have been a judicial decision *by a court* at the first stage, there is no basis for this assumption in the Framework Decision, or in practice. As Lord Phillips acknowledges in para 32, under prior practice followed in relation to the European Convention on Extradition 1957, states were able to issue requests for extradition based on domestic arrest warrants that might not have resulted from any judicial (in the sense of court) process. Nothing in the Framework Decision expressly requires any prior arrest warrant to be the result of a court process, nor do the

evaluation reports attach importance to this being so, or establish that it is so, in practice in relation to a number of member states. The argument that the words in article 8.1(c) "an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect" imply that any such domestic arrest warrant will have been issued by a court would, if correct, support Ms Rose's submission that "judicial" in articles 1 and 6 also means "by a court".

237. The parties are also at issue with regard to the nature of the "judicial decision" to be taken by a judicial authority issuing a European arrest warrant. On any view, the phrase must have been introduced with a protective purpose: see para 224 above. The issuing judicial authority must have been seen as a body or person applying an open and objective mind to the question whether circumstances existed justifying the issue of such a warrant. It is also clear, and the word "may" in article 2(1) of the Framework Decision confirms, that no duty is imposed on any state to issue a European arrest warrant. The Framework Decision confers a power. In these circumstances, Ms Rose submits that, before issuing such a warrant, an issuing judicial authority ought to consider the appropriateness (or "proportionality") of doing so. Miss Montgomery submits that there is no such requirement. The evaluation reports on the implementation of the Framework Decision show that, while a number of states undertake such an exercise, the issue of a European arrest warrant is currently obligatory under the domestic law of several other states. The Council has urged states to change their domestic law to ensure that a "proportionality check" is undertaken in all before the issue of any European arrest warrant: para 3 of its European Handbook on how to issue a European Arrest Warrant (set out in 8216/2/08 Rev 2 COPEN 70 EJN 26 EUROJUST 31). However, the Council takes the same view of the current legal situation as Miss Montgomery, stating in its Handbook, para 3, that "It is clear that the Framework Decision … does not include any obligation for an issuing Member State to conduct a proportionality check. It will be the legislation and judicial practice of the Member States that will ultimately decide this question". Notwithstanding the respect due to the Council's legal service which may have endorsed this passage, it does not follow that the Court of Justice would necessarily take the same view. It seems to me quite possible that the Court would hold that it was inherent in the creation of the discretionary power conferred by article 2, to be exercised under articles 1 and 6 by "judicial decision" taken by an issuing "judicial authority", that some consideration should be paid to the appropriateness in all the circumstances of the issue of a European arrest warrant. Whether this would be so or not, the protective emphasis in the Framework Decision on a judicial decision by a judicial authority lends some impetus to Ms Rose's case that a body independent of the parties should undertake this role.

238. If and when it had to address the present issues, the Court of Justice would have to address at the outset Miss Montgomery's submission that article 6 leaves it to each member state to determine which body, bodies or person(s) constitute

judicial authorities within its legal system for the purpose of issuing a European arrest warrant, with the effect that any decision by such a body or person constitutes a "judicial" decision within article 1. This submission deprives the words "judicial authority" of any autonomous or objective meaning. It makes states their master. Alice would have been right to question "whether you can make words mean so many different things" (*"Through the Looking Glass"*). The alternative and to my mind more natural way of reading article 6 is that it requires each member state to identify which judicial authority is competent, but does not authorise a member state to assign judicial status to take judicial decisions to bodies which or persons who obviously do not possess it. In my view, the Court of Justice would be likely to conclude that the concepts of a judicial decision by a judicial authority cannot be stripped of all objective or autonomous content in the manner that Miss Montgomery's submission suggests.

239. However this conclusion leaves open the question whether a judicial decision by a judicial authority must under the Framework Decision be taken by a body possessing all the characteristics of independence of the executive and the parties for which Ms Rose submits. It is at this point that I have greater difficulty in accepting the case she advances on European law. I do not accept much of the reasoning involved in the five points made by Lord Phillips in his paras 60 to 67, and I am in substantial agreement with all Lord Dyson's comments in paras 155 to 159 on the first four of those points. I do however see force in the general point Lord Phillips makes in paras 16 to 20 of his judgment. The words "judicial authority", and all the more so their homologues "autorité judiciaire" and "Justizbehörde", have a degree of flexibility about them that a reference to a court or judge would not have had. To this, one may add the knowledge that in some civil law countries (France, Greece, for example), public prosecutors (le parquet) are described as an arm of the judiciary. F H Bridge's *French-English Legal Dictionary* published by the Council of Europe in 1994 defines autorité judiciaire as "court; judicial authorities; judiciary; (occasionally) legal authorities" and fonction judiciaire as "judicial office; legal office; legal functions. (The term includes the office of prosecutor as well as that of judge in certain contexts)".

240. In Sweden the public prosecutor is not regarded as part of the judiciary. Nevertheless, it is recognised throughout Europe that public prosecutors have a special status in the administration of justice, which requires them to "be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially": para 6 of the Bordeaux Declaration "Judges and Prosecutors in a Democratic Society", issued jointly by the Consultative Council of European Judges and Consultative Council of European Prosecutors as part of their Opinions numbered respectively 12 (2009) and 4 (2009). It is right, however, to add that para 7 of the same Declaration goes on to add, after reference to the case law to which mention has already been made in para 223 above, that:

> "Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions".

That passage favours Ms Rose's case, because, even on a broad view of "judicial", it means that a public prosecutor should not be taking judicial decisions in a case which she or he is prosecuting.

241. In support of his view that the phrase "judicial authority" must have been used without definition in order to open the concept still wider than the Commission proposed in September 2001, Lord Phillips refers to subsequent state practice, already touched on in para 225 above. In fact, the practice of nominating a Ministry of Justice or the police has been criticised, though it appears without avail, both by the Commission, eg in its first report on the Framework Decision (COM (2006)8 final of 24 January 2006, and in various Council evaluation reports on the operation of the Framework Decision, as summarised in the Council's overall "Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" (8302/4/09 REV 4CRIMORG55 COPEN 68 EJN24 EUROJUST20):

> "The findings of the evaluation demonstrate, however, that in some Member States non-judicial central authorities continue to play a role in cardinal aspects of the surrender procedure far beyond the administrative tasks assigned in the Framework Decision. As a matter of principle, this situation seems difficult to reconcile with the letter and the spirit of the Framework Decision, irrespective of how understandable it may be in view of the specificities of the national system or associated practical advantages.
>
> **Recommendation 1**: The Council calls on those Member States that have not done so to consider restricting the mandate of non-judicial authorities, or to put equivalent measures in place so as to ensure compliance with the Framework Decision with regard to the powers of judicial authorities."

242. For subsequent practice in the application of the parties to be relevant to be taken into account in the interpretation of the Framework Decision, it must under article 31.3 be practice which "establishes the agreement of the parties regarding

its interpretation". It must be practice "which clearly establishes the understanding of all the parties regarding its interpretation", although "subsequent practice by individual parties also has some probative value": *Brownlie, Principles of Public International Law*, 7th ed (2008) pp 633-634. Evidently suspect practice consisting of the use and nomination of executive authorities by a few states cannot come near establishing "the agreement of the parties regarding [the] interpretation of the Framework Decision" within the meaning of article 31.3 of the Vienna Convention on the Law of Treaties. On this I disagree with Lord Phillips in paras 60 and 67. However, a greater number of the member states of the European Union have nominated public prosecutors as issuing judicial authorities (eleven, it appears in relation to accusation warrants and ten in relation to post-conviction warrants) without this receiving the same disapproval, and this is at least a factor to be taken into account in attempting to understand the parameters at a European level of the concept of "judicial authority". A countervailing factor is, however, that ten states have nominated public prosecutors as an executing judicial authority, in the case of three of them as the *only* executing judicial authority, in circumstances where it is clear that only a court could properly fulfil a large number of the duties of such an authority: see para 234 above.

243. Another factor mentioned in argument is the existence of other third pillar measures, containing various different references to judicial authorities such as those cited by Lord Phillips in para 19. I find these of little assistance, except to show that words can mean whatever they are defined to mean. Further, there is no reason to regard the 1990 European Convention on money laundering as background to the Framework Decision, and the European Arrest Warrant 2008/978/JHA cannot support an argument of state practice under the Framework Decision.

244. My examination of the Framework Decision leads to a conclusion that it is far from easy to predict what the attitude of the Court of Justice might be on the question whether a public prosecutor can qualify as an issuing judicial authority for the purposes of reaching a judicial decision to issue a European arrest warrant in a case in which he or she is conducting the criminal prosecution. There are strong arguments each way. However, if a prediction has to be made as to what would be likely now to be held by the Court of Justice to be the legal position under the Framework Decision, I would come down on balance on the same side as Lord Phillips, though for somewhat different reasons. I would be prepared to accept, in the light of the special role and responsibilities to the fair administration of justice of a public prosecutor and in the light of the subsequent use, without apparent criticism, by a not inconsiderable number of states, of public prosecutors as an issuing "judicial authority" (and despite the highly questionable designation of public prosecutors as an executing authority), that a public prosecutor may, even in relation to a case which he or she is prosecuting, constitute a judicial authority taking a judicial decision to issue a European arrest warrant. I would not however

accept that either the police or a Ministry of Justice could or would properly be regarded as constituting such an authority under the Framework Decision.

The Extradition Act 2003 and its interpretation under domestic law

245. I turn in this light to consider whether it follows from this conclusion that the Extradition Act 2003 recognises and gives effect to the concept of a judicial decision by a judicial authority in the same sense as that in which I am prepared to accept that the Court of Justice probably would. For the reasons given in paras 204 to 206 and 217 above, and especially because both the Framework Decision and the Act use the phrase "judicial authority", there is a strong presumption that it does, but this does not follow automatically. A question arises here as to the proper starting point. The natural meaning of the English phrase "judicial authority" favours Ms Rose's case. But Lord Phillips (para 10) takes the view, as I read him, that once one has determined what the Court of Justice is likely now to regard as the proper European legal meaning, that dictates the proper meaning of the domestic Act. Lord Phillips postulates that Parliament can only have intended a different meaning if it set out deliberately to breach this country's European obligations, and that it would in that event also have made it plain that it was doing this, and Lord Kerr at para 115 and Lord Dyson at para 161 make similar comments.

246. I do not regard this reasoning as sustainable. It pre-supposes that the correct European legal answer has always been clear in the sense now considered correct or probable by the Supreme Court, so that Parliament can only have differed from it deliberately. On no view is that the case. Even looking at the matter now, after a long hearing, in my view the European legal answer remains obscure - in part as a result of a deliberate choice by the Council to exclude any definition of a "judicial authority". Further, to the extent that there is any clarity about the current European legal position, it arises in part from subsequent state practice, whereas the primary focus in construing the 2003 Act must be on the parliamentary intention in 2003. As I see it, the natural assumption is either that Parliament meant the phrase "judicial authority" in its ordinary English meaning, or, in the light of the uncertainty at all times about the position under European law, there is at lowest ambiguity about what Parliament meant. The Framework Decision is an important potential source of guidance, but it is obscure. The Supreme Court is concerned with the construction of a British statute, and our role is to elicit the true parliamentary intention in passing it. Parliament in 2003 may well have thought that the concept of a "judicial authority" (taking a "judicial decision") in the Framework Decision meant the same as its natural English meaning. If so, we should give effect to Parliament's intention.

The parliamentary history and material as an aid to interpretation

247. In these circumstances, it is appropriate to consider whether any guidance is properly to be obtained from parliamentary material. Under the rule in *Pepper v Hart* [1993] AC 593 reference is permissible to parliamentary material as an aid to statutory construction where (a) legislation is ambiguous or obscure or leads to absurdity, (b) the material relied upon consists of one or more statements by a minister or other promoter of the relevant Bill together if necessary with such other parliamentary material as necessary to understand such statements and their effect and (c) the statements relied upon are clear. It may also be necessary or relevant to consider whether any such statements were made against the interest of the executive.

248. From the very outset the Commission's proposal for a European arrest warrant and the Council's redraft were the subject of close parliamentary scrutiny. In relation to the Commission proposal and presidency redraft, concern was expressed by the House of Lords European Union Committee in its 6th report dated 12 November 2001. On 10 December 2001 the responsible minister was also being pressed by European Standing Committee B of the House of Commons and gave assurances as the following exchange shows (Hansard (HC Debates), cols 25-52):

> "Mrs Dunwoody: What does judicial authority mean to Her Majesty's Government?
>
> Mr Ainsworth: I tried to give my hon Friend that assurance last week. The only people who will be allowed to issue or execute an arrest warrant will be a judicial authority as recognised normally within either the issuing or the executing state.
>
> Mrs Dunwoody: With respect, I ask again, what is the definition of 'judicial authority'? An answer in any language that I can vaguely understand will do, and I speak five.
>
> Mr Ainsworth: The definition of a 'judicial authority' is exactly that. In this country, it is the Bow Street magistrates' court. In other countries, there are various different authorities such as magistrates and judges who normally issue extradition warrants. Those are the people who will execute a European arrest warrant."

249. In the course of what Mr David Cameron described as a "knock-about finish", Mr Ainsworth ended the debate by saying:

> "[Mrs Dunwoody] asked me for a definition of a judicial authority. Having listened to the comments of Opposition Members, I imagine that they must be advising their friends and relatives not to travel abroad. I would not want to go to any of the countries that the hon Member for Surrey Heath describes, where he says that we are likely to be locked up on trumped up charges by corrupt and politically motivated judiciaries. Where are those countries? Does the hon Gentleman go back to his constituency and advise his constituents not to travel abroad? I feel guilty now, because during the short time in which I have had the privilege of holding my current position I have been responsible for signing extradition warrants to send people back to these dreadful places. I have sent people back to the examining magistrate in Liege, to the magistrate at the public prosecutor's office in Amsterdam, to the court of Brescia, to the county tribunal of Bobigny, to Judge Weber of Saarbrucken, and to magistrate Judge Maria Teresa Palacios Criado of central trial court No 3 in Madrid. That is in southern Europe; what on earth have I done? God knows what happened to the person concerned, or whether they are even still alive."

It is clear that the only people who the minister had in mind as making requests under the existing system were courts, judges or magistrates, of one sort or another.

250. Subsequently, an English language version of the Council redraft became available, containing in article 1 a reference to a "court decision". This led to the following further exchange with the minister, Mr Ainsworth, on 9 January 2002, recorded by the House of Commons European Scrutiny Committee in its 17th Report (Session 2001-2002):

> "5. The minister was asked on 9 January if it followed from article 1 that the courts of this country would not be obliged to recognise and enforce a warrant if it came from a body which they did not recognise as a court. In reply, the minister said that:
>
> 'The judicial authority will be designated by the issuing State, but it will have to be that, a judicial authority and a court, so it will not be for the British authorities to say what is and what is not a court in another European State, but it will not be possible for authorities that clearly are not courts, that are not judicial authorities to issue requests for European arrest warrants as they will not be recognised.'
> …

> 6. When asked if this matter would be made clear in the Extradition Bill, the minister replied that it would 'need to be spelt out in the Bill'…, but that he was not certain that any further clarification was needed, since article 1 stated that the European arrest warrant was to be a court decision. …. The Minister later confirmed that judicial authorities in the United Kingdom: 'will not only have the ability but will certainly not execute a European arrest warrant that comes from anything other than a judicial authority in another European State'."

251. The Committee continued:

> "7. We think it regrettable that the term 'judicial authority' is not defined, given its central importance to the scheme of mutual recognition and enforcement established by the Framework Decision. However, we welcome the minister's acceptance of the principle that a warrant which is not a 'court decision' within the meaning of article 1 will not be recognised in this country."

It is also worth quoting more fully the words following the minister's assurance that the position would "have to be spelt out in the Bill". He went on:

> "I think that it is now clear within the Framework Decision where you will see in later articles that it says that the requirement is between the judicial authority in the issuing State to the judicial authority in the executing State and quite rightly article 1 says that the European arrest warrant shall be a court decision. I am not certain there is any further clarification and I am happy to try and understand concerns that there may be remaining, but it appears to me that it is very clear that this cannot be a police authority, but it must be a court, a judicial authority,"

At a later point, the minister said:

> "Yes, there are different legal systems that apply in different parts of the European Union, but there are clear judicial authorities who apply for extradition and who will be the authorities that have the power to apply for a European arrest warrant. Those judicial authorities will be reported under the Framework Agreement, they are the judicial authorities that will have that power and it is clearly stated in the Framework Decision that it will be a court decision."

The minister may not have been accurately informed about the nature of the foreign authorities at whose behest states had up to 2002 been acting when requesting extradition. All these statements show the importance attached on all sides to any European arrest warrant being issued by a court.

252. The Framework Decision was agreed on 13 June 2002. As set out more fully in paras 219 to 220 above, articles 2 and 6 used the terminology of "judicial decision" (décision judiciaire or justizielle Entscheidung) and "judicial authority" (autorité judiciaire or Justizbehörde). In contrast, the Extradition Bill introduced on 14 November 2002 was phrased simply to apply if the designated authority (in the event SOCA) "receives a Part 1 warrant in respect of a person" (clause 2(1)) stating, in summary, that the person was either accused of and wanted for trial on an offence or was unlawfully at large after conviction. Clause 2(5) to (7) were in similar form to those which ultimately became section 2(7) to (9) (see para 196 above). Not surprisingly, these provisions attracted immediate parliamentary criticism. In its 1st report (Session 2002-2003) dated 5 December 2002 the House of Commons Home Affairs Committee recited the parliamentary history to that date as follows:

> "59. At the time at which the European Scrutiny Committee first considered the draft framework decision, the draft provided for the European Arrest Warrant to be issued and executed by a 'judicial authority'. The Committee was concerned that, without an agreed definition of 'judicial authority', it was not possible to ensure that orders made by police forces, with no recognisably judicial involvement in the making or approval of such orders, would be excluded from recognition and enforcement under the framework decision. Article 1 of the draft framework decision was subsequently amended to refer to the European Arrest Warrant as being a 'court decision issued by a member state'. The Committee inferred from this reference that the 'judicial authority' would have to exercise recognisably judicial functions in an independent manner.
>
> 60. The European Scrutiny Committee asked the Parliamentary Under-Secretary if it followed from article 1 that the UK courts would not be obliged to recognise and enforce a warrant if it came from a body which they did not recognise as a court. He responded that 'it will not be possible for authorities that clearly are not courts, that are not judicial authorities to issue requests for European Arrest Warrants as they will not be recognised', although he pointed out that it will be for each member state to designate a judicial authority competent to issue such warrants. He later confirmed that, under the Extradition Bill, the UK judicial authority 'will not only have the ability but will certainly not execute a European Arrest Warrant that

> comes from anything other than a judicial authority in another European state'. The Parliamentary Under-Secretary also stated that 'the whole thing will need to be spelt out within the Bill'. He gave similar assurances to European Standing Committee B."

The Committee concluded:

> "63. We agree with the European Scrutiny Committee that the European Arrest Warrant should be able to be issued only by a judicial authority exercising recognisably judicial functions in an independent manner. We consider that this requirement should apply to all Part 1 warrants. We therefore recommend that clause 2(5) be amended to provide that the UK judicial authority may not issue a clause 2 certificate unless it believes that the Part 1 warrant was issued by such a judicial authority."

253. The Bill was considered in Standing Committee in the House of Commons on 9 January 2003, when the shadow minister took up the same points, referring back once again to the assurances given in January 2002. Amendments were proposed and (at that stage) lost. One was to add "judicial" into the requirement that an arrest warrant be issued by an authority of a category 1 territory (Hansard (HC Debates), cols 42-45). As will appear, an amendment to this effect was ultimately accepted on 22 October 2003. Another was that only European arrest warrants issued abroad by the equivalent of a High Court judge should be recognised in the United Kingdom. The minister, Mr Ainsworth, said in debate in response, at col 47, that:

> "There is no attempt to renege on any commitments that were given in previous Committees. The framework document could not be clearer. We sought safeguards during the negotiation of the document to ensure that we protected rights in the way the hon Gentleman suggests we should."

Mr. Maples interposed:

> "A British court dealing with an application for the extradition of someone under Part 1 would read the Bill, not the framework document. If the Government took the trouble to get 'judicial' inserted into the framework document, why cannot they simply put it in the Bill? Subsection (5) is ambiguous. It says that the authority

‘has the function of issuing arrest warrants in the category 1 territory’.

A police officer may well be one of the people or organisations that have a function of issuing arrest warrants in another territory. If the arrest warrant is acted on under this legislation, it should be issued by a judicial authority. The question of the presumption of innocence is different, but the insertion of ‘judicial’ in these two places could solve the problem. I am not sure why the minister resists it.”

Mr Ainsworth replied, at col 48:

“Let us discuss how we deal with extradition warrants currently and how we expect them to be dealt with under the European arrest warrant framework. If hon. Members are still not satisfied at the end of the debate they can make their views known. We expect that European arrest warrants will be issued in future by exactly the same authorities as issue warrants under the current arrest procedures. We intend to do that in the United Kingdom. There is no reason to suppose that our intentions are different from those of any other European country. The Bill is drafted in such a way as to inc1ude all those authorities that currently issue arrest warrants, as issuing authorities. I have yet to hear an argument that says that we should change that.

The Committee is well aware that we have enjoyed extradition arrangements with all EU member states for many years. Extradition requests come from a variety of sources. Any Member who read the proceedings of European Standing Committee B would be aware of the wide variety of sources for current extradition requests - the examining magistrate in Liege, the magistrate at the public prosecutor’s office in Amsterdam, the Court of Brescia, the county tribunal of Bobigny or even the magistrate judge Maria Teresa Palacios Criado in Madrid. That gives an idea of the span of arrangements used by our European partners and the sort of people who make arrest warrants today. We do not believe that that will or can change: the framework document insists on no widening outwith the judicial authorities in the Part 1 countries.

We receive extradition requests from a variety of sources throughout the UK and, we should recognise that other EU countries do not have exactly the same structure of criminal justice system as our own. As

> the hon Member for Orkney and Shetland rightly pointed out, our system is structured in two different ways .The current system works well and has not given rise to any problems in the recent past stemming from an inappropriate request from a European partner for extradition. I see no reason to change the system."

254. The Government responded formally on 12 February 2003 to the House of Commons Home Affairs Committee's Report of 5 December 2002 (para 252 above), the response being published in by a further first special report on 3 March 2003. In response to para 63 of the Report of 5 December 2002 the Government recognised "that there is very real concern about this point" and said that it therefore intended to bring forward further amendments to make clear that any incoming European arrest warrant must have been issued by a "judicial authority", but to disapply this requirement to requests for arrest already in the pipeline under the Schengen information system prior to 1 January 2004 (the date when the European arrest warrant was due to come into force), since it was appreciated that Schengen requests could be entered into the system at the request of police officers.

255. The Bill had its third reading in the Commons on 25 March 2003, when the minister introduced amendments Nos 35 and 36 to insert into clauses 2(7) and (8) (the differently worded precursors of the eventual section 2(7) and (8)) a requirement that the designated authority should only certify

> "if it believes that the authority which issued the Part 1 warrant (a) is a *judicial* authority of the category 1 territory and (b) has the function of issuing arrest warrants in the category 1 territory".

The minister explained that these amendments:

> " ….. respond to a point raised by representatives of both parties in Committee. ….. members of the Select Committee on Home Affairs should also welcome them because they raised the same concern. The amendments will make a European arrest warrant acceptable only if it is issued by a judicial authority in a requesting state. If the warrant came from any other source, the UK designated authority would be unable to certify it and no further action could be taken on it. The stipulation that the warrant must be issued by a judicial authority is already in the framework document, so the amendments will make little difference in practice. Nevertheless, we thought it right to respond to the wishes of those who raised the issue and to

> make the guarantee explicit in the Bill." (Hansard (HC Debates), cols 166-167).

256. On 1 May 2003 the Bill had its second reading in the House of Lords, where the minister, Lord Filkin, explained the constitutional position, in the passage I have set out in para 218 above. The Bill was referred to a Grand Committee, where three main areas of concern was raised on 9 June 2003, by the speakers on both sides of the House, particularly Baroness Anelay and Lord Wedderburn. First, they proposed an amendment to insert "judicial" in the first line of clause 2, to make clear, as Lord Wedderburn put it:

> "that, right from the outset there should be absolutely no doubt that a judicial authority –I believe a ministerial statement once indicated that that means a court – must be the source of the Warrant" (Hansard (HL Debates)(GC) col 11).

The minister's response, at col 13, was to agree to consider this:

> "Lord Filkin: As ever, I shall reflect on what my noble friend says. If, on reflection, there are better ways of dealing with the issue, we shall not be churlish or obdurate for the sake of it in resisting such amendment. But clause 2 is quite clear as it stands. A warrant is valid only if it is certified by the UK certifying authority. The UK authority can certify the warrant only if it comes from a judicial authority, as set out in subsections (7) and (8) of clause 2.
>
> Lord Stoddart of Swindon: Then why not say so!?
>
> Lord Filkin: That stipulation could hardly be closer to the beginning of the Bill. Nevertheless, I shall not be churlish, 1 shall consider and reflect. I do not believe that there is any issue of principle here. We are absolutely clear about that, and I have been happy to respond positively to the request of the Official Opposition in this respect."

257. Second, Lord Wedderburn, at col 28, proposed an amendment to omit from clause 2(7) (in its form set out in para 255 above) the words "it believes that". Lord Bassam, now speaking for the government, acknowledged, at col 32, that the Bill was for "many …. a controversial piece of legislation" and agreed to consider this amendment also. Finally, Lord Wedderburn moved an amendment to insert into clause 2(7)(b) after the words the phrase "the function of issuing arrest warrants" the phrase "after a judicial decision". He said, at cols 33-34:

> "As we understand it, a judicial authority must, if it is a court, act judicially. If it were found that a particular court had acceded to requests without a judicial examination of the case, I suggest that the court's action would not fall within the spirit of what we intend. Therefore, we should make it clear—as it is in article 1 of the framework decision— that it is not just a matter of a judicial authority, but of a judicial authority exercising a procedure which amounts to a judicial decision.
>
> A case in point might be that a body which was a judicial authority acted as a matter of course—as a matter of formality—on the request of a public prosecutor. If that could be shown—at least beyond reasonable doubt—I apprehend that such procedure would fall outwith the spirit of what the Government intend. The Government do not, as I understand it, intend that a public prosecutor should just be able to demand of someone who is on the list of designated judicial authorities that an arrest warrant be issued. If that is so, perhaps we should make that understanding clear in the Bill ….."

The minister's response was that he could not see what that would add, that, as he had already explained, "all warrants will have to be issued by a judicial authority", and that

> "I think that it is reasonable to argue that any decision taken on a matter of law or procedure by a person holding judicial office – such as a judge or magistrate - is a judicial decision" (col 36).

He then expressed concern that the amendment was aimed at requiring that the decision to issue a warrant should be taken in court with some kind of official procedure or hearing. After Baroness Anelay and Lord Stoddart had intervened to assure him of the seriousness with which she and other magistrates took the issue of any warrant, the minister said, at col 37:

> "That is exactly what we expect to happen outwith our own jurisdiction. However, we see no need to impose requirements on foreign judicial authorities that we do not impose on our own judicial authorities. We expect that the process will be similar to that in the United Kingdom and that it will be of similar veracity [sic]."

After further concern had been expressed that it might be an administrative, rather than a judicial process, the minister responded:

> "It is absolutely correct, that, regardless of the location ….., we expect the judicial process to be very similar to ours and as robust as ours. It should be considered in exactly the same way."

The debate on this amendment concluded with Lord Wedderburn saying, at cols 38-39, that "it must be a judicial authority" and urging the government to think again.

258. On 22 October 2003 Lord Bassam moved an amendment to introduce into the first line of clause 2(2) a requirement that a Part 1 warrant is an arrest warrant which is issued by *a judicial* authority …." (Hansard (HL Debates), col 1657). He thereby accepted Baroness Anelay's first proposed amendment and the second and third amendments of 9 June 2003 became otiose. The minister explained that the government's change of stance arose from "strongly put" points raised in Grand Committee (ie on 9 June 2003) by Lord Stoddart and Lord Wedderburn and by the principal spokespersons from the Liberal Democrats and Conservatives. It seems clear from the number and identity of the speakers he named that he was referring compendiously to the debate on all three associated amendments on 9 June 2003. Clauses 2(7) and (8) were thereafter consequentially amended to delete the previously introduced requirements of belief and a certificate on the part of the designated authority that the issuing authority was a judicial authority. That point was now covered more directly by the amendment to the first line of clause 2(2).

259. Meanwhile on 10 September 2003 the minister had introduced a new clause, which became section 212 of the Act. The reason for it, he explained, was that

> "while requests on the SIS (Schengen information system) require there to be a previous judicially issued domestic warrant, they may, on rare occasions, be placed on the SIS at the instigation of police officers" (Hansard (HL Debates) (GC), col 34.

His purpose in introducing section 212 was thus, he said, to forestall any argument that any such requests might not be regarded as coming from a judicial source. In consequence, in the Act as finally passed, section 2(2) was qualified by section 212 as regards Schengen alerts issued before 1 January 2004, so that the reference in section 2(2) to an arrest warrant issued by a judicial authority was to be read in that context as if it were a reference to the alert issued at the request of the authority. Section 212 was a temporary measure. It was clearly understood that the police officer would only be acting at the request of a true judicial source and that, under Part 1 of the Bill, any European arrest warrant would in future have itself to come from such a source.

Conclusions

260. What if any admissible guidance does one gain from this parliamentary history? I have already concluded that the concept of "judicial authority" in the Framework Decision should be seen as having autonomous limits in European law. It would follow, on any view, that the concept in section 2(2) must also have objective limits, rather than depend for example upon the grant of a certificate by SOCA. But even if the Framework Decision were not to be understood in this sense, I regard the clear language of section 2(2) of the Act, read with the limited requirement of certification in section 2(7) and (8), as pointing towards an objective domestic conception of judicial authority in section 2(2). At the very least, the position under the Act would be ambiguous. If that is so, then consideration of the parliamentary history makes it inconceivable that the 2003 Act can or should be construed domestically as leaving it to each state to define what is a judicial authority. The only sensible interpretation of section 2(2) in its final form and in the light of the parliamentary history is that it constitutes a self-standing independent requirement, which British courts have to be satisfied is met. It would be circular and undermine the parliamentary process and clear intention if all that it meant was that British courts had to be satisfied that the issuing authority had the function of issuing a European arrest warrant under its domestic law and that the relevant state had notified the issuing authority to the Council as having that function. That might have been the effect of clauses 2(2) and (7) to (9) before they were amended as a result of the proceedings on 9 June and 22 October 2003. It cannot have been their effect after such amendment, or the amendment would achieve nothing.

261. The second question is whether there is any sufficiently clear ministerial statement, read in context, to determine whether or not a public prosecutor can under the 2003 Act constitute a judicial authority. This question is relevant on the assumption that a public prosecutor can under European law constitute a judicial authority for the purposes of the Framework Decision. If a public prosecutor cannot be a judicial authority under European law, then she or he certainly cannot be under the 2003 Act. The direct answer to the second question is, in the light of the material which I have set out extensively, that ministers repeatedly gave assurances or endorsed assumptions that an issuing judicial authority would have to be a court, judge or magistrate. They did so moreover in contexts where a judicial authority was being contrasted by other speakers with the police and prosecutors: see the course of events set out and the passages quoted in paras 248 to 259 above, especially those relating to the parliamentary proceedings on 10 December 2001, 9 January 2002, 9 January, 9 June, 10 September and 22 October 2003.

262. It is true that ministers also gave these assurances with the understanding that the implementation of the Framework Decision by the 2003 Act would not in

this respect lead to any change by comparison with previous practice. But, even though it be the case that bodies and persons other than courts, judges or magistrates were involved in decisions by states to request extradition under the arrangements in place prior to the Framework Decision, this cannot, in my view, undermine the force of the assurances given in relation to the new and more radical procedures being introduced by the Extradition Act 2003, to the effect that the new Act would require the intervention of an issuing judicial authority in the sense of a court, judge or magistrate.

263. Third, I do not consider that the answer given to the second question can be diluted by reference to subsequent state practice. I accept the potential relevance of subsequent state practice to the interpretation of the Framework Decision (paras 242 and 244 above – and see Lord Phillips's judgment, para 67, Lord Dyson's judgment**,** paras 127 to 140 and 152 and Lord Walker's judgment). But this cannot affect the guidance as to Parliament's actual intention in 2003 which is to be gained from the course of the parliamentary debates and amendments in 2003. To treat Parliament as having intended that the words "issuing judicial authority" should bear whatever meaning subsequent state practice might attach to them, would undervalue the significance of the parliamentary process and the seriousness of the concerns expressed, the assurances delivered and the amendments made during that process.

264. Fourth, I consider that the force and quality of the assurances given must outweigh any conclusion as to what may or would be likely to be the European legal position, if that could or were to be established now with any certainty. The Bill was seen, rightly, as affecting liberty and freedom to reside or remain within the jurisdiction of persons who might very well be citizens of the United Kingdom, although Mr Assange is not. It was controversial, and ministers' assurances as to the scope of the phrase "judicial authority" should control its meaning in circumstances where the power of the state is now sought to be deployed to extradite a person at the instance of a public prosecutor. The assurances were in that respect and should bind the executive interest, including that of the respondent which is seeking the assistance of the British state to extradite Mr Assange. Lord Brown takes a contrary view, because, in effect, there cannot be found in the parliamentary exchanges any ministerial statement that the assurances were only given so long as they complied with whatever was (or might prove to be) the European legal position. But that puts the cart before the horse. First, such clarity as now exists about the likely European position only really results from subsequent state practice. But secondly and more importantly, Lord Brown's approach reads into clear parliamentary assurances about the meaning of the Act an unstated qualification that such assurances should not bind if the minister should prove mistaken (Lord Brown's word) about the true scope of the Framework Decision. Both Parliament and the courts can and should, in my

opinion, take ministers at their word as to the meaning of the Act they were promoting, and not question unqualified assurances which they have given.

265. Finally, if this means that there can now be seen to be a possible or likely discrepancy between the United Kingdom's international obligations and the domestic legal system or between the meaning of the phrase "judicial authority" in the framework decision and in the Extradition Act 2003, that is in no way impossible: see per Lord Hoffmann in *R v Lyons*, cited in para 206 above. It is the consequence of the United Kingdom's dualist system, of parliamentary sovereignty and of the clear limitations on the domestic implementation of European law which Parliament intended, for the time being, by the European Communities Act 1972 and the European Union (Amendment) Act 2008, read with Protocol No 36 of the Treaty of Lisbon. As a domestic court, and in the absence of any European Treaty or instrument falling within section 2 of the European Communities Act 1972, our loyalty must be to Parliament's intention in enacting the Extradition Act 2003. The implications of this in the present context are in my view clear.

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

Annex to judgment of Lord Mance (para 199)

Relevant text of Protocol No 36 to the Treaty of Lisbon

"TRANSITIONAL PROVISIONS CONCERNING ACTS ADOPTED ON THE BASIS OF TITLES V AND VI OF THE TREATY ON EUROPEAN UNION PRIOR TO THE ENTRY INTO FORCE OF THE TREATY OF LISBON

Article 9
The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the

entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.

Article 10

1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen acquis integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.”

NOTE

The appellant's application to reopen this judgment was refused for the following reasons:

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

2. At the outset of her address to the Court Miss Rose gave five headings for the submissions that she proposed to make. The third of these was the relevance of subsequent events, other EU Instruments and the practice of EU States. A considerable volume of documentary material that had been placed before the Court related to these matters.

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

4. For these reasons the Court considers that this application is without merit and it is dismissed.