In The Supreme Court of the United Kingdom

ON APPEAL

FROM HER MAJESTY'S HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT) (ENGLAND AND WALES)

Neutral citation of judgment appealed against: [2011] EWHC 2849 (Admin)

BETWEEN:

JULIAN PAUL ASSANGE

Appellant

v

SWEDISH PROSECUTION AUTHORITY

Respondent

CASE FOR THE APPELLANT

Summary of the appeal

1. By means of a European Arrest Warrant ("EAW"), the Respondent prosecutor seeks to extradite the Appellant to Sweden to interrogate him on allegations of sexual misconduct.

2. The High Court refused an appeal against the order for the Appellant's extradition, but certified that the following point of law of general public importance was involved in its decision:

> *"…Whether a European Arrest Warrant ('EAW') issued by a public prosecutor is a valid Part 1 Warrant issued by a "judicial authority" within the meaning of sections 2(2) & 66 of the Extradition Act 2003?..."*

App Pt. 1 p. 5

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3. The Appellant submits that the Swedish public prosecutor is not a "judicial authority" within the meaning of sections 2(2) and 66 of the Extradition Act 2003 ("the 2003 Act"), and accordingly cannot issue a valid EAW, because she lacks the impartiality and the independence from both the executive and the parties which constitute essential features of the exercise of judicial authority, under domestic and European law.

App Pt. 3 p. 1216 & p. 1264

4. In short, the prosecutor, as the party with conduct of the criminal investigation into the allegations against the Appellant, cannot act as a judge in relation to the same action. To purport to do so is a breach of the rule that nobody may be a judge in their own cause, which is a fundamental principle of natural justice underpinning both common law and European legal systems.

5. As the facts of this case demonstrate, the prosecutor is in an adversarial relationship with the Appellant. For example, she has applied to the Swedish court for an order for his detention; and has made submissions opposing his appeal against that order. Contrary to the finding of the High Court, she cannot in these circumstances validly exercise "judicial authority" over his case.

6. To regard the Swedish prosecutor as a "judicial authority" is to interpret Part 1 of the 2003 Act contrary to its plain meaning; contrary to the principle of legality; and in disregard of the safeguards for the rights of individuals which it was intended to contain. Such an interpretation would be inconsistent with the European Convention on Human Rights ("the Convention"), and is not required (or, indeed, permitted) under EU law.

7. Part 1 of the 2003 Act gives 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"). It has significantly changed the law of extradition to European states.

App Pt. 3 p. 1059

8. The new system, which has removed significant safeguards to the requested person, is counterbalanced by the fact that its operation is intra-judicial. The Framework Decision consistently uses the language of "judicial authority":

> *"…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 <u>between judicial authorities</u>… Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of <u>free movement</u>*

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> *<u>of judicial decisions</u> in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice…"* (Recital 5)
>
> *"…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 <u>judicial cooperation</u>…"* (Recital 6)

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> *"…The European arrest warrant is a <u>judicial decision</u> 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…"* (Article 1.1)

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9. The High Court recognised that, in some instances in the Framework Decision, "the term judicial authority is plainly used [in a context which can] refer <u>only</u> to a judge who adjudicates" (judgment, §35). App Pt. 1 p. 17

10. It was always envisaged by Parliament that independent judicial scrutiny would be applied to both the issuance and execution of this draconian instrument. That is why Part 3 of the 2003 Act only permits United Kingdom ("UK") judges to issue EAWs (s.142). App Pt. 3 p. 1319

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11. Parliament believed that EAWs would be issued only by courts or judges, and assured that EAWs issued by other bodies would not be executed.

12. Experience of the EAW system has shown, however, that that belief was misplaced. Whilst the vast majority of EAWs are issued by judges or courts, the UK has nonetheless received EAWs from bodies that are clearly not "judicial".

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13. Until the present case, the High Court did not recognise that there was a problem. In a series of cases, the High Court had held that, by virtue of Article 6 of the Framework Decision,[1] it had no jurisdiction to enquire into the status of the issuing "judicial" authority.[2]

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1. "…6.1. 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. ***Enander v the Governor of HMP Brixton and the Swedish National Police Board*** [2005] EWHC 3036 (Admin); ***Harmatos v Office of the King's Prosecutor in Dendermonde, Belgium*** [2011] EWHC 1598 (Admin). See also ***Goatley v HM Advocate*** [2006] HCJAC 55. Auth Tabs 15, 19 & 17

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14. Thus, the High Court has, for example, regularly executed EAWs issued by Ministries of Justice,[3] which the High Court in the present case recognised could not be legitimate;

> *"…public confidence in the EAW would only be undermined by the recognition of an EAW issued by a Ministry of Justice…"* (judgment, §47).

15. In this case, having heard full argument, the High Court correctly recognised, for the first time, that the self-designation of an authority as judicial by a Member State is not conclusive of its status (judgment, §46).

16. That significant jurisprudential advance having been made, the High Court was required to assess, for the first time, the actual status of a foreign public prosecutor.

17. The High Court recognised that;

    a. The status of a public prosecutor was "debatable" (judgment, §38);

    b. A public prosecutor may lack the essential impartiality required of intra-judicial co-operation (judgment, §§49-54); and

    c. The case law of the European Court of Human Rights in the context of Article 5 is clear to the effect that a prosecutor is <u>not</u> an "officer authorised by law to exercise judicial power" (judgment, §§28-33 & 49).

18. Yet, the High Court nonetheless concluded that the Swedish prosecutor was a "judicial" authority within the meaning of Part 1 of the 2003 Act.

19. It is submitted that the High Court was wrong to reach that conclusion, for the reasons summarised above and set out in detail below.

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3. See, for example, ***Rimas v Ministry of Justice of the Republic of Lithuania*** [2011] EWHC 2084 (Admin); ***R (Dikmonas) v Ministry of Justice of the Republic of Lithuania*** [2010] EWHC 1222 (Admin); ***Baranauskas v Ministry of Justice of the Republic of Lithuania*** [2009] EWHC 1859 (Admin); ***Baksys v Ministry of Justice of the Republic of Lithuania*** [2007] EWHC 2838 (Admin); ***Lopetas v Minister of Justice for Lithuania*** [2007] EWHC 2407 (Admin); ***Chalitovas v State Secretary of Ministry of Justice, Lithuania*** [2006] EWHC 1978 (Admin); ***R (Kuprevicius) v Vice Minister of Justice, Ministry of Justice, Lithuania*** [2006] EWHC 1518 (Admin).

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20. The general importance of ensuring the proper maintenance of the safeguards contained in Part 1 of the 2003 Act, including the requirement that an extradition request may only be made by a judicial authority is clear. In particular:

(a) Since that Act came into force, the UK courts have entertained and executed EAWs issued by prosecutors from at least nine other EU Member States.[4]

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(b) A disproportionately high number of EAWs found by the High Court to be unjust, oppressive or abusive have emanated from prosecutors rather than true judicial authorities.[5] Countries in which prosecutors are authorised to issue EAWs, such as Lithuania, are responsible for many of the EAWs received in this country for trivial matters.

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(c) Serious concerns about the operation of the EAW system have been expressed by the Joint Committee on Human Rights.[6]

Statutory Framework

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21. Section 2 of the 2003 Act provides, as far as is material, that:

> *"…(2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory …*

App Pt. 3 p. 1216

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4. Since the 2003 Act came into force in 2004, this Court has entertained EAWs issued by prosecutors in Austria, Belgium, Estonia, France, Germany, Greece, Italy, Lithuania, the Netherlands and Sweden. It is open to any other EU member State to designate its prosecutors as competent judicial authorities under Article 6 of the Framework Decision at any stage.

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5. See, recently, for example, ***R (Lorencas) v Duty Prosecutor General, Lithuania*** [2011] EWHC 2941 (Admin) [discharge under article 6 ECHR because extradition would be oppressive or unjust]; ***Penta v District Public Prosecutor's Office Zwolle-Lelystad, The Netherlands*** [2011] EWHC 992 (Admin) [EAW oppressive under section 14]; ***Janovic v Prosecutor General's Office, Lithuania*** [2011] EWHC 659 (Admin) [EAW unjust under section 14]; ***Hamburg Public Prosecutor's Office (a German Judicial Authority) v Altun*** [2011] EWHC 397 (Admin) [EAW issued in face of amnesty by Third State where the defendant had been released unconditionally and his sentence deemed served]; ***Office of the prosecutor General of Turin v Barone (No. 2)*** [2010] EWHC 3004 (Admin) [EAW an abuse of process where extradition previously refused by High Court as not in interests of justice and subsequent EAW a collateral and abusive challenge to the prior decision of the High Court].

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6. The Fifteenth Report from the Joint Committee on Human Rights, "The Human Rights Implications of UK Extradition Policy", HC 767; Hansard, House of Commons, 5 December 2011, Col 82.

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> *(7) The designated authority[7] may issue a certificate under this section if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.*
>
> *(8) A certificate under this section must certify that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory…"*

22. The requirement to ensure that the issuing authority is a judicial authority is also engaged by the provisions of section 64 of the 2003 Act. By section 64(2), an 'appropriate authority' of a Part 1 territory may, as in the present case, avoid the requirement of dual criminality by issuing a certificate that the conduct constitutes a Framework List offence.[8] Only an "appropriate authority" is entitled to utilise the far-reaching coercive power. The 'appropriate authority' is defined by section 66(2):

App Pt. 3 p. 1260

> *"…(2) An appropriate authority of a category 1 territory is a judicial authority of the territory which the appropriate judge believes has the function of issuing arrest warrants in that territory…"*

App Pt. 3 p. 1264

The role of the prosecutor in Sweden

23. The Swedish prosecutor is not a judge, nor does she possess or exercise any judicial function (*Bell; Judiciaries within Europe, 2006, Cambridge*, pp 255, 279).

Auth Tab 127 pp. 255, 279

24. The Commission's Mutual Evaluation Report on Sweden[9] records that:

> *"…The Prosecutor-General is the head of the public prosecution service and supervises the work of the public prosecution authorities. The Prosecutor-General is the only public prosecutor entitled to institute or pursue proceedings at the Supreme Court.*

Auth Tab 94 para. 2.1

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7. The "designated authority", for the purposes of the Act, is the Serious Organised Crime Agency ("SOCA") (The Extradition Act 2003 (Part 1 Designated Authorities) Order 2003 (SI 2003 No. 3109) as amended by the Serious Organised Crime & Police Act 2006 (Consequential and Supplementary Amendments to Secondary Legislation) Order 2006 (SI 2006 No. 594)).

Auth Tab 14

8. The House of Lords in ***Dabas v High Court of Justice, Madrid*** [2007] 2 AC 31, HL held that an EAW may self-certify for this purpose, notwithstanding that the 2003 Act requires a separate certificate.

9. Doc. 9927/2/08 REV 2, 21 October 2008, §2.1.

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The Legal Department within the Office of the Prosecutor-General deals with international matters. In that connection, the Legal Department provides public prosecution offices with the necessary assistance both in general (e.g. by drafting manuals) and in relation to particular cases (e.g. providing expertise or giving guarantees when required by foreign authorities).

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At four locations in the country (Umeå, Stockholm, Göteborg and Malmö), there are public prosecution service development centres, tasked with promoting methodological and legal development within different criminal areas; legal follow-up and inspection are also conducted in these offices.

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The operative prosecution work is carried out by 40 Public Prosecution Offices:
• Local Public Prosecution Offices (34);
• International Prosecution Offices (3);
• National Prosecution Offices (3).

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Local Prosecution Offices perform prosecutorial tasks and lead criminal investigations. Sweden does not follow the so called "investigating judge model", and Swedish public prosecutors have very strong powers compared with the situation existing in other Member States: they may decide on any kind of measures during investigations, including coercive measures, with some exceptions (e.g. phone surveillance, or detention).

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International Prosecution Offices have special competence for combating organized, cross border crime and for international judicial co-operation. Currently there are 3 of these offices, located in Stockholm, Göteborg and Malmö, each of them covering a geographical area of Sweden.

There are 3 specialized prosecution units with nationwide jurisdiction: the National Anti Corruption Unit, the Prosecution Unit for National Security and the National Police-related Crimes Unit.

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Cases involving economic crime are handled by the National Economic Crimes Bureau. This agency is administratively an independent authority, although in legal terms it comes under the Prosecutor-General when the latter is acting as the highest prosecutorial authority.

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The Office of the Prosecutor-General may control and supervise both prosecuting activities and administration of the prosecution service by issuing instructions and guidelines of a general nature. In addition, implementation of proper prosecution policy within the public prosecution service may be ensured through interventions of higher prosecutors in individual cases: the Prosecutor-General, the directors of the prosecution offices and some other prosecutors of higher rank may take over a case from lower prosecutors (at the request of a party or on the higher prosecutors' own initiative) and execute the necessary tasks, or carry out the whole investigation. Higher prosecutors are not allowed, however, to give instructions to lower prosecutors concerning prosecution in individual cases.

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As to EAW-related matters, the International Public Prosecution Offices are competent within their regions to receive EAWs and deal with EAW cases. Nevertheless, if the EAW concerns criminality within the competence of one of the National Prosecution Offices or the Economic Crimes Bureau, the EAW will be handled by the competent one among these…."[10]

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25. As can be seen from the history of these proceedings, the Swedish prosecutor takes an adversarial stance towards the person under investigation. For example, in this case, the prosecutor applied to the Stockholm District Court for a detention order in absentia for the purpose of interrogation. When the Appellant appealed to the Svea Court of Appeal against the making of that order, the Swedish prosecutor made written submissions in opposition to his appeal. The same prosecutor (Marianne Ny), having participated as a party to these proceedings before the Swedish courts, later issued the EAW, purportedly as a "judicial authority".

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The 1957 Extradition Convention

26. Prior to 1999, there existed no common or guiding initiative constraining or focusing extradition and other criminal co-operation measures within the EU. Instruments and Conventions were created on an *ad hoc* basis, albeit they were fashioned so as to create a workable and sensible system of co-operation in criminal matters.

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Tab 101

10. See also "Eurojustice" network of European Prosecutors-General, Country Report, Sweden (http://www.euro-justice.com/member_states/sweden/).

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27. Extradition from the United Kingdom was governed by the Extradition Act 1989. Part III of the 1989 Act gave effect to the provisions of the European Convention on Extradition 1957 (the "ECE").[11] Article 1 provided that: Auth Tab 6

> *"…The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order…"* Auth Tab 7 p. 3

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28. The Explanatory Report stated that:

> *"…Article 1…The term "competent authorities" in the English text corresponds to autorités judiciaires in the French text. These expressions cover the judiciary and the Office of the Public Prosecutor but exclude the police authorities…."* Auth Tab 79 p. 5

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> *Article 12… Paragraph 2 specifies at sub-paragraphs (a), (b) and (c) the documents which the requesting Party is required to produce in support of its request, and the information which it must supply. 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. It was observed that the description of the person claimed is not generally given in the request itself but is attached as a separate document. During the discussion on 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…"* Auth Tab 79 p. 11

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29. Thus, to fall within the scope of the ECE, proceedings for an offence had to be in being (whether under the supervision of the judiciary or a public prosecutor). The act of extradition, however, remained an inter-governmental act. Extradition requests were not issued by those "competent authorities" or *autorités judiciaires* but by the Executive. Thus, under the 1957 scheme a prosecutor could <u>not</u> of himself or herself request extradition.

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11. First incorporated into UK law in 1990 by the *European Convention on Extradition Order 1990* (SI 1990 No. 1507) and later re-incorporated by the *European Convention on Extradition Order 2001* (SI 2001 No. 962)). Auth Tab 7

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30. However, under the 1957 scheme, it was the case that a prosecutor conducting an investigation could request the government of that State to seek extradition. That was alien to United Kingdom notions of extradition and was protected against by the common law, by which it was settled that the United Kingdom would not execute an extradition request issued for the purpose of interrogation. This it achieved by the mechanism of the additional UK law requirement that a defendant be "accused"[12]; see ***Re Ismail*** [1999] 1 AC 320, at 326-327;

Auth
Tab 30
p. 326

> *"…It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of "accused" persons. It is also common ground that it is not enough that he is in the traditional phrase "wanted by the police to help them with their inquiries." Something more is required. What more is needed to make a suspect an "accused" person? There is no statutory definition. Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. For the same reason it would be unwise for the House to attempt to define the word "accused" within the meaning of the Act of 1989. It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in section 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: Reg. v. Governor of Ashford Remand Centre, Ex parte Postlethwaite [1988] A.C. 924, 946-947. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: Rey v. Government of Switzerland [1999] A.C. 54, 62G. It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring*

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Tabs 1, 2, 3, 4, 5 & 6

12. Extradition Act 1870, s10; Extradition Act 1873, s3; Fugitive Offenders Act 1881, s2; Backing of Warrants (Republic of Ireland) Act 1965, s1(1)(a), 1(2); Fugitive Offenders Act 1967, s1; Extradition Act 1989, s1(1)(a), 1(2), 6, 9(8), Sched. 1, para. 5(1), 6(2), 7(1).

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an indictment. Moreover, it is important to note that in England a prosecution may also be commenced if a custody officer decides that there is sufficient evidence to charge an arrested person and then proceeds to charge him…Despite the fact that the prosecuting authorities and the court are not involved at that stage, the charging of an arrested person marks the beginning of a prosecution and the suspect becomes an "accused" person. And that is so even if the police continue to investigate afterwards. It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied. That such a broad approach to the interpretation of section 1 of the Act of 1989 is permissible is reinforced by the provisions of section 20. This provision deals with the reverse position of an extradition of a person "accused" in the United Kingdom and contemplates that "proceedings" against him may not be commenced ("begun") for six months after his return. This provides contextual support for a correspondingly broad approach to "accused" in section 1. For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. But in the light of the diversity of cases which may come before the courts it is right to emphasise that ultimately the question whether a person is "accused" within the meaning of section 1 of the Act of 1989 will require an intense focus on the particular facts of each case…."

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31. During the life of the 1957 Convention. the United Kingdom courts were never called upon to address the particular issue of whether a prosecutor was a "judicial authority" because, as noted, under the 1957 scheme, a prosecutor could not issue an extradition request.

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Prosecutors and the meaning of the exercise of judicial authority under the European Convention on Human Rights

32. In the period since 1957, the European Court and Commission of Human Rights ("ECtHR" and "EComHR") have examined the question of whether a prosecutor was a "judicial authority" under Article 5(3) of the Convention, to which all State parties to the Framework Decision are signatories.

33. Article 5(3) ECHR provides that:

> *"…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 or to release pending trial. Release may be conditioned by guarantees to appear for trial…."*

Auth Tab 71

34. In ***Skoogstrom v Sweden*** (1984) 6 EHRR CD77 it was expressly held that a Swedish prosecutor could not be "a judge or other officer authorised by law to exercise judicial power" for the purpose of Article 5(3) of the Convention, because she lacked the essential quality of independence. The EComHR held:

> *"…76. The Commission observes that the public prosecution forms part of the Executive in the traditional sense of that concept. However, this fact alone does not mean that the Public Prosecutor is not independent for the purposes of Art 5 (3). It is true that the Swedish Public Prosecutors have a personal independence as they can never receive instructions from any public authority when deciding in a particular case…*
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> *77. However, in order to possess the necessary independence, the "officer" envisaged by Art. 5 (3) must also be independent of the parties. In this respect, the Commission recalls that the tasks of the Public Prosecutor are inter alia to make preliminary criminal investigations, to decide whether or not prosecution should be instituted, to draw up the indictment and to perform the prosecution in the courts. In addition, the Public Prosecutor has power to provisionally detain a person who is reasonably suspected of having committed an offence. It is noted that in general all these tasks are performed by the same prosecutor, and in case a prosecutor is for some reasons substituted by another prosecutor, then the substitute takes full responsibility of the case. There is thus no question of a distinction between investigating and prosecuting authority. Furthermore, the organisation of the prosecuting functions in Sweden is a*

Auth Tab 57 para. 76

hierarchical system, where a superior prosecutor may give general directives to lower prosecutors, take over their cases and review their decisions. It therefore appears that a prosecutor is subject to constant supervision by his superior, although the superior may not order the subordinate prosecutor to take a particular decision in an individual case.

78. …When Mrs M had to take the decision on the applicant's continued detention she had replaced the Chief District Prosecutor completely, and had taken full command of the whole case of the applicant, which in principle thus included the continued preliminary investigation, the decision as to whether prosecution should be instituted against the applicant, and subsequently the task of performing the prosecution in court. However, in taking full charge of the applicant's case Mrs M did, as the Court put it in the Schiesser Case, "assume the mantle of prosecutor"…In the opinion of the Commission the circumstances of the present case show that when taking the decision on the applicant's continued detention Mrs M was <u>not independent of the parties</u>. She was one of the parties, and could have been called upon to continue to perform tasks, which are undeniably tasks of a prosecutor. The fact that Mrs M did not herself perform the subsequent prosecution in court, could not retroactively make her independent of the parties at the time when she took the detention decision. It was a mere coincidence that all the tasks were not performed by the same prosecutor…

79. Accordingly, the Commission is of the opinion that the Public Prosecutor who decided that the applicant's provisional detention should continue, did not fulfil the requirement of independence…".

35. ***Skoogstrom*** is part of a long-established and consistent line of Strasbourg authority to the effect that public prosecutors, or those subordinate to public prosecutors, are not "officer[s] authorised by law to exercise judicial power" within the meaning of Article 5(3). That case law began with ***Schiesser v Switzerland*** (1979-80) 2 EHRR 417, in which the Court held that:

Auth Tab 55 para. 31

"…31 …the "officer" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested. The first of such conditions is <u>independence of the executive and of the parties</u>…

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> *…34. …the Court emphasises that in the present case the District Attorney intervened exclusively in his capacity as an investigating authority, that is in considering whether Mr. Schiesser should be charged and detained on remand and, subsequently, in conducting enquiries with an obligation to be equally thorough in gathering evidence in his favour and evidence against him (Article 31 StPO). He did not assume the mantle of prosecutor: he neither drew up the indictment nor represented the prosecuting authorities before the trial court (see paragraph 11 above). He therefore did not exercise concurrent investigating and prosecuting functions, with the result that the Court is not called upon to determine whether the converse situation would have been in conformity with Article 5 para. 3…".*

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36. In a series of linked cases (***De Jong v The Netherlands*** (1986) 8 EHRR 20; ***Pauwels v Belgium*** (1989) 11 EHRR 238; ***Van der Sluijs v The Netherlands*** (1991) 13 EHRR 461), the Court applied the principles in ***Schiesser*** to find that Commanding Officers (*auditeur-militair*) lacked the requisite independence because they were capable of acting as prosecutor in the same cause:

Auth Tabs 40, 52 & 58

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> *"…Although independent of the military authorities, the same auditeur-militair could be called upon to perform the function of prosecuting authority after referral of the case to the Military Court…He would thereby become a committed party to any criminal proceedings subsequently brought against the serviceman on whose detention he was advising prior to referral for trial. In sum, the auditeur-militair could not be "independent of the parties" (see the extract from the Schiesser judgment quoted above at paragraph 47) at this preliminary stage precisely because he was liable to become one of the parties at the next stage of the procedure…"* (***De Jong***, para 49. See also ***Pauwels***, §38; ***Van der Sluijs***, §44).

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Auth Tab 40 para. 49

37. The position was no different from that which pertained once the defendant's case was referred for trial and the *auditeur-militair* then did perform the function of prosecuting authority before the Military Court:

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> *"…The auditeur-militair was thus a committed party to the criminal proceedings being conducted against the detained serviceman on whose possible release he was empowered to decide. In sum, the auditeur-militair could not be "independent of the parties"(see the extract from the Schiesser judgment quoted above at paragraph 32) precisely because he was one of the parties. Consequently, the procedure followed before the*

Auth Tab 41 para. 38

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auditeur-militair in Mr. Duijf's case did not satisfy the requirements of Article 5 § 3…" ***(Duinhof v The Netherlands*** (1991) 13 EHRR 478, §38; ***Pauwels v Belgium*** (supra), §38)

38. The ***Schiesser*** principles have been consistently applied by the ECtHR:

- In ***Huber v Switzerland*** (1990) ECHR App. No. 12794/87, 23rd Oct., the defendant's detention was authorised by a District Attorney (independent of the executive) who acted as the prosecutor in the case (drawing up the indictment) albeit not assuming the role of prosecuting counsel in the trial court (although he could have done so as a matter of Swiss law). The ECtHR held that the Attorney could not qualify as an officer authorised by law to exercise judicial power because he "…could not be "independent of the parties" at that preliminary stage precisely because he was "liable" to become one of the parties at the next stage in the procedure…." (at §§42-43). Auth Tab 43

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- ***Brincat v Italy*** (1993) 16 EHRR 591. Public prosecutor authorising the defendant's detention and performing the preliminary investigation, whilst independent of the executive, was not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§§19-21). Auth Tab 38

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- ***Assenov v Bulgaria*** (1999) 28 EHRR 652. Investigator authorising the defendant's detention was institutionally independent but subject to the control of the public prosecutor. Investigator was therefore not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§144-148). Moreover, the prosecutor (who approved the investigator's decision) was also not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§149). Auth Tab 36

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- ***Nikolova v Bulgaria*** (2001) 31 EHRR 3. Investigator authorising the defendant's detention was institutionally independent but subject to the control of the public prosecutor. Investigator was therefore not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§§45-51). Moreover, the prosecutor (who approved the investigator's decision) was also not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§51). Auth Tab 50

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- ***Niedbala v Poland*** (2001) 33 EHRR 48. Prosecutor performing investigating and prosecuting functions was not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§§48-56). The fact that prosecutors, in addition to exercising a prosecutorial role, also act as guardian of the public interest, cannot be regarded as conferring on them a judicial status (§53).

Auth Tab 49

- ***Shishkov v Bulgaria*** (2003) ECHR App. No. 38822/97, 9th Jan. Assistant investigator authorising the defendant's detention was institutionally independent but subject to the control of the public prosecutor. Neither investigator nor prosecutor were independent of the parties and therefore not officers authorised by law to exercise judicial power (§§51-54).

Auth Tab 56

- ***Klamecki (No. 2) v Poland*** (2004) 39 EHRR 7. Prosecutor performing investigating and prosecuting functions was not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§§105-106). The fact that prosecutors, in addition to exercising a prosecutorial role, also act as guardian of the public interest, cannot be regarded as conferring on them a judicial status (§105).

Auth Tab 45

- ***Pantea v Romania*** (2005) 40 EHRR 26. Prosecutor intervened initially at the investigation stage, examining whether it was necessary to charge the applicant, directing that criminal proceedings should be opened against him and taking the decision to place him in pre-trial detention. He subsequently acted as a prosecuting authority, formally charging the applicant and drawing up the indictment on which the latter was committed for trial. However, he did not act as prosecuting counsel before this court (although this would have been possible under Romanian law). Prosecutor not independent of the executive and therefore not an officer authorised by law to exercise judicial power (§§228-229 & 236-239).

Auth Tab 51

- ***Jasinski v Poland*** (2005) ECHR App. No. 30865/96, 20th Dec. Prosecutor performing investigating and prosecuting functions was not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§§46-47). The fact that prosecutors, in addition to exercising a prosecutorial role, also act as guardian of the public interest, cannot be regarded as conferring on them a judicial status (§46).

Auth Tab 44

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- ***Zlinsat, Spol. S.R.O. v Bulgaria*** (2006) ECHR App. No. 57785/00, 15th June. Article 5(3) case law applied to Article 6(1); prosecutor's office not an independent and impartial tribunal (§§74-79). Auth Tab 59

- ***Balbul v Turkey*** (2007) ECHR App. No. 47297/99, 22nd May. Military Judge, subordinate to the army - the prosecutor in the case, was not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§§20-24). Auth Tab 37

B

- ***Moulin v France*** (2010) ECHR App. No. 37104/06, 23rd November. Prosecutors, being independent neither of the executive nor of the parties to the proceedings, are not judicial authorities. The applicant's presentation before the deputy public prosecutor of the Toulouse tribunal de grande instance, two days after her arrest, could not be regarded as presentation before a competent legal authority for the purposes of Article 5(3) (§§55-59). Auth Tab 47

C

- ***Garlicki v Poland*** (2011) ECHR App. No. 36921/07, 14th June. Assessor, subordinate to the Prosecutor-General who had sought to orchestrate the proceedings against the defendant, was not independent of the parties and therefore not an officer authorised by law to exercise judicial power (§§106-116). Auth Tab 42

D

39. The Grand Chamber in ***Medvedyev v France*** (2010) 51 EHRR 39 considered the situation of defendants who were arrested in international waters and detained on board their ship, on the authority of the public prosecutor, for 13 days whilst it was towed to France, whereupon they were brought before an investigating judge. The applicants argued that:

Auth Tab 46 para. 110

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> *"110. …their detention on the ship had not been under the supervision of a "judge or other officer authorised by law to exercise judicial power" but under that of the public prosecutor, who was not such an officer according to the Court's case-law (Schiesser v. Switzerland, 4 December 1979, Series A no. 34; Huber v. Switzerland, 23 October 1990, Series A no. 188; and Brincat v. Italy, 26 November 1992, Series A no. 249-A), in particular because of his lack of independence vis-à-vis the executive…"*

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40. The French government argued that:

> *"..114 …Concerning the characteristics and powers of the officer concerned, the Government maintained that although the Court had found that a public prosecutor or other judicial officer appearing for the prosecution could not be considered a "judge" for the purposes of Article 5 § 3 (see Huber, cited*

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above), the same could not be said of an investigating judge. Investigating judges were fully independent judges whose job was to seek evidence both for and against the accused party, without participating in the prosecution or the judgment of the cases they investigated. In France the investigating judge supervised all custodial measures taken in the cases under his responsibility – be it police custody or detention pending trial – and could terminate them at any time. Although he had to apply to the liberties and detention judge when contemplating remanding a suspect in custody, he had full power to release people or place them under court supervision. The Government pointed out that the Court had already ruled that the investigating judge fulfilled the conditions laid down in Article 5 § 3 (A.C. v. France (dec.), no. 37547/97, 14 December 1999)…

116. Lastly, the Government considered that the public prosecutor was a legal authority independent of the executive, and that his supervision while the Winner was rerouted to Brest had provided the protection against arbitrariness which Article 5 of the Convention was meant to guarantee…"

41. The Grand Chamber did not hold that the prosecutor was an officer authorised by law to exercise judicial power within the meaning of Article 5(3). Indeed, it plainly could not have done, in the light of the Court's consistent case law. Instead, the Grand Chamber held that the investigating magistrate fulfilled the role of a "judge or other officer authorised by law to exercise judicial power" in Article 5(3) and held that the delay in bringing the applicants before the investigating magistrate was reasonable in the circumstances:

"..123 Since Article 5 § 1 (c) forms a whole with Article 5 § 3, "competent legal authority" in paragraph 1 (c) is a synonym, of abbreviated form, for "judge or other officer authorised by law to exercise judicial power" in paragraph 3 (see, amongst other authorities, Lawless v. Ireland, 1 July 1978, Series A, no. 3, and Schiesser v. Switzerland, cited above, § 29).

124. 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 (see, amongst many other authorities Assenov and Others v. Bulgaria, judgment of 28 October 1998, §§ 146 and 149, Reports 1998-VIII).

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> *127. The Court notes that the arrest and detention of the applicants began with the interception of the ship on the high seas on 13 June 2002. The applicants were not placed in police custody until 26 June 2002, after arriving in Brest…*
>
> *128. The fact remains that the applicants were not brought before the investigating judges – who may certainly be described as "judge[s] or other officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention – until thirteen days after their arrest.*

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> *130. The Court observes, however, that it did accept, in the Rigopoulos decision (cited above)…that a period of sixteen days was not incompatible with the notion of "promptness" required under Article 5 § 3 of the Convention, in view of the existence of "wholly exceptional circumstances" that justified such a delay….*

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> *131. In the present case the Court notes that at the time of its interception the Winner was also on the high seas, off the coast of the Cape Verde islands, and therefore a long way from the French coast, comparable to the distance in the Rigopoulos case. There was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the Winner, which made it impossible for it to travel any faster. In addition, the applicants did not claim that they could have been handed over to the authorities of a country nearer than France, where they could have been brought promptly before a judicial authority…"*

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42. The Strasbourg jurisprudence is thus unambiguous: public prosecutors are <u>not</u> "officer[s] authorised by law to exercise judicial power", because they lack the qualities of impartiality and of independence both from the executive and the parties which are an essential feature of any judicial authority.

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43. Although the High Court referred to the existence of this case law (judgment, §§28-32), its judgment is silent as to how those decisions can be reconciled with the interpretation adopted in the Appellant's case. The failure in the Appellant's case to apply, or address, the firmly established principle that public prosecutors are not "officer[s] authorised by law to exercise judicial power" is, with respect, a very serious omission.

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44. Moreover, the observation of the High Court (at judgment, §38) that *"…it is generally recognised that a prosecutor must enjoy independence in the decisions that he must take, though the functions of a prosecutor are distinct and separate from those of a judge…although a prosecutor is in many Member States part of the Executive, as distinct from the judiciary, that independence gives the prosecutor a special status…"*, is contrary to the jurisprudence of the ECtHR. The Strasbourg case law is also clear that such professional independence that prosecutors have is insufficient to afford them the status of judicial authority: whatever the arrangements which protect the prosecutor's independence from the executive, the prosecutor is not independent of the parties. He or she *is* a party, and cannot therefore also act as a judge.

The underlying constitutional law rationale

45. The principle recognised in the Strasbourg case law is merely a manifestation of the basic rule that nobody may be a judge in their own cause ("nemo iudex in causa sua"), which is one of the fundamental principles of natural justice, both at common law, and in European law.

46. As Lord Denning recognised in ***Kanda v Malaya*** [1962] AC 322, at 337:

> *"…The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness…"*

Auth
Tab 21
p. 337

47. Although most often invoked (as is clear from *Kanda*) to avoid actual or apparent judicial bias, the origin of the *nemo iudex* rule was, simply, to ensure that a party could not, at one and the same time, be a party to proceedings, and exercise judicial authority in relation to them. See, for example:

Frome United Breweries Co Ltd v Keepers of the Peace and Justices for County Borough of Bath [1926] AC 586, *per* Viscount Cave LC, at 591:

> *"…From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated."*

Auth
Tab 16
p. 591

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and ***R v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No 2)*** [2000] 1AC 119, *per* Lord Goff at 137:

> *"…I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause - nemo judex in sua causa: see Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759 , 793, per Lord Campbell. As stated by Lord Campbell the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest…"*

Auth Tab 28 p. 137

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48. As indicated by Lord Denning in *Kanda*, the "nemo iudex" rule is a basic principle of Roman law, and accordingly European civil law, as well as the common law. It appears, for example, in the Codex Iustinianus, dated 376 AD (3, 5):

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> *"…We decree by general law that no one ought to be his own judge or to administer justice in his own cause. For it is very unjust to give somebody permission to pass judgment in his own cause…."*[13]

49. As already noted above, the principle is deeply entrenched in the case law of the ECtHR. It is also a recognised fundamental principle of EU law: see, for example, ***Chronopost SA v Commission*** [2008] 3CMLR 19, §§44 – 47.

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Auth Tab 62

50. In the light of this fundamental constitutional principle, very clear words indeed would be required, both in the Framework Decision and in the 2003 Act to permit a prosecutor (and, in particular, a prosecutor who has fulfilled the role taken by the Swedish prosecutor in this case) to be regarded as a "judicial authority" in relation to the person who is under investigation or prosecution: the general and undefined term "judicial authority" cannot conceivably be construed so elastically. To hold otherwise would breach the principle of legality: ***R v Secretary of State for the Home Department, ex parte Simms*** [2000] 2 AC 115, *per* Lord Hoffmann at p131. Fundamental rights cannot be overridden by general or ambiguous words. In the absence of express language or necessary implication to the contrary, general words are to be construed as subject to the basic rights of the individual.

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Auth Tab 29

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13. "Generali lege decernimus neminem sibi esse iudicem vel ius sibi dicere debere. In re enim propria iniquum admodum est alicui licentiam tribuere sententiae."

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Tampere and mutual recognition

51. It is commonly accepted that, in superseding the ECE, the EAW introduced a new form of judicialised extradition. Indeed, the reason for the replacement of traditional extradition processes with a surrender process based on the mutual recognition of judicial decisions was precisely because the Member States agreed that the Executive branch, and therefore the possibility of political influences, should be removed from participating in this process. This terminology is reflected in the other agreed mutual recognition instruments (see below, paras. 119).

52. The issue of mutual recognition in criminal matters was raised at the Cardiff European Council on 15th and 16th June 1998. The Presidency Conclusions confirmed that:

> *"…The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each others courts…."*[14]

Auth
Tab 102
p. 14

53. The United Kingdom was the prime driver of the mutual recognition agenda. A UK discussion paper drawn up for the EU's K.4 committee in March 1999 formed a basis for the formal political agreement on mutual recognition.[15] It confirmed that:

> *"…Judicial decisions which could in principle be brought within the scope of mutual recognition include arrest warrants, summonses to witnesses and defendants, warrants for search and seizure, orders for the production of evidence (such as bank records) and orders for provisional freezing of assets or evidence, eg electronic evidence, especially where speed is critical to preventing the dissipation or destruction of the assets or evidence".*

Auth
Tab 103
p. 5

54. The principle of mutual recognition of judicial decisions was endorsed, as an alternative to a harmonisation of law which had met much resistance, at the European Council meeting in Tampere on the 15th and the 16th October 1999 on the creation of an area of freedom, security and justice in the European Union. The European Council concluded that mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union (§§33 to

Auth
Tab 104
p. 7

14. SN 150/1/98 REV 139, para 39.
15. United Kingdom Delegation to K.4 Committee, document 7090/99 Crimorg 35 Justpen 18, Limite, Brussels, 29 March 1999.

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37). The European Council also explicitly stated that the principle should apply both to judgments and to other decisions of judicial authorities. It asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition (see point 37 of the conclusions of the Tampere European Council). Chapter VI of the Presidency Conclusions provided that:

Auth
Tab 104
p. 7

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"…33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

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…35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

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36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

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37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual

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recognition, respecting the fundamental legal principles of Member States.

55. Any consideration of European criminal justice systems demonstrates that there are considerable differences in relation to domestic criminal justice processes. This diversity affects every aspect of the criminal justice system from the definition of criminal offences, to the process of determining guilt to the imposition and range of sanctions. The reality is that cooperation in the EU is hampered not only by language and organizational differences but by the different legal frameworks governing law enforcement agencies and criminal processes in each jurisdiction. Mutual recognition was adopted precisely because it was seen as a method of overcoming this diversity and because it was a more politically acceptable than attempting to harmonize procedural laws.

56. Following the Tampere Council meeting, the Commission published a Communication presenting the institution's thoughts on mutual recognition. It expressed the view that the traditional system of judicial cooperation in criminal matters was slow, cumbersome and uncertain, and provided its own understanding of how mutual recognition might work:

> *"…borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure - in so far as it has extranational implications - would automatically be accepted in all other Member States, and have the same or at least similar effects there…"* [16]

Auth
Tab 105
p. 2

57. On 15th January 2001, The Council and Commission issued a Programme of measures to implement the principle of mutual recognition of decisions in criminal Matters[17], by which:

> *"…Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights. It can ease the process of rehabilitating offenders. Moreover, by ensuring that a ruling delivered in one Member State is not open to challenge in another, the mutual recognition of decisions contributes to legal certainty in the European Union. Implementation of the principle of mutual*

Auth
Tab 106
p. 1

16. Communication by the Commission on mutual recognition of final decisions in criminal matters (COM (2000) 495 final 26.7.00 p.2).
17. Doc. 2001/C 12/02.

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> *recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law…."*

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> *"…Seek[ing a] means of establishing, at least for the most serious offences in Article 29 of the Treaty on European Union, handing-over arrangements based on recognition and immediate enforcement of the arrest warrant issued by the requesting judicial authority. Those arrangements should, inter alia, spell out the conditions under which an arrest warrant would be a sufficient basis for the individual to be handed over by the competent requested authorities, with a view to creating a single judicial area for extradition.."* was a level 2 priority (§2.2.1).

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> *"…Adoption of an instrument abolishing the formal extradition procedure and allowing a person attempting to flee justice after final sentencing to be transferred to the sentencing State in accordance with Article 6 of the Treaty on European Union…"* was a level 3 priority (§3.1.2).

58. The Commission acknowledged that:

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> *"…the extent of the mutual recognition exercise is very much dependent on a number of parameters which determine its effectiveness"* and this included *"…mechanisms for safeguarding the rights of…suspects…"* and the definition of common standards (parameters 3 and 4).

59. The priority status of the replacement of the extradition system gained significant impetus following the events of 11th September 2001. Extradition became the first vehicle of the mutual recognition initiative.

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The terms of the draft Framework Decision

60. On 19th September 2001, the Commission produced a *Proposal for a Framework Decision on the European arrest warrant and the surrender procedures between the Member States*[18]**.** On 25th September 2011 it produced a second draft, together with an explanatory memorandum[19]. The draft Framework Decision signaled a radical change in the law of 'extradition' as between the Member States. In accordance with Article

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Tab 80
App Pt. 3
p. 100

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18. COM(2001) 522 final. 2001/0215(CNS).
19. COM(2001) 522 final/2, 2001/0215 (CNS).

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Tab 73

34(2)(b) of the Treaty on European Union, the Framework Decision would be binding upon the member states as to the result to be achieved but national authorities retained the choice of form and method of implementation. The Proposal confirmed, at §4.5, that: **A**

App Pt. 3
p. 1010

"4.5.1 …the purpose of the European arrest warrant is the enforced transfer of a person from one Member State to another. The proposed procedure replaces the traditional extradition procedure. It is to be treated as equivalent to it for the interpretation of Article 5 of the European Convention of Human Rights relating to freedom and security; **B**

4.5.2. it is a horizontal system replacing the current extradition system in all respects and, unlike the Treaty between Italy and Spain, not limited to certain offences;

4.5.3 the mechanism is based on the mutual recognition of court judgments. The basic idea is as follows: when a judicial authority of a Member State requests the surrender of a person, either because he has been convicted of an offence or because he is being prosecuted, its decision must be recognised and executed automatically throughout the Union. Refusal to execute a European arrest warrant must be confined to a limited number of hypotheses. The scope of the proposed text is almost identical to that of extradition: the European arrest warrant allows a person to be arrested and surrendered if in one of Member States he has been convicted and sentenced to immediate imprisonment of four months or more or remanded in custody where the offence of which he is charged carries a term of more than a year. Given that the mechanism is particularly binding for the person concerned, it is felt important to allow its use only in cases that are serious enough to justify it; **C** **D** **E**

4.5.4. the procedure for executing the European arrest warrant is primarily judicial. 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…"

61. Article 1 of the draft Framework Decision provided that: **F**

App Pt. 3
p. 1033

"…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…"

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62. However, Article 3 provided that:

> *"…For the purposes of this Framework Decision, the following definitions shall apply:*
>
> *(a) "European arrest warrant" means a request, issued by a judicial authority of a Member State, and adressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgement or a judicial decision, as provided for in Article 2;*
>
> **B**
>
> *(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…"*
>
> **C**

63. The Explanatory Memorandum to the draft therefore observed, with regards to draft Article 3, that:

> *"…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 (cf. Explanatory Report, Article 1), to the judicial authorities as such and the prosecution services, but not to the authorities of police force. The issuing judicial authority will be the judicial authority which has authority to issue the European arrest warrant in the procedural system of the Member State (Article 4)…"* App Pt. 3 p. 1012
>
> **D**
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> **E**
>
> *"…With regard to the executing judicial authority, several procedural mechanisms are possible depending whether the simplified procedure applies or not (Article 16). It will be the prosecution service or a judge, depending on the procedure applicable in the Member State. The term "executing judicial authority" will cover one or the other, as the case requires. But it must always be the authority that takes the decision to execute the warrant. Even if Article 5 enables the Member States to confer powers on a central authority in a series of circumstances, that authority will not be covered by this definition…"*
>
> **F**

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64. The definition of judicial authority had therefore been tied to the 1957 Convention; a different model of extradition. At judgment, §39, the High Court sought, in the Appellant's case, to place significant reliance upon the reference to public prosecutors in this Explanatory Memorandum.

The revised final Framework Decision

65. Such reliance was misconceived. The terms of draft Article 3 did not survive and never became law. A positive decision was taken by amendment that there should be no *sui generis* definition of "judicial authority".

66. The fate of Article 3 was tracked by the House of Commons Select Committees. In its *Seventeenth Report (Session 2001-02)*, 30th January 2002, the House of Commons European Scrutiny Committee reported that:

Auth
Tab 123
para. 3

> *"…3. We drew attention, at an early stage, to the lack of any definition of the term 'judicial authority' in the Framework Decision. We were concerned that, without an agreed definition, 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, were excluded from recognition and enforcement under the Framework Decision. In his letter to us of 6 November 2001, the Minister had explained to us that the reference to 'judicial authority' was "deliberately generic, so as to allow each Member State to designate an authority within their system", and that he did not believe it necessary to provide for any supervision or control over designations made by Member States. We noted that existing extradition agreements (notably the 1957 European Extradition Convention) provided means whereby a reservation or objection could be made in relation to a designation made by another State. By contrast, the Framework Decision had no provision for reservations or objections, so that a designation by another Member State would have to be accepted.*
>
> *4. The text which emerged from the Justice and Home Affairs Council on 6 and 7 December 2001 referred, for the first time, to a European arrest warrant being a 'court decision issued by a Member State' (Article 1). Although it remained the case that a Member State was free (under Article 6) to designate a 'judicial authority', with no supervision or control by other Member States, we inferred from the reference to the European arrest warrant being a 'court decision' that it was established that the*

'judicial authority' would have to exercise recognisably judicial functions in an independent manner.

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."*[20]

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'*[21]*, 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…"*[22]

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…".*[23]

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20. Evidence, Q2. Auth Tab 123 p. 12
21. Evidence, Q3.
22. Evidence, Q6.
23. See also the *House of Commons Select Committee on Home Affairs, First Report (Session 2002-2003), 28 November 2002*, §§57-63. Auth Tab 124 p. 17

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67. On 13th June 2002, the final *Framework Decision on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA) was published. The Framework Decision summarized the Tampare initiative and consistently uses the language of "judicial authority":

App Pt. 3
p. 1059

> *"…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… 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…"* (Recital 5)

> *"…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…"* (Recital 6)

> *"…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…"* (Article 1.1)

68. The hallmark of the Framework Decision is that it abandons the political-governmental procedures and becomes judicialized – "the European Arrest Warrant is a judicial decision" (Article 1(1)). Interstate transfer is left in the hands of the *judiciary*, not the government, who had always previously had a role in extradition affairs.

No construction inconsistent with the ECHR

69. Absent definition, guidance or constraint, the term "judicial authority" in the Framework Decision is to be construed in accordance with established EU law norms. As stated above, the clear ECtHR jurisprudence since 1957 requires "judicial" authorities to be restricted to bodies independent of the Executive and of the parties. Prosecutors are neither.

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70. All EU Member states are High Contracting Parties to the ECHR. It is a fundamental norm of EU law that EU measures are not to be enacted or construed in a manner inconsistent with the ECHR. In ***Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*** [1970] ECR 1125 and Case 4/73, ***Nold v. Commission*** [1974] ECR 491, the ECJ declared that international human rights treaties to which Member States had become signatories, provided guidelines which should be followed within the framework of EU law. To be lawful, a measure must be compatible with the fundamental rights. In ***Elliniki Radiophonia Tiléorassi AE***, Case C-260/89 [1991] ECR I-2925, the European Court of Justice observed that:

Auth Tab 65

Auth Tab 61

Auth Tab 64

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> *"…41 With regard to Article 10 of the European Convention on Human Rights, referred to in the ninth and tenth questions, it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case C-4/73 Nold v Commission [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case C-222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case C-5/88 Wachauf v Federal Republic of Germany [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed…" (§41).*

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71. In ***MSS v. Belgium and Greece*** (2011) 52 EHRR 2, the ECtHR made clear that states cannot continue to use presumptions of equivalence to evade their national and international responsibilities to protect ECHR rights. Similarly, in ***NS v SSHD*** (C-411/10), 21 Dec. 2011, presumptions of compliance with fundamental rights can never be conclusive. Legal obligations to cooperate within the EU which are based on presumptions of trust must not be permitted to override Convention protection.

Auth Tab 48

Auth Tab 68

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72. The EAW system was always intended to be ECHR compliant. Recital 12 provides that:

App Pt. 3 p. 1060

> *"…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…"*

73. Article 1(3) once again states the importance of safeguarding the fundamental rights of persons subject to it:

> *"…1.3 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…"*

74. The High Court of Northern Ireland has observed that the Framework Decision has two underlying purposes; it seeks to encourage speedy transfer while ensuring that sufficient safeguards are in place so that fundamental rights are respected (***Ballan, Re Judicial Review*** [2008] NIQB 140 per Kerr L.C.J. at §15).

Auth Tab 10

75. In ***Proceedings Concerning I.B***, Case C-306/09 [2011] 1 WLR 2227, CJEU, Advocate General Cruz Villalon stated that:

Auth Tab 69 para. 43

> *"…. the need to interpret the Framework Decision in the light of fundamental rights has become more imperative since the entry into force of the Charter of Fundamental Rights…."* (§44). Thus, although *"…mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area. The Framework Decision repeatedly states as much in Recitals 10, 12, 13 and 14, and in Article 1(3)…"* (§43).

76. An EU instrument whose recitals expressly refer to the EU Charter of Fundamental Rights falls to be assessed in the light of those provisions. See ***Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministers*** [2011] 2 CMLR 38, §§16-17:

Auth Tab 60 para. 16

> *"…16. Article 6(2) EU…which is mentioned in recital 1 to Directive 2004/113, provides that the European Union is to respect 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, as general principles of Community law.*

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Those fundamental rights are incorporated in the Charter, which, with effect from December 1, 2009, has the same legal status as the Treaties.

17. …Since recital 4 to Directive 2004/113 expressly refers to arts 21 and 23 of the Charter, the validity of art.5(2) of that directive must be assessed in the light of those provisions (see, to that effect, Schecke GbR v Land Hessen (C-92/09 & C-93/09), judgment of November 9, 2010 , at [46]).…"

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77. There exists, in any event, an institutional commitment of the EU to ensure respect for fundamental rights when legislating and when implementing laws nationally. The Framework Decision as an EU instrument is now subject to the provisions of the Charter of Fundamental Rights, pursuant to Article 6(1) of the Treaty on European Union. In the Consolidated Version of the TEU, Article 6(1) provides:

Auth Tab 74

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"…The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2007, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties." Article 6(2) also provides: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms…"

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78. Under Article 6(3) TEU, it is confirmed that:

"…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…"

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79. This heralds 'a Europe of fundamental rights' in which the Union is intended to be 'exemplary'.[24] The Commission has asserted that:

Auth Tab 78

"…Respect for fundamental rights within the EU will help to build mutual trust between the Member States and, more generally, public confidence in the Union's policies. A lack of confidence in the effectiveness of fundamental rights in the Member States when they implement Union law, and in the capacity of the Commission and the national authorities to enforce them, would hinder the operation and strengthening of cooperation machinery in the area of freedom, security and

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24. COM (2010) 573 final. 19.10.2010, at p.2 and 4.

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justice…"[25] Thus, a clear and unambiguous commitment to respecting mutually agreed basic standards positively promotes the mutual confidence underpinning cooperation. Not only must the "*…[t]he Union's action …. be above reproach when it comes to fundamental rights…*"[26] but the "*…upholding of fundamental rights by Member States when they implement Union law is in the common interest of all the Member States because it is essential to the mutual confidence necessary for the operation of the Union…*". [27]

Auth Tab 119 para. 3.1

80. This has been subsequently reiterated by a *Commission Green Paper on Strengthening mutual trust in the European judicial area*[28], which confirms, at §3.1, that:

> *"…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 crossborder dimension, <u>its implementation, including the core principle of mutual recognition on which it is based, must respect fundamental rights</u>…"*

81. The European Council's 'Roadmap' to establish specific harmonizing procedural protections in the European Union[29] confirmed, in Recital (2), that:

> *"…the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen such trust…."*

82. Further, in Recital 10, the Council recognises that:

> *"…a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual…".*

Auth Tab 78

25. COM (2010) 573 final. 19.10.2010, p.4
26. COM (2010) 573 final. 19.10.2010, p.4
27. COM (2010) 573 final. 19.10.2010, p.9. The Stockholm Programme OJ C 115, 4.5.2010, also confirms that the "…[t]he protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union…" para 2.4.

Auth Tab 118 para. 2.4

28. COM/2011/0327.
29. Resolution of the Council of 30 November 2009 (OJ C 295, 4.12.2009, p.1).

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83. There ultimately exists, in the form of European Convention on Human Rights, an irreducible core of basic standards which all European systems must respect and implement. This creates a harmonizing pull because, irrespective of the differences between systems, the ECHR introduces or reaffirms basic principles which are required to be accommodated across the common law and civil law traditions. This has contributed to an element of convergence in standards designed to ensure due process and the rule of law. The intention of the ECHR is not to harmonise, yet it has become a force for convergence of due process values.[30]

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84. By giving the Charter's provisions binding legal force, the Lisbon Treaty formalises the principle that fundamental human rights are part of EU law. Moreover, following the Lisbon Treaty, the European Court of Justice has demonstrated its ability to use fundamental rights as a yardstick against which EU legislation may be judged.[31] In ***Association Belge des Consommateurs Test-Achats ASBL and Others*** (supra), A-G Kokott observed that:

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> *"…[p]rovisions must, without restriction, withstand examination against the yardstick of higher-ranking European Union law, in particular against the yardstick of the fundamental rights recognised by the Union…"* and that *"…even though fundamental rights can as a rule be restricted, they should be used as a yardstick in examining the legality of legal measures…".*[32] Thus, *"…discretion on the part of the Council is not boundless…"* as it *"…cannot have the effect of frustrating the implementation of a fundamental principle of European Union law…"* such as those set out in the Charter.[33]

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85. Thus, EU legislation must be interpreted in ways which ensure that the fundamental rights in the Charter, and as a consequence, the ECHR, are both practical and effective.[34] Obligations to implement EU legislation can provide no justification for the action which is inconsistent with human rights. Moreover, national courts are expected to interpret

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30. See, for example, in ***Salduz v Turkey*** (2009) 49 E.H.R.R. 19 the ECrtHR promulgating a model of protection of the suspect during interrogation which has been seen as largely antithetical to some inquisitorial systems; ***Pishchalnikov v Russia*** (2009) 7025/04, 24 Sept; ***Brusco v France*** (2010) 1466/07, 14 Oct. Auth Tabs 54, 53 & 39

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31. See, for example, ***Kücükdeveci v Swedex GMbH & Co. KG*** [2011] 2 CMLR 27. Auth Tab 67

32. *Association Belge des Consommateurs Test-Achats ASBL and Others* [2011] 2 CMLR 38, Opinion of AG Kokott, §§35-36. Auth Tab 60

33. ***Ibid***, at §48.

34. The Court had already confirmed that it is assisted by the jurisprudence of the ECtHR, applicable to the EU through the Charter; ***Kadi v Council of the European Union*** [2009] 1 AC 1225, ECJ, §360. Auth Tab 66

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legislation in this way in accordance with Article 51(1) of the Charter as addressed to EU institutions and Member States when they implement EU law, including in the field of judicial cooperation in criminal matters.[35] Thus, for example, the German High Court has demonstrated a willingness to imply an overall limit of proportionality into the EAW was based on several sources of law including the Charter of Fundamental Rights and the fundamental principles of the European Union;

> *"…the principle of proportionality of criminal offences and penalties … is a general principle of the Union's law…"* (***GPPS v C***, 25th Feb. 2010).[36]

Auth Tab 33

Article 6 of the Framework Decision

86. Article 6 of the Framework Decision provides that:

App Pt. 3 p. 1062

> *"..6(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…"*

87. Article 6 must be interpreted in the context set out above. It did not permit Member States to designate politicians or police or prosecutors or lay persons or intelligence officers or any other non-judicial officer to whom local law may give competency to issue EAWs. Neither does it provide individual Member States, or the EU institutions, with competency to create an autonomous meaning of "judicial authority". It did no more than oblige Member States to select, from within its pool of judicial authorities as defined by human rights norms and jurisprudence, and the basic principle of natural justice, that sub-set which were competent to issue EAWs, and to notify the General Secretariat of the Council of the same. The High Court accordingly misconstrued Article 6 (§40).

Auth Tab 68

35. Note that the decision in ***NS v SSHD*** (C-411/10) 21.12.11 confirms that the Charter is justiciable within the UK, despite Protocol 30.
36. Higher Regional Court Stuttgart, Decision of February 25, 2010. For a translation and commentary on this case, see Joachim Vogel and J. R. Spencer, Proportionality and the European arrest warrant" [2010] Criminal Law Review, p474–82.

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88. At judgment, §40, the High Court questioned the function of Article 6 if the term "*judicial authority*" were confined to a judge who adjudicates. In fact, the function of Article 6 is clear, and the question of "the judge who adjudicates" is beside the point. The aim is to oblige Member States to designate those judges within their respective systems that are competent to issue EAWs. It is not to permit Member States to designate authorities which could not fairly or properly exercise judicial authority, and by that act of designation confer such authority upon them.

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The Framework Decision read as a whole

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89. Draft Article 3 having been rejected, the Framework Decision contains nothing on its face to qualify or extend the plain meaning of "*judicial authority*" in the 2003 Act. Recital 5 describes "*…a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions…*" whilst Article 1(1) refers to the EAW as a "judicial decision" and Article 1(3) guarantees respect for fundamental rights and legal principles – among which the distinction between judicial and executive power is perhaps the most fundamental. The principle of mutual recognition upon which the EAW is based is, in this context, a mutual recognition of the decisions of the courts of member states, not of policemen or prosecutors employed by the Executive.

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90. The High Court accepted (judgment, §35) that, in some instances, *"…the term judicial authority is plainly used [in a context which can] refer only to a judge who adjudicates…*", yet proceeded to hold that the term means different things in different parts of the Framework Decision ("*…we do not consider that the term can be so confined when it is used elsewhere in the Framework Decision…*"). That holding is unreasoned and untenable. A document which uses the same term throughout ought, in the absence of a clear indication to the contrary, be taken to mean the same thing throughout. The need for a clear indication of some different meaning is, as set out above, all the greater, where the meaning contended for violates a fundamental principle of natural justice.

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Evaluation Reports

App Pt. 3 p. 1070

91. Under Article 34(3) of the Framework Decision, the Commission was required to submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals. In 2006[37], and again in 2007[38], the Commission reported that:

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> *"…The surrender of requested persons between Member States, pursuant to the Framework Decision (Article 1(1)), has become entirely judicial. This is attested to, for example, by the fact that the large majority of Member States authorises direct contacts between judicial authorities, at the different stages of the procedure (Articles 9(1), 15 and 23). However, certain Member States have designated an executive body as the competent judicial authority for all aspects (Article 6: DK) or for some (EE, LV, LT, FI, SE)…")*[39]

Auth Tab 81 para. 2.1.2

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92. Under Article 34(4) of the Framework Decision, the Council was required to conduct a review of the practical application of the provisions of the Framework Decision by the Member States. The Council of the European Union fourth round of mutual evaluations was therefore assigned to "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". The evaluation process was conducted from March 2006 to April 2009.

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93. Of course, the Council evaluation reports do not represent an authoritative ruling on the legality of the means used by Member States to implement the Framework Decision. However, they show that States have designated authorities under Article 6 of the Framework Decision which are manifestly not judicial, and that this situation is causing concern to the Council.

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37. COM(2006)8 final, First Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 24 January 2006.

Auth Tab 81

38. COM(2007) 404 final, Second Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 11 July 2007, § 2.1.2.

Auth Tab 82

39. A reference to the designation of Ministries of Justice (DK, EE, LT, FI) and police (SE). Latvia has designated its courts (issuing) and prosecutors (executing).

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94. The High Court proceeded (at judgment, §46) upon a fundamental misunderstanding of EU Treaty provisions in suggesting that "*…However there appear to have no instances where the Commission has taken action in respect of a body that should not have been designated as a judicial authority*….". In fact, the Commission has no power to take infringement proceedings in relation to unamended pre-Treaty of Lisbon third pillar legislation until December 2014.[40] Thus, no inference can properly be drawn from the absence of infringement proceedings that the EU institutions are content with the manner in which the Framework Agreement has been implemented by individual Member States.

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95. Whilst the majority of Member States have nominated courts and judges under Article 6(3), some States have nominated public prosecutors[41], Ministries of Justice[42] and police[43].

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Ministries of Justice

96. Denmark[44], Estonia[45], Finland[46], Germany[47] and Lithunia[48] all designated their Ministries of Justice as issuing judicial authorities. The evaluation reports on Denmark (§7.3.1.1 & recommendation 8.5)[49], Germany (§7.3.1.1)[50] and Lithuania (§7.2.1.1 & recommendation 8.1)[51] criticised the designations. The Lithuanian report states that:

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40. An observation made by the Commission in COM(2011) 175 final, Report from the Commission to the European Parliament and Council, on the implementation since 2007 of the Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, 11 April 2011, p3**.** App Pt. 4 p. 1697
41. Austria, Bulgaria, Estonia, France, Finland, Greece, Lithuania, the Netherlands, Portugal, Sweden, and for post-conviction EAWs only, Belgium, Italy and Luxembourg.
42. Denmark, Estonia, Finland, Germany and Lithuania.
43. Sweden.
44. Doc. 13801/1/06 REV 1, 12 January 2007. Auth Tab 84
45. Doc. 5301/1/07 REV 1, 19 March 2007. Auth Tab 85
46. Doc. 11787/1/07 REV 1, 16 November 2007. Auth Tab 89
47. Evaluation Report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States-Report on Germany (Council Document 7058/1/09 REV 1 30 April 2009), p.40. Auth Tab 99
48. Doc. 12399/2/07 REV 2, 14 December 2007. Auth Tab 92
49. See Also SEC(2011) 430 final, p64 "…The Framework Decision does not define what a judicial authority is, this question being left to the national law of Member States. Whilst it is understood that the Minister of Justice is designated by national Danish law as being a judicial authority, it is difficult to view such a designation as being in the spirit of the Framework Decision…" App Pt. 4 p. 1170
50. Germany has not amended its legislation; SEC(2011) 430 final, p80. App Pt. 4 p. 1786
51. See also SEC(2011) 430 final: "…LT has indicated that an EAW for enforcement of

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"…*The [Ministry of Justice] is not a judicial authority. Pursuant to Article 6(3) of the FD, in conjunction with Article 6(1) of the FD, Lithuania notified the Council General Secretariat that in matters relating to convictions the MOJ was the issuing authority. Under Article 6(1), however, the issuing authority must be a judicial authority. The Lithuanian authorities recognised that EAWs should be issued by judicial authorities, and that the MOJ could not be considered a judicial authority. In particular, in cases where the EAW is initiated by the Prison Department, and hence no judicial authority at all is involved in the process, this situation is in clear contradiction with the FD (The expert team was informed that Lithuania had decided to entrust the MOJ with the power to issue EAWs in the years immediately following the entry into force of the FD in order to build up a sort of know-how and to allow the judiciary to gain confidence in the new instrument). The expert team was, however, informed by the MOJ of plans to allow the courts to issue EAWs directly in the future. The team would very much welcome such an initiative…*" (§7.2.1.1).

Auth Tab 92 para. 7.2.1.1

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97. By contrast, the Estonian and Finnish designation of its Ministries of Justice received no adverse comment. Much apparently depends upon the identity of the composition of the particular evaluation team in question.

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Prosecutors

98. Whilst the evaluation reports contain little criticism of those States that have nominated prosecutors as competent to issue EAWs, a number of reports record the obvious lack of judicial independence of the prosecutors in question. See Austria[52], France[53], Germany[54], Greece[55],

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a sentence is issued by the Ministry of Justice but only at the request of the judicial authority or the authority executing the sentence, that is the relevant prison department which is, however, under the under the control of the Ministry of Justice . The Ministry of Justice is not a judicial authority, but rather part of the executive. In particular, in the case the issuing of a EAW is asked by the prison department, there is no involvement at all of the judiciary…." (p117-118).

App Pt. 4 p. 1823

52. Doc. 7024/1/08 REV 1, 24 June 2008, § 2.1.

53. Doc. 9972/2/07 REV 2, 20 July 2007, §§2.2 & 3.4.

Auth Tab 93

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54. Doc. 7058/1/09 REV 1, 30 April 2009), §2.1.

Auth Tab 88

55. Doc. 13416/2/08 REV 2, 3 December 2008, §2.1. In issuing an EAW the PPCA has no discretionary powers (§2.2). No proportionality check is applied in issuing an EAW (§7.2.1.1). "…*The expert team is of the view that this practice is not in conformity with the spirit of the Framework Decision. A proportionality check and/or the use of other forms of assistance (MLA request, video or telephone conference) would be advisable in such cases*…" (§7.2.1.1.).

Auth Tab 99

Auth Tab 96

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and the Netherlands[56]. In Finland[57], although the report observes that prosecutors are not expressly stated to be judicial authorities by Finnish law, the report observes that:

> "…*however that in its notification to the Council General Secretariat (5166/04) Finland has identified in application of Article 6(3) of the FD, that…Prosecutors are the competent authorities for the issue of a European arrest warrant for the purposes of conducting a criminal prosecution…"* (§2.2)

Auth Tab 89 para. 2.2

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99. Other states have limited the circumstances in which a prosecutor may issue EAWs. Belgium[58], Italy[59] and Luxembourg[60] permit prosecutors to issue post-conviction EAWs only. Bulgaria[61] permits prosecutors to issue EAWs during the pre-trial and post-conviction phases only. In Belgium, in each prosecutor's office a magistrate had been appointed to whom any question concerning the issue or execution of an EAW was to be referred (§7.1). At the other extreme, in Luxembourg, the Chief Public Prosecutor delegates this competence to the prosecuting counsel assigned to the sentence enforcement service (§2.1 & 3.1).

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100. By contrast:

- In Cyprus (in which a judge is the designated issuing judicial authority), the report observed[62] that:

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> *"…Whilst CY has indicated that the Office of the Attorney General is neither a political, judicial nor an administrative authority, the Commission is concerned by the role it plays in the issuing of an EAW. Indeed, for a EAW to be issued in a prosecution case, the consent of the Attorney General must be given in writing prior to the EAW being produced before the competent judicial authority…"*

App Pt. 4 p. 1751

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- In Lithuania:

> *"…As to the Office of the Prosecutor General, it is considered as judicial authority in LT because the related provision is inserted in Chapter 9 of its*

App Pt. 4 p. 1823

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56. Doc. 15370/1/08 REV 1, 2 December 2008, §2.1. — Auth Tab 95
57. Doc. 11787/1/07 REV 1, 16 November 2007. — Auth Tab 89
58. Doc. 16454/2/06 REV 2, 19 March 2007. — Auth Tab 86
59. Doc. 5832/2/09 REV 2, 18 March 2009. — Auth Tab 97
60. Doc. 10086/2/07 REV 2, 19 November 2007. — Auth Tab 91
61. Doc. 8265/1/09 REV 1, 27 April 2009. — Auth Tab 98
62. SEC(2011) 430 final, p52.

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> *Constitution entitled "The Court" of the judicial Procedure. Hence, there is no strong support to the argument that the Office of the Prosecutor General is a judicial authority in LT. Again, the Framework Decision states that an EAW must be issued or executed by a judicial authority and as a consequence LT's implementation of Article 6 is contrary to the Framework Decision…"*[63]

- In the Spanish evaluation report[64], it is expressly noted that:

Auth Tab 87 para. 2.1

> *"…Public prosecutors are not competent to issue EAWs. The chief prosecutor is a governmental appointee who sits at the top of the prosecutorial hierarchy…"* (§ 2.1).

101. Despite the clear Strasbourg case law under Article 5 ECHR, many EU Member States[65], including France[66], also continue to designate prosecutors for the execution of EAWs.

102. So far as the Swedish designation of prosecutors as a judicial authority is concerned, it is of note that the report observes that:

Auth Tab 94 para. 7.2.1.5.

> *"…Pursuant to the transposing law, the person surrendered to Sweden may renounce entitlement to the speciality rule before an official appointed by the Office of the Prosecutor-General, the National Prison and Probation Administration or the National Board of Institutional Care to receive a declaration of this kind, before the chief medical officer at the unit where a sentence of forensic psychiatric care is being executed, before the prosecutor or, on the authority of the prosecutor, before a police officer who is assisting the investigation. This provision does not seem to be in line with Article 27(3)(f) of the Framework Decision, which expressly provides that such a renunciation shall be given before a judicial authority…"*(§7.2.1.5 & Recommendation 8.7)[67]

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63. SEC(2011) 430 final, p117-118.
64. Doc. 5085/2/07, 6 June 2007.
65. Austria, Czech Republic, France, Germany, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovakia, Sweden
66. Doc. 9972/1/07 REV 1, 20 July 2007, §4.6. In apparent ignorance of the Article 5 case law, the report called for the prosecutor to be given additional powers to detain.

Auth Tab 88

67. And Sweden has similarly done nothing in response to this (SEC(2011) 430 final, p175).

App Pt. 4 p. 1881

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Police

103. In Finland[68], domestic implementing legislation gave competence to the police to liaise directly with the issuing judicial authority (whereas Article 15(2) of the Framework Decision reserves such activities to the "executing judicial authority") (§ 7.3.1.2). However, Finland has refused to amend its legislation because:

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> "*…Despite this recommendation Finland does not see the role of the police as incompatible with the practise and aim of the Framework Decision since the police, when requesting additional information, always act at the request and on behalf of the prosecutor. Hence, the provision has not been amended….*"[69]

Auth Tab 90 p. 1

104. Sweden[70] went so far as to designate the police (the International Police Cooperation Division) as a competent issuing judicial authority. The report observes that this is:

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> *"…not in line with the definition of the EAW as a "judicial decision" in the Framework Decision. The Swedish authorities explained that their national rules are not so strict in describing the concept of judicial authority. They also explained that, in implementing the Framework Decision, they adopted a pragmatic approach in the sense that they preferred making the EAW procedure as close to their national system as possible (judicial authorities does not play any role in these matters at domestic level, where enforcement of sentences is handled by the Prison Service and the Police). However, the expert team question the validity of these arguments in the light of the clear letter and principles of the Framework Decision, and stress that in such cases the EAW is issued and the form completed - including the summary of the judgment that serves as the basis for the EAW - by IPO officers, with no judicial control being provided by the domestic legislation. It should be a relatively simple matter to arrange for EAWs issued by the IPO to be checked by a prosecutor…."* (§7.2.1.1 & Recommendation 8.3)

Auth Tab 94 para. 7.2.1.1.

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> Moreover, *"…[t]here is no regulation or even written guidance governing the decision of the competent administrative authorities in requesting the IPO to issue an EAW. This adds to the absence of judicial control on the issue of EAWs in conviction cases. In that connection, the expert team would also*

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68. Doc. 11787/1/07 REV 1, 16 November 2007. Auth Tab 89
69. Doc. 14282/11, 16 September 2011.
70. Doc. 9927/1/08 REV 1, 21 October 2008.

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> *like to point out that, according to the information provided, one person at the IPO is basically in charge of completing the EAW forms, which makes the system quite vulnerable in this respect…"* (§7.2.1.2)

105. In spite of this criticism, Sweden has done nothing to amend its legislation.[71] In fact, in 2009, Sweden re-designated the police as competent to issue EAWs[72].

The final report

106. The final 2009 Council report on the fourth round of mutual evaluations[73] observes 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 (§3.1).

Ireland

107. The Appellant submits that the position in Ireland is instructive. Section 2(1) of the Irish European Arrest Warrants Act 2003 defines 'judicial authority' as "…the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed…by a court in the State…". The High Court of Ireland held in ***Minister for Justice Equality & Law Reform v Altaravicius*** [2006] EIHC 270 that a public prosecutor falls within that very broad definition. Section 20 of the Act[74] further provides for receivability of supplemental information emanating from the "…issuing judicial authority or the issuing state…". Before the Supreme Court of Ireland in ***Minister for Justice Equality & Law Reform v Koncis*** [2011] EISC 37, at §§39-52, it was accepted that materials emanating from a prosecutor did not emanate from a judicial authority (but that a prosecutor was a body falling within the second, broader, limb of section 20).

Auth Tab 9

Auth Tab 34

Auth Tab 35

App Pt. 4 p. 1881
Auth Tab 83
Auth Tab 100

71. SEC(2011) 430 final, p175.
72. Doc. 10400/09, 29 May 2009.
73. 8302/4/09 REV 4, 28 May 2009.
74. As amended by the Irish Criminal Justice (Terrorist Offences) Act 2005.

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The High Court's reliance upon France

108. In some Member States, such as France, the public prosecutor is theoretically considered part of the judiciary. The High Court relied heavily upon this point (judgment, §38). It is submitted that, in fact, the question whether a *French* prosecutor could be regarded as a judicial authority is irrelevant to this appeal. The question in this appeal concerns only the nature of the authority of a Swedish prosecutor, given the role fulfilled by that official under the Swedish legal system. Different considerations might arise in relation to France, and ought properly to be examined in a French case.

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109. In any event, the High Court's treatment of the civil law inquisitorial system, through the medium of France, is over-simplistic.

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110. This traditional conception, based on an inquisitorial model of judicial supervision, has been subject to challenge by the jurisprudence of the ECHR which demands evidence of impartiality and independence in both function and role if such prosecutors are to be characterised as 'judicial' in the exercise of particular coercive functions under Article 5.

111. Taking France as an example, *procureurs* (prosecutors) are under the hierarchical authority of the Executive. The *juge d'instruction* is not. The reality of judicial supervision and the lack of impartiality and independence has led to ECtHR decisions against France often concerning Article 5(3).[75] ECtHR decisions have become a driver for reform in France representing a harmonising pull in respect of due process values previously rejected as adversarial imports.

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112. For example, high-profile cases[76] led to reform in 2000 which removed the power of pre-trial detention from the instructing magistrate, handing it to a new judge not involved with the investigation who was named "*le Juge des libertés et de la detention"*. Further reform was sparked by the Outreau commission which was set up in the wake of the disastrous Outreau case where there were profound repercussions to the *juge* and *procureur* working together and to charge. This led to calls for the scrapping of *juges d'instruction* – subject to the proviso that the prosecutors should be made independent of the legislature. Following this, the *Léger Committee*, an ad hoc government committee, was tasked with making proposals about criminal justice reform. It released its final report in September 2009. It recommended handing criminal inquiries over to prosecutors as it claimed that the investigating judge "cumulates

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75. Since ***Medvedyev v France*** and ***Moulin v France***.

76. Such as ***Tomasi v France*** (1993) 15 EHRR 1, concerning amongst other things the length of detention.

Auth
Tabs 46 & 47

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the functions of a judge and that of an investigator and, in other words, he is neither totally a judge nor totally an investigator."[77] The French government intended to abolish the current role of the *juge d'instruction* and place the public prosecutor (the *procureur*) in charge of all criminal investigations. But, following the ECtHR decisions in ***Medvedyev*** and ***Moulin***, the government was compelled to drop these plans.

Auth Tab 47

113. In ***Moulin***, the ECtHR noted that different rules govern sitting judges (*juges du* siège) and public prosecutors (*parquet*) in France. The latter are in particular under "…*the authority of the Minister of Justice, who is a member of the government, and therefore, the executive branch*…" These differences were apparent in relation to the process of appointment, to reporting, to responsibility and removal. Unlike judges, they were not irremovable and the Minister had disciplinary authority over them (§§22-29 & 56). The Court mentioned that it was aware that "…*the ties of dependency between the Minister of Justice and the prosecuting authorities in France were the subject of a national debate*…" and that it did not wish to take a stance in such debate (§57). However, it concluded that public prosecutors in France did not satisfy the requirement of independence from the executive. It confirmed that prosecutors "*dépendent tous d'un supérieur hiérarchique commun, le garde des Sceaux, ministre de la Justice qui est membre du gouvernement et donc du pouvoir executive*" (§56). The term "officer authorised by law to exercise judicial power" included guarantees of both independence and impartiality. The Court further reiterated that the characteristics that a judge or other officer must possess in order to satisfy the requirements of Article 5 precluded him or her, among other things, from intervening subsequently against the applicant in the criminal proceedings, as the prosecution did. The procureur "*ne remplissait pas les garanties d'indépendance pour être qualifié, au sens de cette disposition, de 'juge ou (...) autre magistrat habilité par la loi à exercer des fonctions judiciaires* (§59)"

The European Evidence Warrant and European Investigation Order

Auth Tab 115

114. It is also instructive to compare the EAW Framework Decision with other Third Pillar Justice & Home Affairs ("JHA") acquis. *The Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, 18th December 2008 (2008/978/JHA)* was intended to replace the existing laws of Mutual Legal Assistance. The "EEW" was a

Auth Tab 129

77. Human Rights Watch, Reforming Criminal Procedure in France, 4 September 2009, (http://www.unhcr.org/refworld/docid/4aa4d3a71a.html).

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decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in contemplated and ongoing criminal proceedings (Article 1). Its provisions are significant. Because its scope was wider (and was intended to operate pre-prosecution), an "EEW" could be issued by an 'issuing authority' which was broadly defined by Article 2 so as to mean

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> *"…(i) a judge, a court, an investigating magistrate, a public prosecutor; or*
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> *(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 with competence to order the obtaining of evidence in crossborder cases in accordance with national law…"*

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115. Article 11(4) provided that:

> *"…If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing State, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the EEW. Before so deciding, the executing authority shall consult the competent authority of the issuing State…."*

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116. Article 13(2) further provided, so far as executing authorities were concerned, that:

> *"…The decision to refuse the execution or recognition of the EEW pursuant to paragraph 1 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. Where the EEW has been issued by a judicial authority referred to in Article 2(c)(ii), and the EEW has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State, the decision may also be taken by any other judicial authority competent under the law of the executing State if provided for under that law.."* (see also Article 16(3)).

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117. In April 2010, the European Investigation Order ("EIO") was proposed by Belgium, Bulgaria, Estonia, Spain, Luxembourg, Austria, Slovenia and Sweden78, to replace the EEW. At its meeting on 13th and 14th December 2011, the Council agreed the general approach on the majority of the text of the draft Directive, published on 21st December 2011[79]. By Article 2(a) "issuing authority" continues to be defined as:

> *"…i). a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or*
> *ii) any other competent authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law…"*[80]

118. Thus, where an EU mutual recognition instrument intends to empower a public prosecutor to exercise mutual recognition functions, it says so.

Other JHA acquis

119. The EAW Framework Decision was the first Third Pillar (JHA; now Police and Judicial Cooperation in Criminal Matters) mutual cooperation initiative measure. The scheme of Article 6 [no definition of judicial authority - Member States to select, from within its pool of judicial authorities as defined by human rights norms and jurisprudence, that sub-set which were competent] is a recurring one in subsequent mutual cooperation criminal justice Third Pillar initiatives:

- **European Freezing Order:**
  - *Framework Decision on the application of the principle of mutual recognition to financial penalties, 22nd July 2003 (2003/577/JHA)*[81]
  - The purpose of the Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings (Article 1 & 2(a)). 'Issuing State' shall mean the Member State in which a judicial authority, as defined in the national law of the

Auth Tab 107

78. Doc. 9145/10.
79. Doc. 18918/11.

Auth Tab 121

80. By Articles 1(1) & 5a(3), where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO.
81. Implemented in UK domestic law by the Serious Organised Crime & Police Act 2005.

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issuing State, has made, validated or in any way confirmed a freezing order in the framework of criminal proceedings (Article 2(a)). Freezing Orders must be transmitted by the "competent judicial authority" which issued it (Article 4). They may be executed by a "competent judicial authority of the executing State (Articles 7-8).

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- **European Financial Penalties:**
  - *Framework Decision on the application of the principle of mutual recognition to financial penalties, 24th February 2005 (2005/214/JHA)*[82]

Auth Tab 122

  - The purpose of this Framework Decision is to facilitate mutual execution of financial sentences. A financial decision is one that is issued by a court, or provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters, an authority of the issuing State other than a court (Article 1). Financial Orders issued by the court may be transmitted by the "competent authority" of the Issuing State (Article 4 – the identity of which, by Article 2, the issuing State is obliged to notify the General Secretariat). They may be executed by a "competent authority of the executing State, as defined in the law of that State" (Article 6 - the identity of which, by Article 3, the executing State is obliged to notify the General Secretariat).

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- **The European Confiscation Order:**
  - *Framework Decision on the application of the principle of mutual recognition to confiscation orders, 6th October 2006 (2006/783/JHA).*

Auth Tab 111

  - The purpose of this Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a confiscation order issued by a court competent in criminal matters of another Member State (Article 1). Confiscation Orders issued by the court may be transmitted by the "competent authority" of the Issuing State (Article 4 - the identity of which, by Article 3, the issuing State is obliged to notify the General Secretariat). They may be executed by a "competent judicial authority of the executing State, as defined in the law of that State" (Article 8(2) - the identity of which, by

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82. Implemented in UK by the Criminal Justice & Immigration Act 2008.

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Article 3, the executing State is obliged to notify the General Secretariat). **A**

- **The European Enforcement Order:**
  - *Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 27th November 2008 (2008/909/JHA)*

Auth
Tab 113

  - The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence (Article 3). A judgment is an order of a court of the issuing State imposing a sentence (Article 1). A judgment issued by the court may be forwarded by the "competent authority" of the Issuing State (Article 5 - the identity of which, by Article 2, the issuing State is obliged to notify the General Secretariat). They may be executed by a "competent authority of the executing State (Article 8 - the identity of which, by Article 2, the executing State is obliged to notify the General Secretariat). **B** **C** **D**

- **The European Probation Order:**
  - *Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, 27th November 2008 (2008/947/JHA)*

Auth
Tab 114

  - This Framework Decision lays down rules according to which a Member State, other than the Member State in which the person concerned has been sentenced, recognises judgments and, where applicable, probation decisions and supervises probation measures imposed on the basis of a judgment, or alternative sanctions contained in such a judgment (Article 1). A judgment is an order of a court of the issuing State imposing a sentence (Article 2). A judgment issued by the court may be forwarded by the "competent authority" of the Issuing State (Article 5 - the identity of which, by Article 3, the issuing State is obliged to notify the General Secretariat). They may be executed by a "competent authority of the executing State (Article 8 - the identity of which, by Article 3, the executing State is obliged to notify the General Secretariat). This Framework Decision expressly **E** **F** **G**

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provides, by Article 3(2) that "…Member States may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures…"

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- **The European Supervision Order:**
  - Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 23rd October 2009 (2009/829/JHA) — Auth Tab 117
  - This Framework Decision lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures. (Article 1). A Supervision Order may be issued by the "competent judicial authority" of the Issuing State (the identity of which, by Article 6(1), the issuing State is obliged to notify the General Secretariat). It may be executed by a "competent judicial authority of the executing State (the identity of which, by Article 6, the executing State is obliged to notify the General Secretariat). This Framework Decision expressly provides, by Article 6(2) that "…As an exception to paragraph [6(1))]…Member States may designate non-judicial authorities as the competent authorities for taking [certain] decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures…"

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- **The European Protection Order:**
  - Article 82(1) of the Treaty on the Functioning of the European Union (TFEU) provides that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions — Auth Tab 75
  - *Directive on the European protection order, 13th December 2011 (OJ 2011 L 338)* — Auth Tab 120
  - This Directive sets out rules allowing a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or

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> psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue the protection of the person in the territory of that other Member State, following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State (Article 1). A Protection Order may be issued by a "judicial or equivalent authority" of the Issuing State (Articles 1, 2(1) & 6(2) - the identity of which, by Article 3, the issuing State is obliged to notify the General Secretariat). It may be transmitted by a "competent authority" of the issuing State (Article 8) and shall be executed by a "judicial or equivalent authority" of the executing State (Article 2(1) - the identity of which, by Article 3, the executing State is obliged to notify the General Secretariat).

120. The term "judicial authority" is thus intended to confirm a judicial status on a body or person that is more than a label, as it purports to distinguish such a body/individual from the Executive.

The 2003 Act

121. Even if the Appellant is wrong about the Framework Decision, and it did contemplate a Member State being free to designate politicians or policemen or prosecutors or lay persons or intelligence officers or any other state official to whom local law may give competency, to issue EAWs, the Framework Decision is not part of UK law.

122. The High Court rightly held that the fact a Member State has categorised a body as a judicial authority for the purposes of the Framework Decision cannot be determinative of its status under the 2003 Act (judgment, §47). Similarly, the Respondent conceded and the High Court accepted that the fact that SOCA has issued a certification under section 2 is not conclusive of the status of the foreign judicial authority under the 2003 Act (judgment, §48). In short, it is for the domestic courts of this country to determine whether the requirements of the 2003 Act are met, including whether the EAW has been issued by a judicial authority (judgment, §48).

123. The 2003 Act does not define "*judicial authority*". There is no provision which deems that "judicial authority" is to include anything beyond that encompassed by its plain meaning. The plain meaning of the term "judicial authority" is an impartial person or body independently exercising judicial power – i.e. a magistrate, judge or court.

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124. There is ample support for this interpretation from the 2003 Act itself:

i. This is the meaning which Parliament, in the absence of any contrary indication, must be taken to have intended in passing the Act. Had Parliament intended the scope of "judicial authority" to be defined by reference to the notifications given by a requesting State under the Framework Decision, it would have made that intention clear.

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ii. It is this meaning that has been acted upon in relation to the issuance of EAWs in this country, where the issuing "*judicial authority*" is the "*appropriate judge*". A prosecutor is, understandably and inevitably, partisan. That is why even the CPS, despite its high professional standards, is not authorised to issue Part 3 EAWs; a judge (and a particular one at that) must do so (section 142 of the 2003 Act).

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iii. Far from there being any contra-indications in the Act itself, the plain meaning is supported by a *ejusdem generis* construction of Section 202(4)(a), which refers to ratification of a document "*signed by a judge, magistrate or other judicial officer of the territory*".

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125. In applying and interpreting that legislation, national courts "… *must do so as far as possible in this light of the wording and purpose of the Framework Decision in order to attain the result which it pursues …*" (***Pupino*** [2006] QB 83, ECJ; ***Dabas v High Court of Justice, Madrid*** [2007] 2 AC 31, HL). On any view, the Framework Decision did not require EAWs to be issued by prosecutors. Under the terms of Recital 12, Member States were, and remain, free to refuse to execute EAWs issued by prosecutors, and for its national laws to so provide:

Auth Tabs 70 & 14

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> *"…This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process…"*

126. In any event, as set out above, the principle of legality requires that very clear language would be needed in order to construe the 2003 Act as including as a "judicial authority" a person who was also a party to the proceedings, such as the Swedish prosecutor. No such language has been identified by the High Court or the Respondent.

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127. It is clear from ***Office of the King's Prosecutor, Brussels v. Cando Armas and another***, [2006] 2 AC 1, HL, at §§23-24, that part of the purpose of the 2003 Act was:

Auth Tab 22

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> *"…to protect rights. Trust in [the 2003 Act's] ability to provide that protection will be earned by a careful observance of the procedures that have been laid down … the liberty of the subject is at stake here, and generosity must be balanced against the rights of the persons who are sought to be removed under these procedures. They are entitled to expect the courts to see that the procedures are adhered to according to the requirements laid down in the statute…"*

127. In the early days of the 2003 Act, the proper approach to be taken to these 'additional' provisions was a matter of controversy. However, and as the High Court recognised (§§9-19), the matter was quickly settled by the House of Lords which held that the construction of the 2003 Act must be approached in the following manner:

    i. First, it "…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…" (***Office of the King's Prosecutor, Brussels v Cando Armas*** [2006] 2 AC 1, HL per Lord Bingham of Cornhill at §8).

    Auth Tab 22

    ii. However, where the "wording of Part 1 of the 2003 Act does not…match that of the Framework Decision to which it seeks to give effect in domestic law…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…" (***ibid.*** per Lord Hope of Craighead at §24).

128. This is precisely one of those cases envisaged by Lord Hope. Article 6 of the Framework Decision was not transposed directly into UK law. The 2003 Act could have provided that "*A Part 1 warrant is an arrest warrant which is issued by an authority of a category 1 territory notified to the secretariat under Article 6(3) of the Framework Decision*". It did not. Instead, the 2003 Act purposely preserved the ability of the UK, as executing Member State, to determine whether a Part 1 warrant is issued by suitably independent – judicial – body (premised upon the – now erroneous – assumption that other EU member states understood that 'judicial' meant 'judicial'). The 2003 Act is abundantly clear. Section 2(2) requires a Part 1 warrant issued by a judicial authority, irrespective of whether a State has chosen to make an executive or other non-judicial body competent to issue an EAW and has notified it to the secretariat under Article 6(3) of the Framework Decision.

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129. To have a warrant accepted and acted upon in the UK, the 2003 Act mandates that it must on its face have been issued by a judicial authority and not by any partisan state functionary to whom local law may give competency.

130. The principle of strict observance of extradition requirements is not a new one:

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> *"…it is a fundamental point of principle that any use of the procedures that exist for depriving a person of his liberty must be carefully scrutinised. Lord Atkin's declaration in Liversidge v Anderson [1942] AC 206, 245: "that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act" has lost none of the force which it had when it was delivered over sixty years ago. When, in In re Farinha (Antonio da Costa) [1992] Imm AR 174, 178 Mann LJ said that the courts must be vigilant to ensure that the extradition procedures are strictly observed, he was making precisely the same point. The importance of this principle cannot be over-emphasised…" (**Regina (Guisto) v. Governor of Brixton Prison and another** [2004] 1AC 101, HL per Lord Hope of Craighead at §41).*

Auth Tab 32 para. 41

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131. It is a principle that is of particular importance in respect of territories (including all part 1 territories) in respect of which there exists no inquiry into evidential sufficiency:

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> *"…Since Parliament has delegated to the executive the power to include any states it thinks fit - a power it has exercised generously - the need for rigour at this elementary level is far more than merely technical…"* (***Bentley v The Government of the United States of America*** [2005] EWHC 1078 (Admin), per Sedley L.J. at §17).

Auth Tab 11 para. 17

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132. It is right to note that the case of ***Cando Armas*** (supra), heard by the House of Lords in 2005, involved an EAW issued by a prosecutor. However, in that case, this issue was neither argued nor within the scope of the certified question before the House. In any event, as in ***Cadder v HM Advocate*** [2010] 1 WLR 2601, SC:

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> *"…It is remarkable that, until quite recently, nobody thought that there was anything wrong with this procedure…Countless cases have gone through the courts, and decades have passed, without any challenge having been made to that assumption. Many more are ongoing or awaiting trial—figures were provided to the court which indicate there are about 76,000 such cases—or are being held in the system pending the hearing of an*

Auth Tab 12 para. 4

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appeal although not all of them may be affected by the decision in this case. There is no doubt that a ruling that the assumption was erroneous will have profound consequences. But there is no room, in the situation which confronts this court, for a decision that favours the status quo simply on grounds of expediency. The issue is one of law…It must be faced up to, whatever the consequences…." (at §4).

Parliamentary intent

133. In fact, examination of Hansard confirms that Parliament specifically intended (and assured) that judicial authority would mean a court or judge. By way of summary:

i. The phrase 'judicial' was not included in the Extradition Bill as originally drafted. It referred merely to 'an authority of a category 1 territory'. In response to an tabled amendment in Standing Committee to insert the term 'judicial authority', the Parliamentary Under-Secretary of State for the Home Department government stated, on 9th January 2003, that:

> *"…Article 6 [of the Framework Decision] could not be clearer. There is no suggestion, nor even the possibility, that a police officer can issue a European arrest warrant without being in breach of the Framework Decision…There is no attempt to renege on any commitments that were given in previous Committees*[83]*… 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…the examining magistrate at 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 Palocios 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 only people who are allowed to issue a European arrest warrant are those who have that function under the framework document. That document spells out that such people must be judicial authorities. I accept that the fears*

App Pt. 3 p. 1201

83. A reference to Undertakings given to the European Scrutiny Committee by the Parliamentary Under-Secretary at the Home Office, Mr. Bob Ainsworth MP, in January 2002 (see above, paragraph 66).

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> *raised by the Opposition Members are real, but I hope that if they are prepared to read the two documents together, they will be satisfied that the sort of abuses that they believe may arise cannot do so…"*[84]

ii. In response to those concerns, the government introduced an amendment on Report "…to make it absolutely clear that all European arrest warrants must come from a judicial source. The relevant provisions can be found in subsections (7) and (8) of Clause 2…"[85]

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App Pt. 3 p. 1203

iii. In Grand Committee in the House of Lords, a further amendment was tabled to add the words "after a judicial decision" so as to;

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> *"…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; namely, that this is a judicial authority—and, as my noble friend the Minister mentioned, information as to who the authorities are will be sent by the other state—and that that judicial authority must be acting, as it normally would, in terms of a procedure which can be said to be a judicial decision…"*

App Pt. 2 p. 1211

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iv. In resisting that proposal, the Parliamentary Under-Secretary of State for the Home Department government stated, on 9th June 2003, that;

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84. Hansard, House of Commons, Standing Committee D, 9 January 2003, Col 47-49, Mr. Ainsworth.

85. Hansard, House of Lords, Grand Committee, 9 June 2003, Col GC12, Lord Filkin.

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App Pt. 3
p. 1212

> *"...We currently receive requests from a wide range of judges and magistrates across the European Union, and we see absolutely no reason why that should change. Amendment No. 24 would provide that the decision to issue a warrant has to be a "judicial decision". I have to confess that I am not wholly clear what is meant by that. As I have already explained, all warrants will have to be issued by a judicial authority. I think that it is reasonable to argue that any decision taken on a matter of law or procedure by a person holding a judicial office—such as a judge or magistrate—is a judicial decision. So I cannot see what the amendments would add to the Bill. …*
>
> *…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. That is why we will be clear and ensure clarity as to what constitutes a judicial authority. The judicial authorities will be properly listed. As I said, we do not see the need to impose requirements on foreign judicial authorities that we do not impose on our own judicial authorities. Yes, it will be a judicial process in the sense that the noble Lord, Lord Stoddart, understands, but that process will be similar to ours. We expect it to operate very similarly to ours…"*[86]

The High Court's misunderstanding of the pre-2004 position

134. The High Court held, at judgment §34, that

> *"…we do not think much assistance is gained from [the statements of Parliament] given the broad category of authorities and the practice under the 1989 Act to which the Ministers referred. This practice is illustrated by R v Bow Street Magistrates Court (ex p Van Der Holst) (1986) 83 Cr App R 114, where one of the warrants was signed by the Public Prosecutor…The Court held that is was valid as all that was required was that it be signed by an officer of the Netherlands. In Re Speight (31 July 1996, transcript), the warrant was also signed by the Public Prosecutor…no challenge was made to the validity of the warrant…"*

86. The amendment was accordingly withdrawn. Hansard, House of Lords, Grand Committee, 9 June 2003, Col GC35-37, Lord Bassam of Brighton.

135. Reliance on ***Van der Holst*** and ***Re Speight*** was factually and legally misplaced. Factually, both cases were solely concerned with the authentication of materials (the underlying domestic arrest warrant and other materials) supporting an extradition request (as to which, see section 202(2) of the 2003 Act), not with the body responsible for the making of the extradition request itself (the Dutch government in both cases, not the Dutch prosecutor). Part 1 of the 2003 Act transferred, for the first time, the function of issuing extradition requests to the judiciary. In short, in neither ***Van der Holst*** nor ***Speight***, nor any other case prior to 2004, was an extradition request issued by a prosecutor.

136. Legally, both cases were decided under a materially different statutory regime. In ***Van der Holst*** section 15 of the Extradition Act 1870 provided that a domestic arrest warrant (which the Requesting State was required to produce in support of its extradition request) may be signed by a "judge, magistrate, or officer of the foreign state". There existed no requirement that the "officer" be judicial. In ***Re Speight*** (1996) unreported, 31 July 1996 section 26(1)(a) of the 1989 Act used the same 1870 formulation. The domestic arrest warrants were admissible because they were issued by an "officer" of the Requesting State.

Auth Tab 27

Auth Tab 31

Ismail

137. The High Court ruled that, despite the fact that "*…it is clear on the extrinsic evidence that a decision has not been taken…*" to prosecute or charge the Appellant (§149-150), he nonetheless remains an "accused" person within ***Re: Ismail*** [1999] AC 320 (above paragraph 30).

Auth Tab 30

138. The High Court refused to certify this issue as a point of law of general public importance. However, this is not a point of independent legal significance, arising independently but fortuitously on the facts of this case. It is intertwined and inextricably linked with the issue that was certified. The reality is that EAWs issued by prosecutors rather than courts occur precisely when the case is at the pre-prosecution / pre-charge stage. Of course, after that stage has passed, a foreign court is substantively seized of the case and will invariably issue its own warrants.[87]

87. And, insofar as non-judicial authorities may issue post-conviction EAWs, different principles may apply (as the High Court observed at judgment §45). It may be easier to apply the principle of mutual recognition to final post-conviction decisions because those decisions are surrounded by greater safeguards, have enjoyed full judicial scrutiny, and are taken by largely equivalent judicial authorities in all the Member States, whereas the competent authorities for taking pre-trial decisions do not have the same characteristics everywhere.

APPENDIX

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139. As stated above, despite the terms of the 1957 Convention, this problem never arose. Prosecutors with conduct of a case pre-charge / pre-prosecution were not permitted to issue extradition requests. Insofar as they were entitled to call upon their government to do so, ***Re: Ismail***, and the UK domestic requirement that a defendant be "accused", provided adequate protection.

B

140. The 2003 Act carried forward that domestic requirement in section 2(3)(a). Parliament always intended this requirement to be a substantive additional and effective safeguard against investigatory EAWs. Were ***Ismail*** applied properly, the issue that confronts the Court in the Appellant's case would simply not arise in reality. EAWs issued by prosecutors rather than courts, whilst the case is at the pre-prosecution / pre-charge stage, would be refused.

C

141. The certified issue before this Court is a live one, only because, as the Joint Committee on Human Rights has recently reported,[88] ***Ismail*** is not being applied properly by the High Court under the 2003 Act, and warrants for interrogation are being executed. The inability of Part 1 of the 2003 Act to adequately protect against investigatory or evidence-gathering EAWs is a problem that has attracted significant recent censorship.

D

142. The facts of this case are plainly stark and unusual. As the High Court observed, a final decision has not been made to prosecute or charge the Appellant. This is a clear and obvious case of an investigatory EAW. The Appellant's arrest was used as an opportunity to take his DNA (an obvious mutual legal assistance investigatory measure). The Swedish prosecutor herself has issued public statements confirming that:

> *"…I requested his arrest so we could carry out an interrogation with Assange…"*

App Pt. 1 p. 149

E

> *"…We have exhausted all the normal procedures for getting an interrogation (and) this investigation has gotten to a point where it is not possible to go further without interrogating Assange himself,' Ny said…"*

App Pt. 1 p. 173

> *"…The basis for this is that he must be interrogated in the investigation and that he could not be located for the interrogation…"*

App Pt. 1 p. 173

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88. House of Lords / House of Commons Joint Committee on Human Rights, fifteenth Report (Session 2010-2012), "The Human Rights Implications of UK Extradition Policy), HL 156 / HC 767, §§167-169.

Auth Tab 125 para. 167

G

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> *"…we have come to a point in the investigation where we cannot go further/proceed without speaking to Julian Assange…"* App Pt. 1 p. 173

> *"…Director of Public Prosecution Marianne Ny said Thursday the reason for the request is that investigators have not been able to bring Assange in for an interrogation…"* App Pt. 1 p. 174

B

> *"…The background is that he must be interrogated in the investigation and we haven't been able to reach him to perform these interrogations…"* App Pt. 1 p. 175

> *[after the decision] "…what happens next is that we're going to issue an international warrant to get the arrest decision executed. This means that we can continue our investigation and have an interrogation with Assange…"* App Pt. 1 p. 177

C

143. And, after the EAW was issued:

> . *I want to emphasise that before a decision to prosecute the defendant has been made, he will be given the right to examine all documents relating to the case. If th**e** prosecution goes ahead, the suspect will have the right to receive a copy of the investigation…".* App Pt. 1 p. 143

D

> *"…if a decision is made to charge Mr Assange, he and his lawyers will be granted access to all documents related to the case (no such decision has been made at this stage)…"* App Pt. 1 p. 144

144. Had the High Court applied the clear and straightforward test laid down by Lord Steyn in ***Ismail***, namely "*…whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution…*" it is obvious that the Appellant is not, and cannot be, properly classified as an "accused" person. Instead, the High Court reasoned (at judgment §153) that more than one test emerges from *Ismail*, the alternative one being no more than untrammeled factual intuition.

E

145. Both issues are therefore separate manifestations of the same problem, and point to the same conclusion; namely that the entire EAW scheme, or at least the 2003 Act, is firmly premised upon post-charge proceedings being afoot before a foreign court. The correct answer given to either issue would be apt to answer the Appellant's case and halt the decline in public confidence in Part 1 of the 2003 Act.

F

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APPENDIX

146. Finally, the Appellant notes that a decision in his favour would not, in fact, prevent the Swedish prosecutor from investigating the alleged offences.

147. Prior to being charged (or a step being taken that can fairly be described as the commencement of a prosecution), a criminal suspect is someone to whom the Mutual Legal Assistance treaty provisions (and Chapters 2-3 of Part 1 of the Crime (International Co-Operation) Act 2003) are capable of applying. His account may (and should) be taken pursuant to those provisions. There exists no legal or procedural obstacle to the Swedish authorities taking the Appellant's evidence now by telephone, by video-link, in person at an Embassy, or in person via in the United Kingdom by means of Mutual Legal Assistance provisions, and ending the preliminary investigation. The Appellant has offered all of the above. The Swedish prosecutor has so far declined them all; without substantive reason. The EAW is a draconian instrument which affects individual liberty, freedom of movement and private life: it should only be resorted to if other, less invasive, measures for achieving the general interest have failed or are unavailable. The results sought to be achieved by this EAW could have been achieved and could still be achieved by alternative means.

Auth
Tab 8

Conclusions

148. For all the reasons set out above, the Appellant submits that the Swedish prosecutor is not capable of being regarded as a "judicial authority" for the purposes of the 2003 Act, and the EAW is accordingly invalid.

149. In all the circumstances, your Appellant submits that the decision of the High Court was incorrect.

150. Your Appellant submits that the certified Point of General Public Importance should be answered 'no' for any or all of the following:

REASONS

(1) BECAUSE the Appellant's extradition is sought under an EAW that was not issued by a judicial authority within the meaning of the 2003 Act.

(2) BECAUSE the High Court was wrong to conclude otherwise.

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(3) BECAUSE the compromise reached by this judgment (§§49-50 & 19) is the creation of a two-tier system of scrutiny of EAWs, in which those issued by prosecutors are, whilst valid, subjected to more intense scrutiny. Whilst compelled by the acknowledgment that prosecutors are partial, and not independent of the parties, this compromise is unprincipled and unprecedented. Compromises of this nature are entirely inconsistent with this Court' case law concerning the construction of Part 1 of the 2003 Act. Either a body is a "judicial authority", in which case the full vigour of Part 1 should apply, or it is not and Part 1 should not apply at all. The present state of the law is unsatisfactory and unclear.

B

Dated this the 12th day of January 2012

Dinah Rose QC
Blackstone Chambers

Mark Summers
Matrix Chambers

Helen Law
Matrix Chambers

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IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT) (ENGLAND AND WALES)

Neutral citation of judgment appealed against: [2011] EWHC 2849 (Admin)

BETWEEN:

JULIAN PAUL ASSANGE

Applicant

v

SWEDISH PROSECUTION AUTHORITY

Respondent

CASE FOR THE APPELLANT

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