

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 RESPONDENT

Introduction

1. According to Part 1 of the Extradition Act 2003 (the 2003 Act) and the European Union Council's Framework Decision on the European arrest warrant and the surrender procedures between Members States (the EAW Framework Decision), to which Part 1 of the 2003 Act gives effect, a European Arrest Warrant (EAW) must be issued by a "judicial authority". This appeal concerns whether a public prosecutor may be a "judicial authority" for the purposes of the 2003 Act. App Pt. 3
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pp. 1059-1077
2. The Appellant argues that "judicial authority" should be interpreted narrowly so that it applies only to a judge exercising judicial powers as these powers are defined and understood within the UK's domestic legal system and under the Article 5 jurisprudence of the European Court of Human Rights.

3. The Respondent submits that the term “judicial authority” has a wide and autonomous meaning. The term is used in Part 1 of the 2003 Act to give effect to the EAW Framework Decision that, on proper analysis, permits an EAW to be issued by individuals or bodies (including a public prosecutor) recognised within an EU country as exercising authority in its domestic judicial system and having the function of issuing EAWs.
4. This broader approach recognises:
 - the wider meaning given to the concept of “judicial authority” on continental Europe;
 - the historic role of public prosecutors within EU Member States in authorising arrests and making extradition requests; and
 - the language and purpose of the EAW Framework Decision, as a key component in the European common area of justice, designed to accommodate the varying domestic legal systems of the Member States.

Proceedings in Sweden

5. The Appellant arrived in Sweden on 13 August 2010. By 18 August 2010 he had had sexual relations with two women both of whom, on 20 August 2010, attended a police station. The Swedish police understood what was said by these women as amounting to complaints of rape and molestation against the Appellant. A formal criminal investigation started. It was discontinued but restarted after an appeal.
6. Whilst the criminal investigation was ongoing, the Appellant left Sweden. His arrest was ordered on 27 September 2010 by the Swedish Prosecution Authority. The lawfulness of this order was challenged by the Appellant in the Court of Appeal in Svea, Sweden. The Court of Appeal upheld the arrest warrant and on 2 December 2010 a European arrest warrant was issued by Marianne Ny, a Director of Public Prosecutions with the Swedish Prosecution Authority, seeking the Appellant’s surrender, relying on the decision of the Svea Court of Appeal. The EAW described

four offences of rape and sexual assault alleged to have been committed by the Appellant.

Proceedings in the UK

7. The EAW was certified by the Serious Organised Crime Agency (SOCA) pursuant to the 2003 Act on 6 December 2010. The Appellant was arrested on 7 December 2010. Extradition proceedings were heard by Senior District Judge Riddle between 7 and 11 February 2011 at Belmarsh Magistrates' Court. In a judgment dated 24 February 2011, the Senior District Judge ordered the Appellant's extradition. The Appellant lodged a statutory appeal against this decision. A Divisional Court (Sir John Thomas PQBD and Ouseley J) heard this appeal on 12 and 13 July 2011. The Appellant argued on appeal that:
- i. The EAW had not been issued by a "judicial authority";
 - ii. None of the offences described in the EAW fairly or accurately described the conduct alleged. Consequently, the information did not meet the dual criminality test provided for by section 10 of the 2003 Act;
 - iii. The Appellant was not "accused" for the purposes of section 2(3) of the 2003 Act;
 - iv. The issue of an EAW was not proportionate.
8. These arguments were rejected by the Court on 2 November 2011. On 5 November 2011 the Court certified a question relating to argument (i) above but refused leave to appeal. On 16 December 2011 the Appellant was granted leave to appeal by the Supreme Court.

The issue before the Supreme Court

9. The issue to be resolved by the Supreme Court is:

"Whether a European Arrest Warrant issued by a public prosecutor is a valid Part 1 Warrant issued by a "judicial authority" within the meaning of section 2(2) & 66 of the Extradition Act 2003."

The Respondent's submissions in summary

10. The meaning of the term “judicial authority” in the EAW Framework Decision must be considered before the meaning of the term in the 2003 Act may be determined.
11. The fact that the term appears in a Framework Decision must require the term to be given a pan European interpretation. A wide construction of the term is justified having regard to the broad meaning given to the term “judicial authority” in continental European legal systems where it is used to refer to persons performing a range of official functions in connection with the administration of justice, not merely judges. Typically public prosecutors as well as judges will be included within the term.
12. The EAW Framework Decision was the first significant measure in the development of a common European area of justice based on the principle of mutual recognition of judicial decisions. The context of the EAW Framework Decision, including its evolution from draft to final form, in combination with its provisions and the clear intention to facilitate the process of extradition, provide strong support for the contention that a public prosecutor is within the term “judicial authority” and that the term is to be construed widely so as to give effect to the purpose of the EAW Framework Decision.
13. This analysis is confirmed by the actions of several EU Member States who have appointed public prosecutors as judicial authorities for the purposes of issuing EAWs. Tacit approval of this practice by the EU is evident in its numerous evaluation reports of the Member States’ practices. The practice has not been questioned by the European Court of Justice.
14. Finally, consideration of analogous European instruments both before and since the EAW Framework Decision confirm the wide meaning of the term “judicial authority”.
15. This wide construction does not undermine the protections guaranteed in Article 5 of the European Convention on Human Rights (ECHR) since there is no requirement under that Article for any judge to be involved in

the process leading up to the issue of an order for arrest on account of criminal conduct or the arrest itself. The due process protections in Article 5 only bite in a criminal case once an arrest has been effected.

16. The issue of an EAW does not deprive the person affected of his due process rights; he has the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power and to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. The Appellant has exercised his Article 5(4) ECHR rights in Sweden to challenge the lawfulness of his detention. His Article 5(3) rights have been fully protected in the UK by the process under the 2003 Act.
17. This broad approach to the EAW Framework Decision and a proper understanding of Article 5 of the ECHR informs the correct approach to Part 1 of the 2003 Act. There is a well-established practice of interpreting the 2003 Act consistently with the EAW Framework Decision to the extent that it is possible; unless Parliament has included separate additional safeguards within the 2003 Act not provided for by the EAW Framework Decision. The High Court was entirely correct to identify the force of this interpretive obligation [at paragraphs 10 and 33].
18. The 2003 Act adopted the term “judicial authority” within Part 1 of the Act directly from the EAW Framework Decision. It provided no additional safeguard limiting or modifying the definition of “judicial authority”. Were “judicial authority” to have a significantly narrower meaning than is evident in the EAW Framework Decision, it would have been made clear in the legislation. Given the interpretative approach set out above it is not permissible to read into the 2003 Act a definition that is both absent on the face of the legislation and inimical to its effective operation.
19. To approach the European scheme of extradition on the basis of a parochial common law understanding of the term “judicial authority” is not justified by reference to the EAW Framework Decision and cannot have been the interpretative approach intended by those responsible for drafting the 2003 Act. The principle of mutual recognition that underpins all of the European Union’s efforts to achieve cooperation within the common area

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of justice requires the UK to recognise and act on EAWs issued by those identified as “judicial authorities” under the domestic law of the issuing State where they have the function of issuing EAWs.

The background to the Framework Decision

20. Building upon the Treaty on European Union and the Treaty of Amsterdam in 1997, it has been a repeatedly expressed ambition of the European Union to become an area of freedom, security and justice.¹ This goal was identified in Title VI of the Consolidated version of the Treaty on European Union, 24.12.2002, C/324/5 (the Amsterdam TEU) which focused on Police and Judicial Cooperation in Criminal Matters. Article 29 set out the broad aim as follows:

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“Article 29

Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- *closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,*
- *closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit*

¹ Following the Lisbon Treaty this ambition has found expression in Title V Chapter 4 of the Consolidated version on the Treaty on the Functioning of the European Union, 30.3.2010, C/83/47 (TFEU) Article 82: “1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83...2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision ...”

(‘Eurojust’), in accordance with the provisions of Articles 31 and 32,

- *approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).”*

21. Article 31 provided as follows in relation to judicial cooperation:

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“Article 31

Common action on judicial cooperation in criminal matters shall include:

- (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;*
- (b) facilitating extradition between Member States;*
- (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;*
- (d) preventing conflicts of jurisdiction between Member States;*
- (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.”*

22. The fulfilment of these aims had been the focus of various discussions within the EU. The conclusions of the Tampere European Council of 15 and 16 October 1999 were particularly significant in the creation of the EAW Framework Decision. At Tampere it was decided that mutual recognition of judicial decisions should become the underpinning principle for cooperation in criminal matters within the EU. It was decided that formal extradition procedures then available should be abolished between Member States and that a simpler system should be devised based upon the mutual trust in the integrity of the legal and judicial systems of the Member States.

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23. On 27 November 2001 the European Commission put forward a set of draft proposals for a Council Framework Decision on a European arrest warrant. Article 1 of the draft Framework Decision provided that:

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“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.”

24. The term “judicial authority” was defined at Article 3 of the draft in the following terms:

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p. 1033

“‘issuing judicial authority’ means the judge or the public prosecutor of a Member State, who has issued a European arrest warrant.”

25. The Explanatory Memorandum which accompanied this draft explained Article 3 in the following way:

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p. 1012

“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”

26. The Explanatory Memorandum can only be understood as indicating that it was intended that “judicial authority” should be construed sufficiently widely so as to include prosecutors and that it was envisaged that prosecutors would have power to issue warrants for extradition and surrender.

27. An intention to allow prosecutors to initiate the process of surrender or extradition was also consistent with the stated aim of the Commission to replace and simplify existing arrangements in the field of extradition including the European Convention on Extradition 1957, the reciprocal laws passed by the Nordic States in relation to extradition and part of the Schengen acquis (see recitals 3 and 4 of the Preamble).

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28. Under each of the schemes to be simplified and replaced, it was possible for public prosecutors to issue warrants and to request extradition. It is unthinkable that the EAW Framework Decision intended to remove these features of each of the schemes by its use of the term “judicial authority”.

European Convention on Extradition

29. Under the European Convention on Extradition 1957 requests for extradition could be made by competent authorities under Article 1 on the basis of a warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party (article 12). The Explanatory Report explained in relation to Article 1 that: *“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.”*

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Nordic States

30. The Nordic States extradition arrangements are described in Shearer, Ivan; Extradition in International law; Manchester University Press 1971 at pages 63-64: *“The Nordic Treaty of 1962 to which Denmark, Finland, Iceland, Norway and Sweden are party agreed on broad principles of co-operation ... Effect was given to the scheme of extradition by the enactment of similar legislation by each member State. ... The procedural provisions avoid altogether recourse to diplomatic channels. A request for extradition may be made by the police or prosecutor of the requesting state directly to the comparable authority in the requested state. ... A fugitive may appeal against his extradition on any legal grounds to the superior courts.”*

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Schengen Acquis

31. In the Schengen Acquis under Articles 95 and 98 the Schengen information system may be used to issue an alert for persons wanted for arrest for extradition purposes as well as persons wanted in connection with criminal proceedings or who have been sentenced at the request *“of the judicial authority of the requesting contracting party”* (Article 95). Article 98 refers to *“competent judicial authorities.”*

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32. A 2009 review of the operation of Article 98 revealed that in most cases public prosecutors and judges were treated as “*competent judicial authorities*” for the purpose of issuing Article 98 alerts. In some Schengen States the police, security police, tax and customs authorities, border guard authorities and other authorities competent for criminal investigations were also competent to decide on Article 98 alerts, see: Report of the Schengen Joint Supervisory Authority on an inspection of the use of Article 98 alerts in the Schengen Information System.

The EAW Framework Decision: Relevant provisions

33. A Framework Decision issued by the European Council has the purpose of approximating the laws and regulations of the Member States. Framework Decisions are binding upon Member States as to the result to be achieved, but leave national authorities to determine the methods of implementation, see Article 34 (2)(b) of the Amsterdam TEU.
34. The EAW Framework Decision clearly sets out the purpose of the EAW scheme at recitals 5, 6, 10, 11 and 12 of the Preamble. They provide:

“(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

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

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

consequences set out in Article 7(2) thereof.

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

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(12) *This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.”*

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35. By Article 1.1 of the Framework Decision:

“The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal prosecution...”

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p. 1060

36. Article 1.2 states:

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

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p. 1060

37. Article 6 concerns the “*Determination of the competent judicial authorities*” entitled to issue an EAW within each Member State. It provides:

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p. 1062

“1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State. ...

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.”

38. Given the history and purpose of the EAW Framework Decision and the clarity of its language, there is no room for an argument that a Member State that recognises a public prosecutor under its domestic law as a judicial authority and authorises that prosecutor to issue EAWs may not determine that such a prosecutor is a competent judicial authority for the purpose of issuing EAWs.

The 2003 Act: Relevant provisions

39. It is well established that Part 1 of the 2003 Act gives effect to the EAW Framework Decision. The interpretive approach to Part 1 of the 2003 Act is informed by the content and intention of the EAW Framework Decision. In Caldarelli v Court of Naples [2008] UKHL 51, Lord Bingham explained at paragraphs 22-23:

“While a national court may not interpret a national law contra legem, it must ‘do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues and thus comply with article 34(2)(b) EU’ (Criminal proceedings against Pupino (Case C-105/03) [2006] QB 83, paras 43, 47: see Dabas v High Court of Justice in Madrid, Spain [[2007] 2 AC 31, paras 5, 39-40, 75-77). As I suggested in Cando Armas, above, para 8, the interpretation of the 2003 Act must be approached on ‘the twin assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of cooperation by the United Kingdom than the Decision required, it did not intend to provide for less.’

Providing as they do for international cooperation between states with differing procedural regimes, the Framework Decision and the 2003 Act cannot be interpreted on the assumption that procedures which obtain in this country obtain elsewhere. The evidence may show that they do not...”

40. Section 2(2) of the 2003 Act defines an EAW in the following way: “A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory...”

41. Sections 2(7) and 2(8) of the 2003 Act, concerning certification of EAWs received in the UK by the relevant designated authority, states: App Pt. 3
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“2(7) The designated authority 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.

2(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.”

42. No definition of the term “judicial authority” is provided in the 2003 Act. The language used is a direct transposition from the EAW Framework Decision. There is no basis having regard to that language or the purpose of the 2003 Act for giving the term “judicial authority” a meaning different from its meaning in the EAW Framework Decision.

43. The Appellant seeks to rely on certain Parliamentary materials. No attempt is made to justify this reliance by reference to the rule in Pepper (Inspector of Taxes) v Hart [1993] AC 593. Section 2 and the term “judicial authority” must be shown to be ambiguous or obscure for the rule in Pepper v Hart to apply. Further any Parliamentary material relied on must clearly point to the legislative intention for which the Appellant contends. Auth
Tab 25

44. Read in context there is no ambiguity or obscurity in the use of the term “judicial authority” in the 2003 Act. Reliance on the Parliamentary material is therefore not justified. Moreover even if the Parliamentary material is relied upon, it does not point to any clear legislative intention to exclude requests made by public prosecutors. The Hansard references make it clear that the Bill was not intended to make any change to the identity of the person who could issue foreign warrants.

45. The Parliamentary Under-Secretary of State made it clear on 9 January 2003 that the identity of such persons would not and could not change. From his reference to requests emanating from “*the magistrate at the public prosecutor’s office in Amsterdam*” the Houses of Parliament should have appreciated that judicial authorities (including public prosecutors) had issued requests under the European Convention on Extradition and would continue to do so under the 2003 Act. As the Administrative Court App Pt. 3
p. 1201

observed in this case [at paragraph 34], the Parliamentary Under-Secretary of State's reference was based on R v Bow Street Magistrates Court (ex p Van Der Holst) (1986) 83 Cr App R 114, the leading case on the propriety of warrants issued by prosecutors, in which one of the warrants was signed by the public prosecutor to the District Court of Amsterdam.

Current practice by Member States

46. A survey of UK extradition case law under the 2003 Act reveals that Sweden is far from alone in designating public prosecutors as an authority competent to issue EAWs. Since the start of the EAW scheme it has been the practice of a number of prominent Member States to issue EAWs through public prosecutors.²

47. Under Article 34 of the EAW Framework Decision the Commission is required to submit a report to the European Parliament and to the Council on the operation of the Framework Decision, accompanied, if necessary, by legislative proposals. From the full range of evaluation reports conducted since the EAW Framework Decision took effect, it is clear that Belgium, Estonia, France, Portugal, Finland, Luxembourg, Lithuania, Sweden, Greece, The Netherlands, Italy, and Bulgaria all permit EAWs to be issued by public prosecutors.

48. In none of the evaluation reports is any principled criticism made of the widespread designation of public prosecutors as issuing judicial authorities. No best practice recommendations are advanced to stop or to minimize the practice and no legislative proposals have been brought forward to address any perceived concerns in this regard. The ECJ regarded the involvement of the Finnish public prosecutor in Leymann and Pustovarov [2008] ECR I-8983 with equanimity.

² See inter alia: Office of King's **Prosecutor** Brussels v. Cando Armas [2006] 2 AC 1; Vey v The Office of the **Public Prosecutor** of the County Court of Montluçon, France; Thompson v **Public Prosecutor** of Boulogne Sur Mer [2008] ACD 5; Johnson v **State Prosecutor** at the Tribunal de Grande Instance de Lille, France [2009] EWHC 2830 (Admin); Parasiliti-Mollica v The Deputy **Public Prosecutor** of Messina, Italy [2005] EWHC 3262 (Admin).

49. This broad approach to the meaning of “judicial authority” is not confined to the EAW Framework Decision. As set out below there is an established practice, both before and after the EAW Framework Decision of the term “judicial authority” being used, within the context of comparable cross-border criminal legal instruments, to include public prosecutors.

“Judicial Authority” and other instruments adopted under Title VI of the Amsterdam TEU or Title V of the TFEU

50. Prior to the EAW Framework Decision and the introduction of the principle of mutual recognition, there are examples of the term “judicial authority” being used to include public prosecutors. The clearest example is the 1957 European Convention on Extradition, set out above. This approach to the use of “*autorités judiciaires*” has endured: It is instructive to consider instances where the term “judicial authority” has been utilized in analogous European Union instruments following the EAW Framework Decision which similarly seek to further the common area of justice based upon the principle of mutual recognition. It is evident from such a survey that “judicial authority” is not accorded the narrow definition of “judicial” in the sense for which the Appellant contends.

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51. In addition to the EAW Framework Decision, one of the key Framework Decisions based upon the Tampere Conclusions is the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (EEW). At recital 8 of the Preamble the EEW Framework Decision sets out the meaning of “judicial authority” in the following terms:

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

Auth 52. It goes on to provide at Article 2(c):
Tab 115

“(c) ‘issuing authority’ shall mean:

*(i) a judge, a court, an investigating magistrate, a public prosecutor;
or*

(ii) any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law;”

Auth 53. Article 3 provides:
Tab 115

“1. Each Member State shall inform the General Secretariat of the Council which authority or authorities, under its national law, are competent pursuant to Article 2(c) and (d) when that Member State is the issuing State or the executing State.”

Auth 54. The approach to recognition is addressed in Article 11, which provides:
Tab 115

“Article 11

Recognition and execution

1. The executing authority shall recognise an EEW, transmitted in accordance with Article 8, without any further formality being required and shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents or data, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 13 or one of the grounds for postponement provided for in Article 16.

2. The executing State shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State.

3. Each Member State shall ensure:

(i) that any measures which would be available in a similar domestic case in the executing State are also available for the purpose of the execution of the EEW;

and

(ii) that measures, including search or seizure, are available for the purpose of the execution of the EEW where it is related to any of the offences as set out in Article 14(2).

4. 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."

55. Part C of the annexed model European evidence warrant sets out that a public prosecutor is a "type of judicial authority" capable of issuing such a warrant and is capable of validating such a warrant where it has been issued by another designated judicial authority not specified within the EEW Framework Decision. Auth
Tab 115

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

57. Similarly the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union in defining a "criminal investigation" states:

*"'criminal investigation': a procedural stage within which measures are taken by competent law enforcement or **judicial authorities, including public prosecutors**, with a view to establishing and identifying facts, suspects and circumstances regarding one or several identified concrete criminal acts"* Auth
Tab 112

58. The Commission's Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union introduces the European supervision order in the following terms: Auth
Tab 110

"The European supervision order is a decision issued by a judicial authority (i.e. a court, a judge, an investigating magistrate or a public prosecutor) in one Member State that must be recognised by a competent authority in another Member State. The aim is to let the suspect benefit from a pre-trial supervision measure in his or her natural environment (residence). As regards the threshold, the European supervision order is an option whenever there is a possibility under the national law of the issuing Member State to order that a suspect be remanded in custody, irrespective of the fact

that the thresholds vary between Member States. However, the European supervision order is not only an alternative to pre-trial detention. It may also be issued in relation to an offence for which only less severe coercive measures (e.g. travel prohibition) than pre-trial detention are allowed, i.e. where the threshold may be lower than for remand in custody.”

59. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) provides by Article 28(3) one of the grounds for delay or refusal of cooperation as :

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Tab 109

*“Where the law of the requested Party so requires, co-operation under Section 2, in so far as the assistance sought involves coercive action, and under Section 3 of this chapter may also be refused if the measures sought or any other measures having similar effects would not be permitted under the law of the requesting Party, or, as regards the competent authorities of the requesting Party, **if the request is not authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.”***

60. Similar use of the term “judicial authority” features at Articles 28(7) and 35.
61. The Appellant asserts at paragraph 119 that the lack of any definition of the term “judicial authority” within the EAW Framework Decision itself is a recurring theme in later Framework Decisions and that this somehow demonstrates Member States are expected to select, *“from within its pool of judicial authorities as defined by human rights norms and jurisprudence, that sub-set which were competent.”* Analysis of the Framework Decisions listed under paragraph 119 does not support such a proposition. There is nothing within the Framework Decisions listed that limits the body responsible for issuing the relevant request or process to the narrow definition of “judicial authority” the Appellant advances.
62. Whilst these Framework Decisions may require the underlying judgment or order (by their nature) to have emanated from court proceedings the issuing authority acting thereafter on behalf of the Member State is not limited to a “judicial authority” in the narrow sense. For example, whilst the Framework Decision on the application of the principle of mutual recognition to confiscation orders, 6th October 2006 (2006/783/JHA)

requires the underlying confiscation order to have been issued by a court, the Framework Decision clearly envisages that the “*authority competent for the execution of the confiscation in the issuing State*” is different. Article 3 of that Framework Decision does not offer the slightest suggestion that the competent authority must be ‘judicial’ in the sense of being a judge.

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63. For this reason the Respondent submits an analysis of the various instruments which have been brought about to achieve a common area of justice based on mutual recognition fails to support the suggestion that “judicial authority” has a narrow or restrictive meaning. Quite the reverse is true. The numerous Framework Decisions establish the importance of Member States having the autonomy to designate their own competent authorities by reference to their domestic law. It is notable that where exclusive distinctions are drawn between a Member State’s authorities they are frequently drawn between judicial authorities and law enforcement authorities, or the police, but not as between judges and public prosecutors.

‘Judicial authority’ and the ECHR authorities

64. The Appellant relies upon the proposition that, because a prosecutor is not “*a judge or other officer authorised by law to exercise judicial power*” (see: Medvedyev v France [2010] ECHR 3394/03) and is not impartial for the purposes of Articles 5 or 6 of the ECHR, it is not lawful for a prosecutor to issue a warrant or an EAW because this would breach fundamental constitutional principles and would involve a construction that is contrary to EU law norms.

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65. However this argument proceeds upon the false premise that there is a constitutional principle that requires decisions to arrest to be made by an impartial judge and not by a party. This premise is false since as a matter of European, ECHR as well as UK law, arrests may be ordered and carried out by persons (such as police officers) who are not judges and who are not impartial. The lawful arrest or detention of a person effected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence is specifically authorised by Article 5(1)(c). There is no requirement for the person

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authorising the arrest to be a judge or to be impartial. Article 5 is not violated by such an arrest provided that the person arrested is informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him and is brought promptly before a judge or other officer authorised by law to exercise judicial power and that he is able take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

66. The EAW in this case is no more than an order for arrest issued by a prosecutor. It has been subject to scrutiny by the courts in Sweden and in England. There is no conceivable breach of fundamental rights involved in such a process. None of the ECHR authorities, referred to by the Appellant, supports the proposition that a prosecutor issuing an EAW is acting contrary to Articles 5 or 6 or is otherwise in breach of the principle of legality.

Submissions

67. It is submitted that the High Court's decision not to restrict the term "judicial authority" in the 2003 Act to a judge was plainly correct and arises out of a correct analysis of the language and purpose of the EAW Framework Decision. A judicial authority will include any public officer exercising authority in an EU State's domestic judicial system having the function of issuing EAWs.
68. The 2003 Act contains nothing that requires a more limited definition of "judicial authority" to be imposed.
69. Ultimately, whilst acknowledging that a public prosecutor's role as one of the parties to the underlying criminal proceedings in the requesting state is distinct from the role of a judge who adjudicates, the High Court expressed no doubt in principle that a public prosecutor could constitute a judicial authority where the issuing State vested him with the specific function of issuing EAWs. It is submitted this conclusion was correct. Whilst greater scrutiny of the request may be justified where a public prosecutor has issued an EAW without the oversight of a domestic court, this cannot

undermine the public prosecutor's status as a competent judicial authority within the requesting state and should not lead to UK courts refusing to consider such requests.

70. The functions imposed on the "judicial authority" in some parts of the EAW Framework Decision may only lawfully be performed by a judge (see for example the functions in the executing state identified in Recital 8 and Articles 14 and 15), however it is submitted that the High Court was right not to confine the meaning of the term "judicial authority" where it is used elsewhere in the EAW Framework Decision where there is no functional imperative requiring the Court to construe the term more narrowly. Article 6 makes clear that the question of designation is a matter for the domestic law of the requesting state. The principle of mutual recognition requires that a Member State's designation is respected, unless, as the High Court observed at paragraph 46, the judicial authority is "*self evidently not a judicial authority within the meaning of that broad term within the Framework Decision.*"

App Pt. 1
p. 1060
App Pt. 1
p. 1064

App Pt. 1
p. 19

71. In this case, on 29th May 2009, in accordance with the provisions of Article 6, the Council of the European Union published the Swedish list of authorities competent to issue and execute a European Arrest warrant. It states:

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"Issuing judicial authority. A European arrest warrant for prosecution is issued by the public prosecutor. A European arrest warrant for the enforcement of a custodial sentence or other form of detention is issued by the National Police Board"

72. Given the approach taken by multiple Member States to designating public prosecutors as judicial authorities and the apparent acceptance by the EU Commission of this practice, combined with the replication of this arrangement in subsequent European instruments, it cannot be argued that public prosecutors are "self-evidently" not judicial authorities for the purposes of the EAW Framework Decision or, most importantly, the 2003 Act, which as set out above, adopts the EAW Framework's language of "judicial authority" without reservation or qualification.

Conclusion

73. Your Respondent respectfully submits that the appeal should be dismissed for the reasons set out above.

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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:
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BETWEEN:

JULIAN PAUL ASSANGE

Appellant

v

SWEDISH PROSECUTION AUTHORITY

Respondent

CASE FOR THE RESPONDENT

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