

Lord Kerr at the Francis Taylor Building Boydell Lecture

European Arrest Warrants: A European Understanding of "Judicial Authority" as Highlighted in Assange v Swedish Prosecution Authority

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I did not know Peter Boydell. I rather wish that I had. He was plainly an interesting, not to say intriguing, man. I am told that in the 32 years that he led them, the strength and expertise of his chambers in planning and administrative law expanded and deepened. But he was obviously something of a renaissance man outside his professional life. I am given to understand that he was in a major way instrumental in saving from demolition the Grand (or, as it is sometimes known, the Matcham) Theatre in Blackpool, a building which is (Google tells me) among the top 8 per cent of all listed buildings in England. I know from last year's lecture that, in his professional life, Peter Boydell was perhaps not noted for his battles in the cause of conservation so his campaign to save the Grand adds to the fascination of the man.

But perhaps the most significant thing to be said about Peter Boydell - and one does not have to have known him to be able to say this - is that he clearly commanded the esteem and affection of his colleagues for they established this annual lecture in his honour and memory. And I am delighted and honoured to have been invited to deliver this, the fifth Boydell lecture.

I am afraid that he might have found the subject of tonight's talk rather far removed from his area of practice and interest. And I am a little apprehensive that members of his chambers (and many others in this audience) will likewise find it of (at best) passing academic curiosity. I apologise for that. On the basis that confession is good for the soul, I should admit that the title was chosen for

the wholly unworthy reason that the *Assange* case was the one that came to mind as being among the most interesting coming up in our lists, at the time that I was asked to deliver this lecture. And so I apologise again.

In fact, as will become all too rapidly apparent, the case is not in the least interesting in any conventional way. But I have reached my apology quotient so no more apologies.

With that, what I accept is a rather unpromising, indeed, downright disheartening introduction, let me turn to the theme of tonight's talk – the meaning of judicial authority for the purpose of European Arrest Warrants. It is of course well known that an application has been made to re-open the *Assange* appeal. It is, I hope, unnecessary for me to say that I do not intend to comment at all on the issues which have prompted that application. But the judgments have been handed down and they are in the public domain. Leaving, as I shall leave, strictly to one side the issues that arise on the application to re-open, it is perfectly feasible and, I am satisfied, not at all improper, to discuss the other aspects of the appeal, whatever may be its ultimate outcome.

The subject of the meaning of judicial authority will be examined principally through the medium of the *Assange* appeal, and I want to begin by telling you what that case was *not* about. It was not about – indeed was not even remotely about – Mr Assange's role as an internet activist; and, contrary to the assumption of some commentators, it was not about his possible extradition to the United States of America; it was not even about whether the allegations which had prompted the Swedish prosecution authority to seek his extradition were sustainable. The appeal was concerned with what was meant by a judicial authority where that term is used in, on the one hand, the Framework Decision of 13 June 2002 on the European Arrest Warrant and, on the other hand, the Extradition Act 2003.

What is meant by a judicial authority is a seemingly narrow issue but it is one which spawned a number of quite teasingly difficult but enthralling questions. One does not have to be (at least I hope one does not have to be) an extradition anorak to find these really quite absorbing. But I do not intend to deal with all the points in what was a superbly argued appeal. Indeed, it would demand far too much of my capacity and of my audience's tolerance to try to cover all those issues. Instead, I intend to concentrate on a limited number of areas for no particular reason other than that they are those which have especially interested me.

Let me sketch the topics that I intend to cover.

The first is the meaning to be given to “judicial authority” in the Framework Decision. Under the current system of extradition (or as it is more properly called, ‘surrender’) a judicial authority is required both to issue the warrant seeking extradition and to execute it. So in the country seeking extradition whether a warrant should be issued seeking extradition must be decided by a judicial authority and in the country where the extradition is to be ordered (the executing country) a judicial authority must decide whether the individual should be extradited. One of the important issues which arose on the *Assange* appeal was whether the issuing judicial authority and the executing authority should be possessed of the same attributes.

The second topic is related to the first. Indeed it is impossible to separate them and, for the most part, I will deal with both together. It concerns the legislative history of the Framework Decision. Does it tell us what was intended about the breadth of meaning to be given to the term “judicial authority”? A broader consideration on this subject is the use to which travaux préparatoires can be put in interpreting EU legislation generally, but I fear that I shall not have time to say much on that interesting subject.

Next I would like to say something about whether there is an imperative for congruence between the Framework Decision and domestic legislation. This is in some ways the most important development to emerge from the *Assange* case and I should be quick to give credit for that development to my colleague, Jonathan Mance, whose analysis of the issue has, if not exploded a myth, at least firmly corrected strongly held – but, as it has proved, incorrect - assumptions concerning the existence and force of the duty of conforming interpretation incumbent on domestic courts in respect of framework decisions.

Then I want to say something about whether, in order to decide what meaning should be given to the term, ‘judicial authority’ in the 2003 Act, it was legitimate by recourse to *Pepper v Hart* principles to examine records of Parliamentary debates in order to ascertain the intention of Parliament as to what interpretation should be placed on that expression.

Finally, if I have time, I would like to pose a few questions about what I see as the tension that arises where an ascertainable Parliamentary intention is in conflict with a strong presumption that legislation should not be inconsistent with an international instrument to which the UK is a party.

Let me turn, then, to the first of those themes – what should ‘judicial authority’ in the Framework Decision be taken to mean. Isolated from its context, the expression would, of course, readily connote an authority that is judicial in character and, in the common law sphere, that would bring with it attributes of impartiality and independence. But it cannot be divorced from its context and that context is set, I suggest, not merely by the text of the Framework Decision itself but also by the background in which it came to be made so it is, I am afraid, necessary to touch lightly on that background.

As ever, it is well captured in the enviable prose of Lord Bingham in *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2005] UKHL 67 in paras 2 and 3 of his speech in that case. As he explained, the procedures that existed before the Framework Decision and which had been established by bilateral treaties between various countries had been characterised by technicality and delay so great as to impede or even frustrate the efficacy of the process. There had accordingly been a movement among the Member States of the European Union to establish, as between themselves, a simpler, quicker, more effective procedure. The essence of that new procedure was that it was founded on Member States' professed confidence in the integrity of each other's legal and judicial systems.

This consideration is, I think, centrally important in deciding the approach to be taken to the interpretation of the Framework Decision. Whereas previously, there was a discernible reluctance on the part of many countries to accede to applications for extradition, especially of their own nationals, the Framework Decision was designed to herald a new era where member states of the EU would accept, without significant question, the integrity of the legal systems of other member states and agree to the surrender of persons whose extradition was sought. This demanded a considerable shift in cultural attitudes. The UK in particular had grave reservations about the extradition of persons without there having been any examination in domestic courts of the adequacy of the evidence to sustain the charge on which extradition was sought. It was, on that account, reluctant to accede to the 1957 European Convention on Extradition. Discussion of these reservations is to be found in the judgment of Lord Phillips in the *Assange* appeal at paras 26-30. Although the 1957 Convention did not require a requesting State to adduce any evidence to support the allegation that the fugitive had committed the crime of which he was accused, most countries remained unenthusiastic about sending off their nationals to be tried in conditions which might not mirror those in the extraditing state. But the new mood music for the Framework Decision was that confidence in the propriety of the request for surrender was to be the order of the day and chariness about the system of trial that an extraditee might face was to be set aside.

It is clear that the mood music was not exactly tuneful in the ear of all those who engaged in the discussions about the content of the Framework Decision but confidence in other countries' legal systems and its inevitable concomitant of acceptance of the adequacy of the safeguards that those systems provided undoubtedly was the overriding feature that loomed large in the drive for the measure.

This, then, was the backdrop against which the Framework Decision was formed. Or rather, it is a necessarily foreshortened and vastly over-simplified expression of that backdrop. For those who wish to examine the background more fully I commend the judgments of Lord Phillips and Lord Mance.

The move to a system of surrender (which had as its cornerstone trust in the integrity of the legal system of the country seeking extradition) gave rise to profound issues of policy, indeed profound issues of philosophy. One can readily understand, and even sympathise with, the sentiment that nationals of this country should not be shipped off to an uncertain fate in some foreign state without at least close scrutiny of the basis on which their extradition is sought. On the other hand, examination of the adequacy of evidence to sustain proceedings in a foreign jurisdiction carries self-evident difficulties and the imposition of a requirement that it be demonstrated in the executing country that there is a sufficient basis to justify the surrender of the individual creates the potential for the very technicalities and delay which had bedeviled the earlier procedures.

This policy or philosophical debate plays directly into the question of how 'judicial authority' in the Framework Decision should be interpreted. It is easy to

recognise the force of the argument (on policy grounds) that if a judicial authority such as a judge, magistrate or court has to decide whether an extradition warrant should issue, at least some comfort can be obtained from the knowledge that the warrant will not be issued without it being subject to some form of impartial and independent scrutiny. It might be considered that this is particularly necessary in the case of an extradition warrant. An arrest in any circumstances is – or, at least, should be – a daunting experience for the person who is the subject of it. To be uprooted from one’s home and transported to a foreign jurisdiction must be doubly so.

The countervailing argument, of course, is that with the ease of travel and the general mobility of people and the opportunity for transnational crime, a streamlined system of rendering those suspected of such crime to the justice of the state where it was committed is not less than vital.

It was this contrary argument that prevailed, as is clear from the fifth and sixth recitals of the preamble to the Framework Decision. They state:

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 purpose 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 [until] 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."

And the fundamental nature of the change in system was frankly acknowledged in the passage from the opinion of Advocate General Ruiz-Jarabo in his opinion in *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3672, which is quoted by Lord Dyson in his judgment in *Assange*. This is what the Advocate General said:

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

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

43. The nature of the situation changes when assistance is requested and provided in the context of a supranational, harmonised legal system where, by partially renouncing their sovereignty, States devolve power to independent authorities with law-making powers.”

It is clear from this passage that the Framework Decision was no mere tinkering with the scheme of extradition. It represented the outworking of a fundamental change in the legal order. Whereas, previously, extradition depended on a bilateral, mutual co-operation between the state that requested and the state that was requested to provide extradition, the Framework Decision was premised on a “supranational, harmonised legal system”. Moreover, subscribing to that system, it was acknowledged, necessarily involved a partial renunciation of sovereignty. While, therefore, the direct source of the more easily obtained surrender of fugitive offenders is to be found in the terms of the Framework Decision, far more importantly, what underpins the new scheme is the notion that the legal systems of the various member states have been subsumed into a supranational order. In these circumstances examination of the efficacy of the legal system of the requesting state is not only precluded, it would be a wholly inapposite exercise.

Note well the statement in recital 6 of the Framework Decision: that the EAW is the *first* concrete measure in the field of criminal law implementing the principle of mutual recognition. We should understand that this Framework Decision is but part of a broader movement towards mutual recognition of all criminal judgments between member states, and that this will occur not merely because individual EU instruments so decree but because that is the logical and inevitable consequence of the harmonised legal system described in Advocate General Ruiz-Jarabo’s opinion.

Turning to the text of the Framework Decision, Article 6.1 provides that 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. Those of us who expressed a view on it in *Assange* accepted that the term ‘judicial authority’, taken on its own did not comfortably accommodate a public prosecutor. But the French version of the Framework Decision used the term ‘autorité judiciaire’ and it became clear that this was capable of bearing a broader meaning than its English counterpart. As a matter of principle, equal weight must be given to the English and French versions. Lord Phillips concluded that the various contexts in which the term was used indicated that a broader meaning to the term than would be given by adherence to the conventional English connotation was warranted. Lord Dyson, by contrast, found that more assistance was to be obtained from an examination of how the relevant part of the Framework Decision has been applied and viewed in practice. Lord Mance pointed out that the Framework Decision drew no explicit distinction between the qualities which must be possessed by an issuing and an executing judicial authority, despite the fact that the executing judicial authority unquestionably had adjudicative functions which only could be fulfilled by a court or judge. Nevertheless, he concluded that the words “judicial authority” had in European law a measure of flexibility about them that a reference to a court or judge did not. Moreover, as Lord Mance also pointed out, in some civil law countries (France and Greece, for example), public prosecutors (le parquet) are described as an arm of the judiciary. He concluded that, in light of the special role and responsibilities of a public prosecutor in the fair administration of justice and in light of the subsequent use by several states, of public prosecutors as an issuing “judicial authority”, without incurring criticism from the European Commission or the Council, a public prosecutor may constitute an issuing judicial authority. Of the latter body, Lord Dyson referred to its role in reviewing the practical application of the provisions of the Framework Decision by Member States and observed that in none of the evaluation reports that this process generated was a word of criticism made about the use of public prosecutors as issuing judicial authorities, notwithstanding the fact that in eleven member states they are so designated.

As I have said, on the appeal this issue was inevitably linked to the question of the legislative history of the Framework Decision and strikingly different views were expressed as to the significance of that history. Before turning to those, it is perhaps helpful to recognise a distinction between legislative history (in the sense of examining what discussions or debates preceded the making of the Framework Decision) and legislative background (by which I mean the legal position that obtained before the Framework Decision and the manner in which that legal position was altered).

It is, at first sight, a remarkable fact that a draft of the Framework Decision in September 2001 contained a definition of “judicial authority” which included “public prosecutors” but by the time of the final version that definition had been removed and replaced by article 6.1 which did not provide a definition but merely stated that the judicial authority was to be the competent authority according to the law of the issuing member state. If the original definition had remained, obviously there could have been no debate about whether a public prosecutor could have constituted a judicial authority nor, indeed, could there have been any appeal by Mr Assange. But the fact is that the original definition was deleted and a good deal of discussion naturally ensued on the hearing of the appeal as to why it had been removed.

Lord Phillips mooted two possibilities – either it was intended to restrict the meaning by excluding public prosecutor from the ambit of judicial authority or it was to broaden the meaning beyond even the offices of judge and public prosecutor. For a number of reasons, Lord Phillips preferred the latter explanation. Although concurring in the outcome of the appeal, Lord Dyson disagreed with this conclusion. He pointed out that no material had been produced which explicitly revealed why Member States had agreed to make the change. Lord Mance’s disagreement with Lord Phillips’ conclusion on this issue was more profound. In the first place he suggested that the abandonment of the original definition was as likely to reflect a failure of the member states to agree

on a definition as it was to signal a wish to enlarge the potential group beyond judges and public prosecutors. Pragmatically, the member states, if they were unable to agree, shelved the problem so that, when circumstances permitted it, the Court of Justice of the European Union could grapple with the problem. Secondly, he stated that the Court of Justice would probably not engage in a process of speculation about why the change had been made. Rather, it would (and this is a direct quotation from Lord Mance's judgment) "focus on the final Framework Decision and seek to make sense of its text in the light of its purpose, the principles underlying it and general principles of European law".

I must somewhat shamefacedly admit that I ducked this issue. I rather lamely said that I could see force in all three views. On further reflection, it seems to me that Lord Mance's analysis is to be preferred. I think that the high probability is that some member states simply could not sign up to the fairly tight definition contained in the September 2001 draft. Consensus on a definition of judicial authority could not be achieved so resort was had to the venerable device of the fudge. It was left open to member states to nominate the judicial authority and whether the authority so nominated met whatever requirements that position was later deemed to require would be left to the Court of Justice.

But it is at this point that the legislative background – as opposed to the legislative history – becomes pertinent and I am relieved to be able to assert that I did not duck this issue. For it seemed to me – and it still does – that if no agreement was reached as to whether public prosecutors could be issuing judicial authorities, it was at least clear that there was no agreement that they should be excluded from that role. The undeniable fact was that public prosecutors had traditionally issued extradition warrants. If they were to be removed from that role, this would represent a radical departure from the administrative arrangements that had hitherto obtained. It seemed to me that if the Framework Decision was to be interpreted as removing public prosecutors from that function, explicit provision to that effect would be required.

Lord Dyson was not enamoured of that suggestion. He pointed out, reasonably enough, (I say, reasonably enough, only because he is the audience tonight) that the Framework Decision was itself a radical overhaul, replacing what was formerly an inter-governmental act with a wholly judicialised system and one could not therefore make any assumptions about a failure to make explicitly clear that public prosecutors were excluded. Well, yes, up to a point. But the plain fact is, as the framers of the Framework Decision well knew, public prosecutors had regularly performed this function in many of the member states. Some agency would have to perform the function in the future. Public prosecutors had been expressly mentioned in the September 2001 draft. It seems to me that, against that background, it is impossible to conclude that it had been agreed that they be excluded from the role. And the significant point surely is that, if it had not been expressly agreed that they should be so excluded, to interpret the Framework Decision as having that effect is a step too far.

Of course, all this interesting debate would have been avoided if it had been possible to refer the case to the Court of Justice for a preliminary ruling. I don't think any of the justices would have dared to say that the matter was 'acte clair'. But this was not an option. As Lord Mance explained, the Framework Decision was a "third pillar" measure agreed under Title VI of the Treaty on European Union. Under article 34(2)(b) of the Treaty such measures were "binding as to the result to be achieved" but the choice of form and methods as to how the result was to be achieved was left to the national authorities. Member States were not obliged to accept the jurisdiction of the European Court of Justice and therefore the preliminary ruling system did not arise. The European Commission is unable to take enforcement measures against Member States in relation to any perceived failure to implement domestically the requirements of a third pillar measure. All this being so, the European legal principle of interpretation in conformity with Community law, as explained by the Court of Justice in *Criminal Proceedings against Pupino*, does not apply to the Framework Decision. That principle (*i.e.* of interpretation in conformity with Community law) requires a national court, when applying national law, to do so as far as possible in light of the wording and purpose of the EU measure. It had been

assumed (particularly in *Dabas v High Court of Justice in Madrid* and *Caldarelli v Court of Naples*) that the principle applied in respect of this Framework Decision. Time forbids my dilating on this issue but for those who wish to learn more of the reasons for the revised view, I commend the wholly authoritative exegesis on the subject to be found in Lord Mance's judgment in *Assange* in paras 198-217. As he has convincingly demonstrated, the conforming interpretation principle did not apply; the only domestically relevant legal principle was the common law presumption that the Extradition Act 2003 was intended to be read consistently with the UK's obligations under the Framework Decision. But it is important to recognise that while the legal principle of conforming legislation does not apply, the common law presumption is not to be lightly dismissed.

Before turning to briefly examine its impact in the present case, I should say that, unfortunately I do not have time to discuss the important question about the use, if any, to which the travaux préparatoires may be put as an aid to the correct interpretation of the Framework Decision but, again I refer those interested to para 229 of Lord Mance's judgment with which I am in respectful and admiring agreement.

Let me look quickly at the question of the admissibility of Parliamentary debates. I would like to deal with that before saying anything about the impact of the common law presumption of consistent interpretation between the 2003 Act and the Framework Decision. Substantial quotations from exchanges in Parliamentary debates appear in the judgments of Lord Phillips and Lord Mance and tempting though it is to repeat some of these, I am afraid that I cannot justify doing so. One must make one's own judgment about the import of the statements made in Parliament. It will be remembered that the conditions (stipulated in *Pepper v Hart*) prerequisite on the exercise of the power to have recourse to Parliamentary materials are: that the legislation is ambiguous or obscure, or that it leads to an absurdity; that the material relied upon consists of one or more statements by a Minister or other promoter of the Bill; and that the statements relied upon are clear. For my part I simply could not accept that the last of those conditions was satisfied. There was, in my estimation, a measure of

confused thinking in Parliament about what the Act would achieve in terms of protection for those whose extradition from the UK was sought. It may well be that there was an aspiration on the part of some of the contributors to the debates that the 2003 Act should require that an issuing authority be a court or judge; it may even be the case, as Lord Mance has suggested, that ministers gave assurances or endorsed assumptions that an issuing judicial authority would be a court, judge or magistrate (although, I think that these assurances, if they were indeed given, could not be described as unqualified). But the essential point is that there was no clear statement that could properly be characterised as an unambiguous assertion of Parliamentary intention.

The more interesting question (although one which, in the event, we were not required to address directly) is whether a particularly emphatic statement of intention is required to satisfy *Pepper v Hart* conditions where the vaunted intention is one which would bring Parliament into conflict with the UK's international obligations. Lord Bingham in the *Cando Armas* case had said that the interpretation of the 2003 Act "must be approached on the twin assumptions that Parliament did not intend the provisions of Part 1 of the Act to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of cooperation by the United Kingdom than the Framework Decision required, it did not intend to provide for less". Lord Mance identified a possible tension between this approach and that of Lord Hope in the same case where the latter said, at paras 20, 24, that the introduction of the European arrest warrant system was highly controversial and that there were limits to the principle that extradition treaties and statutes should receive "a broad and generous construction", because the liberty of the subject was at stake. These considerations led Lord Hope to the view that where there were differences between the Framework Decision and the 2003 Act, it was to be assumed that Parliament had introduced those differences in order to protect against unlawful interference with the right to liberty.

If one recognises, as I think one must, that the Framework Decision is founded crucially and centrally on the intention that member states repose confidence in the judicial systems of other member states from which requests for extradition come, there is, I believe, a critical difficulty in accepting the proposition that Parliament can, on the one hand, subscribe to the Framework Decision, and, on the other, build in safeguards about its operation which go beyond those contained in the Decision itself.

As I sought to point out in my judgment in *Assange*, to conclude that Parliament intended that a warrant for surrender could only be accepted in this jurisdiction if it had been issued by a court or judge would involve acceptance that it was intended to severely restrict the operation of the Framework Decision by excluding those countries whose issuing authorities were public prosecutors. Such an intention would, I think, be pretty remarkable. But, certainly, if that remarkable intention was to be found to exist, it would surely require not only the most explicit articulation of its existence but also the clearest evidence of an appreciation of its implications.