IN THE SUPREME COURT UKSC 2011/0264

BETWEEN:

Julian Paul Assange

Appellant

- v –

Swedish Prosecution Authority

Respondent

Application for a leave to intervene

(Rule 26 of the Supreme Court Rules 2009)

Interveners

1. Both proposed interveners take substantively the same view of the European Arrest Warrant and how the law may be re-formulated in this appeal. A joint intervention therefore seems expedient.

2. As a Member of European Parliament for London since 2004, and a member of its Civil Liberties, Justice and Home Affairs Committee since 2009, **Gerard Batten** has taken a great interest in the EAW system. Over the past seven years, he made numerous parliamentary speeches and written questions on the matter, and was involved in public campaigns over controversial EAW cases, especially those of his constituents Andrew Symeou and Miguel-Angel Meizoso-Gonzalez. He made a detailed written submission for the recent extradition review by Sir Scott Baker's panel.

3. **Vladimir Bukovsky** was one of the founders of the human rights movement in the Soviet Union in 1960s and 1970s and one of the most prominent Soviet political prisoners for 12 years. He was released from prison and famously exchanged for a Chilean communist leader in 1976, and lives in the UK since 1978. He was a key expert witness in the landmark Constitutional Court case in Russia *Communist Party v President Yeltsin* (1992), where the communist rule was condemned as unconstitutional and incompatible with the rule of law. In his more recent books and

articles, he argues that the European Union is in danger of developing into a new Soviet Union, and singles out the European Arrest Warrant as a particular threat to human rights.

Proposed submission

Introduction

4. This case comes before Your Lordships' House on a certified point of law which might appear a narrow and procedural issue; but to answer it, you will have to revisit the very fundamentals of the Constitution.

5. The Appellant's case is supported by the clear language of the statute, the underlying legislative intention, the language of the EU Council Framework Decision, Strasbourg case-law and – last not least – the basic principles of what is known in common law as *natural justice*. The High Court Judgement recognises in para 41 that '*a common law judge*' certainly '*would not consider a prosecutor as having a judicial position or acting as a judicial authority*'. Indeed, the English common law has always drawn a clear line between the prosecutor and anything that may be called a judicial authority; this is the very core of our adversarial system of criminal law. The principle that *nobody can be a judge in his own case* has been considered so fundamental that, extraordinarily, even an express provision of a statute could not overturn it. Thus, Hobart CJ held in *Day v Savadge* (1614) Hob 85; 80 ER 235: "*Even an Act of Parliament, made without natural equity, as to make a man judge in his own case, is void in itself, for* jura naturae sunt immutabilia*, and they are* leges legum." The same principle had been famously applied by Lord Coke CJ in *Dr Bonham's Case* (1610) 8 Co Rep 114a.

6. One would need a truly formidable authority to defeat this, and the High Court judgement finds it in a fundamental objective of the European Union, enshrined in Article 2 of the EU Treaty: to make the EU a common '*area of freedom, security and justice*'. The purpose of the Framework Decision is to contribute towards this objective, which would be much more difficult to attain if we fail to recognise that in some of the European legal systems prosecutors are regarded as *judicial authorities* alongside judges.

7. In effect, the High Court has ruled that this ***political*** purpose of the Framework Decision trumps the ordinary meaning of the words in the express provisions of the same Framework Decision and in the British statute. This approach may or may not be in line with the earlier decisions of lower courts. If it is, the Interveners submit that this state of law is unsatisfactory and not in line with basic constitutional principles governing the relations between domestic and EU law.

PART 1. Unsatisfactory state of the law at present

The position in EU law

8. Article 34(2)(b) of the EU Treaty provides:

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

9. Thus a Framework Decision *per se* is not a source of law. Like an international treaty, it merely imposes an *international* obligation on the UK government to modify the domestic law to achieve certain results. The government discharges this obligation by enacting a statute (in this case, Part 1 of the Extradition Act 2003), and it is the statute, not the Framework Decision, that the courts in this country have to apply.

10. However, the European Court of Justice held in *Criminal Proceedings against Pupino* (2005):

    When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2) (b) EU.

11. Unfortunately, there is a degree of ambiguity in this ruling, which has had very serious consequences in the present case and many others. What are the respective meanings of '***result to be achieved***' in Art. 34(2) EU, *'**wording and purpose of the framework decision**'* in *Pupino,* and *'**result which it pursues**'*? Does '*result*' mean effective enactment of the specific provisions of the Framework Decision (e. g. that EAWs, defined in Art. 1 as 'judicial decisions' should be issued by 'judicial authorities' as per Art. 6) or does it refer to the broader policy objectives which the

Framework Decision '*pursues*' (e.g. an EU-wide 'area of freedom, security and justice' in Recital 5 of the Preamble)? Does conforming interpretation merely mean avoiding substantive inconsistencies with the Framework Decision, or does it make its ***policy objectives*** an overriding consideration for the courts?

12. The EU law has a hierarchical structure, typical of many continental legal systems and of international law, but not well known to common law practitioners, where specific provisions are made with reference to a general objective, which, in turn, is adapted with reference to an even more general objective, and so on to an ultimate objective of the Union. Thus, Article 2 of the EU Treaty lists five 'objectives' of the Union, including '*to maintain and develop the Union as an area of freedom, security and justice*'; Article 29 sets a subordinate objective of '*developing common action among the Member States in the fields of police and judicial cooperation*'. Various ways to achieve it are further particularised in Title VI of the Treaty, including '*facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States […] in relation to proceedings and the enforcement of decisions*' (Article 31(1)(a)), and the Framework Decision on EAW is adapted under that heading. National legislation, in turn, implements the provisions of the Framework Decision. So we have a long chain of more and more general provisions, where provision A pursues objective B, objective B pursues objective C, and so on; ultimately, all these roads lead to Article 2 of the EU Treaty.

13. How far should a confirming interpretation go down this road? Is it limited to the immediate '*results to be achieved*' spelt out in the substantive provisions of the Framework Directive, or does it include the whole chain of '*results*' down to the very general objectives of the Union enshrined in Art. 2?

14. **The Interveners shall invite the House to give a very clear answer to this question, limiting this rule of interpretation to ensuring conformity with the specific substantive provisions of the Framework Decision.**

<u>The position in domestic law</u>

15. By definition, any extradition system has to balance the obvious public interest in simplicity and speed against the rights of the suspected fugitive and thus includes safeguards of liberty. The replacement of 'traditional' extradition with the EAW

system removed some of those safeguards, such as the *prima facie* case requirement or dual criminality in relation to certain categories of offences. However, some other safeguards were, of course, preserved – by statute (e.g. the human rights bar to extradition in S. 21 of the 2003 Act) or by common law (e.g. the power to refuse extradition for abuse of process).

16. Yet, wide interpretation and overzealous application of *Pupino* rules threatens to upset the balance and effectively destroy the surviving safeguards. Once the interest in simplicity and speed is elevated to the rank of an overriding consideration, you are on a very slippery slope. Unfortunately, the application of *Pupino* in domestic case-law demonstrates this only too clearly.

17. The House of Lords considered the interrelation between a domestic statute and a Framework Decision twice, both times in relation to the EAW. *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67 was decided before *Pupino*, and *Dabas v High Court of Justice in Madrid* [2007] UKHL 6 after *Pupino*. Unlike the present case, however, both *Armas* and *Dabas* dealt with clear inconsistencies between the Extradition Act and the Framework Decision. In both cases, the House stressed that it was the statute where the actual law on the EAW is to be found.

18. In *Armas*, Lord Hope (with whom their other Lordships agreed) stressed the importance of '*careful observance*' of statutory procedures for the public confidence in the ability of EAW system to safeguard rights (para 23). Differences between the statute and Framework Decision had to be approached on the assumption that they were "*regarded by Parliament as a necessary protection against an unlawful infringement of the right to liberty*" (para 24). Dealing with an ambiguity of the Extradition Act provisions, Lord Hope says in para 35:

    The answers are to be found in the first place in the language which has been used by the legislature […] The context in which that language has been used is, of course, provided by the common law.

19. That, in itself, would settle the issue in the present case, where the legislature used the words '*judicial authority*', whose meaning in the common law context is clear enough. But *Armas* was not the end of the story.

20. In *Dabas*, the House of Lords considered a requirement present in the Extradition Act but not in the Framework Decision, namely that an EAW for a framework list offence

must be accompanied by a certificate that the alleged conduct falls within the framework list and is punishable with imprisonment for 3 years or longer. The warrant in *Dabas* contained statements to that effect but was not accompanied by a separate certificate. The majority reaffirmed the rules of interpretation given in *Armas*, but also followed *Pupino* in holding that the statute must be interpreted in conformity with the purpose of Framework Decision, so it was permissible to regard the EAW itself as the requisite certificate.

21. However, Lord Scott (partly dissenting) held in paras 67-70 that neither Article 34(2)(b) of the EU Treaty, nor *Pupino*, justified '*reading down of a clear statutory provision*'. It was not inconsistent with the purposes of the Framework Decision, and in any event, the Extradition Act had to be construed in a normal way, reflecting the legislative intention of the Parliament to safeguard rights of the accused.

22. So, applying *Pupino* even to a minor formality required by the statute left this House divided. Unfortunately, *Dabas* was later applied by the lower courts in such ways as were never envisaged at the time. Not minor formalities, but major safeguards of liberty were effectively read down from the statute.

23. The Interveners shall be forgiven if they illustrate this, first of all, with the cases of two of Mr. Batten's own constituents, in which he was closely involved.

24. In *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece [2009] EWHC 897 (Admin)*, a Greek judicial authority requested a surrender of Andrew Symeou, a 20-year-old British student, to face a charge of manslaughter. Mr Symeou resisted the extradition on ***abuse of process*** grounds, and presented strong evidence that the Greek police obtained the crucial witness statements incriminating him by beating, mistreatment and intimidation of witnesses. The High Court applied *Dabas* and held the UK courts had no jurisdiction to look into the actions of the requesting state's police in EAW cases. Laws LJ and Ousley J added in para 39:

The absence of even an investigation before extradition into what has been shown by the defendant here may seem uncomfortable; the consequences of the Framework Decision may be a matter for legitimate debate and concern. But we have no doubt but that the common area for judicial decisions in criminal matters means that the judicial systems of the countries of the European Union must be regarded as capable

of providing sufficient minimum safeguards for a fair trial in a civilised country, including provisions for the exclusion of evidence obtained by coercion.

25. Likewise, the Court dismissed another ground advanced on behalf of Mr. Symeou – that the extradition would be incompatible with his human rights, especially Article 3 rights, in view of the prison conditions in Greece, the widespread mistreatment of prisoners, and the record of police mistreatment in this particular case. The Court held that, as this was a '*Framework Decision case*', they had to assume that Greece would comply with its ECHR obligations.

26. Mr. Symeou was subsequently surrendered to Greece and spent about a year in pre-trial detention, including detention in some of the world's most notorious prisons with conditions tantamount to torture. He was severely mistreated. In the end, he was acquitted by the Greek court on the same grounds which had been advanced in the *abuse of process* context in the first place. The ordeal he and his family went through ruined their lives. None of this would need to have happened had the High Court not been bound by *Dabas* or applied it differently.

27. In *Juzgado de Istruccion Cinco de Palma de Mallorca, Spain (Judicial Authority) v Miguel Angel Meizoso Gonzalez*[1], a Spanish magistrate requested a surrender of Dr. Meizoso to answer an unsubstantiated private complaint against him at a very early stage of her preliminary inquiry into the case. It was not in dispute that he had not been charged and that there was no substantive evidence against him. Like Mr. Assange at the earlier stages of the present case, Dr. Meizoso resisted the EAW on the grounds that it was not issued for ***prosecution*** and that he was not '***an accused person***'. The District Judge applied *Pupino* and *Dabas* and held that to accept Dr. Meizoso's contention would be incompatible with the purposes of the Framework Decision. The High Court upheld that decision on appeal[2]. Curiously, though, Dr. Meizoso successfully avoided extradition by claiming asylum and presenting evidence that the EAW was issued unlawfully and under pressure from his political opponents in Spain. The asylum application is currently pending before the Home Secretary. Dr. Meizoso is also challenging the Framework Decision in the European Court of Human Rights.

[1] 3 June 2010, City of Westminster Magistrates Court, unreported
[2] *Meizoso-Gonzales v Spain [2010] EWHC 3955 (Admin)*

28. In *Atkinson v Supreme Court of Cyprus* [2009] EWHC 1579 (Admin), the defendants had stood trial for manslaughter in Cyprus, were acquitted, and subsequently returned to the UK. The prosecution appealed the acquittal to the Supreme Court of Cyprus, which heard the case *in abstentia*, substituted a guilty verdict, and issued EAWs. The defendants relied on S. 20 of the Extradition Act 2003, which provides that an EAW for a conviction *in abstentia* can only be executed if the convict "deliberately absented himself from his trial" or if he would be entitled to a retrial, neither of which applied to them. Collins J applied *Dabas* and held that the statute should be construed to avoid '*a barrier to surrender which was not authorised by the Framework Decision*" and in a way '*which ensures that the necessary co-operation and so speedy surrender takes place*'. Accordingly, Collins J construed '*trial*' in S. 20(3) as meaning a continuing process which included the subsequent prosecution appeal, and held the defendants had deliberately absented themselves from that part of their '*trial*'. In effect, the Court read down the entire S. 20 of the 2003 Act, which was undoubtedly intended by Parliament to serve as an important safeguard against convictions *in abstentia.*

29. Many more cases may be cited where the application of *Pupino* and *Dabas* led to manifest injustice and undermined human rights. Indeed, it has rendered most of the bars to extradition provided by the 2003 Act utterly ineffective. Thus, challenges to EAWs on human rights grounds are routinely dismissed on the basis of the assumption (mentioned in *Symeou*) that the requesting state would certainly comply with its ECHR obligations and to assume otherwise would be incompatible with the purposes of the Framework Decision. Not a single case is known where an EAW extradition was refused on human rights grounds: the safeguard enacted by Parliament in S. 21 of the Extradition Act has effectively been destroyed.

30. Ever since the EAW scheme was introduced, it raised widespread concerns that its safeguards of liberty were insufficient. Lords Hope's observation in *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, para 23, is very relevant here:

> *…a system of mutual recognition of this kind* […] *is ultimately built upon trust. Trust in its turn is built upon confidence. As recital 10 of the* [Framework Decision] *preamble puts it, the mechanism of the European arrest warrant is based on a high level of confidence between Member States. The reason why discussions about the*

introduction of the European arrest warrant generated so much heat in the United Kingdom was a lack of confidence in the ability of the criminal justice arrangements of other Member States to measure up to the standards of our own, and a corresponding lack of trust in the ability of the new system to protect those against whom it might be used. Now that the argument is over and the new system is in force it has to earn that trust by the way it is put into practice. The system has, of course, been designed to protect rights. Trust in its ability to provide that protection will be earned by a careful observance of the procedures that have been laid down.

31. In event, alas, the procedures have not been carefully observed, and consequently the system has failed to earn that trust. Indeed, the public distrust in the EAW system is as widespread today as never before. The view of the EAW as a threat to liberty is now shared by HM Government[3] and even by the European Commission[4]. Similar conclusions have been reached by the House of Commons in a recent debate, by the both Houses' Joint Committee on Human Rights[5], and by every reputable human rights NGO who examined this subject (e.g. Big Brother Watch, Liberty, and Fair Trials International). Ultimately, it will be for the Parliament to decide on the future of the EAW system; but your Lordships also have an important role to play. Whatever reform is forthcoming, if the EAW regime survives at all, it will still be governed by a statute implementing a Framework Decision. It is therefore necessary to clarify the law on the interrelations between them, especially as the number of EAWs received in the country is expected to rise sharply after the UK joins Schengen Information System in 2013. Furthermore, similar issues will inevitably arise in connection with the forthcoming introduction of *European Investigation Order, European Protection Order, European Public Prosecutor* and further EU innovations in the field of criminal law. These issues must be resolved as a matter of urgency.

32. The Interveners shall invite Your Lordships to take advantage of the present case and lay down clearer guidelines on the EU requirement of confirming interpretation, and its interrelation with other rules of statutory interpretation, than those in *Pupino* and *Dabas*. To do so, it is necessary to consider the issue in a broader constitutional context.

[3] See, for example, the House of Commons debate on 5 December 2011, the speech of the Immigration Minister
[4] 3rd Report from the Commission to the European Parliament and the 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, COM(2011) 175, 11 April 2011
[5] 15th Report - The Human Rights Implications of UK Extradition Policy, HL Paper 156/HC 767, 22 June 2011

PART 2 – Relevant constitutional context

Law and ideology

33. The co-existence of two different systems of law – British and European – in the same jurisdiction has created many difficulties. Yet, the greatest problem lies even deeper than the fundamental differences between the two great legal traditions. It comes from the fact that, unlike Britain, the EU is both a legal system and a political project, driven by its own distinctive ideology.

34. Thus, the objective to create a common *area of freedom, security and justice* is political and not legal; and yet, it is cherished and stressed in every preamble to every specific piece of EU legislation in that field. The substantive provisions of the Framework Decision are simply legal provisions; but they are accompanied by political declarations in the preamble, which in turn refer to a political programme agreed by Tampiere European Council in 1999, etc. The further we go along this road towards the ultimate objectives of the Union, the landscape becomes more and more political, less and less legal.

35. This distinction goes to the very roots of jurisprudence. By their very nature, law and ideology are direct opposites. The law is all about enforcing clear rules; an ideology is all about pursuing vague ideals. The law is naturally static; an ideology is naturally dynamic. An ideology is always a legend, a dream; it explains itself in metaphors; it strives to change the world and boldly challenges the dull reality. The whole object of law, by contrast, is to be as clear and precise as possible. The law has to be realistic, take due account of the imperfections of the universe, and express itself in plain language. Consequently, whilst ideology may well inspire legislators to make the law and the citizens to obey it, one cannot write an ideology itself into the law – no more than the medieval scholasts could calculate exactly how many angels can dance together on the point of the same needle.

36. One of the Interveners, Mr. Bukovsky, had the misfortune of being born in the Soviet Union, where the rule of ideology had completely subdued the rule of law. He was one of the leading figures in the human rights movement, whose sole purpose was to affirm the rule of law over the ideology against all the odds, even though the entire repressive machine of the state was against them. He spent 12 years in the Soviet

Gulag because his legal arguments carried no weight in the Soviet courts dominated by ideology. The judgements against him had been written ahead of the trial by the Communist Party and only rubber-stamped by the judges. His goal at every trial was not to be acquitted, but the show the travesty of justice for what it was. In brief, he had the benefit of exploring this basic dichotomy of jurisprudence most thoroughly in the cells of KGB prisons. Today, with growing horror, he once again observes an ideology – the EU ideology – slowly but surely undermining the rule of law in this country.

37. The difference between the rule of law and of an ideology is precisely what distinguishes a democracy from a totalitarian regime. It was of necessity the central legal issue of Nuremberg trial. It was also the central legal issue in the Russian case of *Communist Party v President Yeltsin* (1992), where the Constitutional Court called upon Mr. Bukovsky's expertise on the issue. It is a basic problem of the *sharia law*, which includes the Islamic religion as its most fundamental part. And indeed, your Lordships' great predecessors have been through the same dichotomy, most famously in *Bowman v Secular Society*. They held that while the English law was undoubtedly a Christian law, the Christian religion itself was not a part of it. The phrase '*Christianity is a part of the law of England*', even though it had been affirmed by most eminent legal authorities of the past centuries, was '*rhetoric*' and not law.

38. It may or may not be possible to reconcile the conflicting principles of the British and European law. It is manifestly impossible to reconcile the British or any other law with the EU's or any other ideology. The European Communities Act 1972 incorporates the body of European law into the British law; it did not and could not elevate the EU political principles to the rank of law.

39. In this sense, the High Court judgement against the Appellant not merely conflicts with the express provisions of the statute and the Framework Decision; **it undermines the rule of law itself**. A court of law may not answer a legal question by first enquiring what kind of answer would bring us closer to the 'European dream', 'ever closer union', or 'a common area of freedom, security and justice'. All those may be very sound political ideas, or just utopian claptrap. Many would passionately advocate one or the other view of them. This debate may go on forever or may be resolved tomorrow – but whatever happens, this debate belongs outside the courtroom. The courts should be concerned with the law alone.

Sovereignty and incorporation of EU law

40. The leading case on this issue is *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2003] Q.B. 151, popularly known as *Metric Martyrs*. The question there was whether the provisions of the European Communities Act 1972, which conferred Henry VIII powers to enact provisions of EU Directives, were subject to implied repeal – a doctrine inherent in the parliamentary sovereignty. Laws LJ (with whom Crane J agreed) rejected '*the assumption that the incorporation of EU law effected by the 1972 Act […] must have included not only the whole corpus of European law upon substantive matters such as (by way of example) the free movement of goods and services, but also any jurisprudence of the Court of Justice, or other rule of Community law, which purports to touch the constitutional preconditions upon which the sovereign legislative power belonging to a member state may be exercised*.

'59. Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the 1972 Act. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the 1972 Act which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself.'

41. From this, Laws LJ proceeded to give his famous four propositions on the relationship between the EU and domestic law in para 69:

…the correct analysis of that relationship involves and requires these following four propositions. (1) All the specific rights and obligations which EU law creates are by

the 1972 Act incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation. (2) The 1972 Act is a constitutional statute: that is, it cannot be impliedly repealed. (3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes. (4) The fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the 1972 Act were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case.

70. I consider that the balance struck by these four propositions gives full weight both to the proper supremacy of Community law and to the proper supremacy of the United Kingdom Parliament. By the former, I mean the supremacy of ***substantive*** *Community law. By the latter, I mean the supremacy of the legal* ***foundation*** *within which those substantive provisions enjoy their primacy. The former is guaranteed by propositions (1) and (2). The latter is guaranteed by propositions (3) and (4). If this balance is understood, it will be seen that these two supremacies are in harmony, and not in conflict.*

42. So the English law, by force of the EEC Act 1972, incorporates the ***substantive*** EU law; but it does not incorporate the ***constitutional*** EU law – at least insofar as it concerns the transfer of sovereignty or undermines the sovereignty of Parliament. Laws LJ in *Thoburn* expressly rejected the reliance on the famous ECJ case *Costa v ENEL*, which claims that the EEC Treaty created a '*new legal order*' where some of the member-states' sovereign rights had been surrendered to the Community. The constitutional implications of that case had no place in the English law.

43. Similarly, it may be added, whilst incorporating the substantive provisions of EU law, the EEC Act does not incorporate any political or ideological principles and objectives of the EU into our law; not even if these principles or objectives are recognised in ECJ case-law or any other sources of the EU law. That would have undermined the rule of law in the same way as EU's constitutional provisions would

have undermined parliamentary sovereignty. The Parliament in 1972 had no power to authorise an abolition of the rule of law any more than it had the power to abolish its own sovereignty.

44. Before *Pupino*, the courts consistently held that, without an explicit incorporation, the government's international obligations cannot bind the courts or directly affect the domestic law. Lord Templeman held in *Duke v Reliance Systems Ltd* [1988] AC 618, 639-640:

"*Section 2(4) of the European Communities Act 1972 does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals. Section 2(4) applies and only applies where Community provisions are directly applicable.*"

45. See also the dictum of Lord Denning MR in *Felixstowe Dock and Railway Co v British Transport Docks Board* [1976] 2 Lloyd's Rep 656, 663

46. The constitutional status of EU law adapted under Title VI of the EU Treaty is different from any other EU law. UK enjoys a general 'opt-out' from Title VI, and only 'opts in' specific measures such as the Framework Decision when the national government decides so. Whatever may be the position in other EU member-states, the UK obligations under the Framework Decision are voluntarily accepted by the government and remain purely intergovernmental. The Framework Decision and even Title VI of the Treaty itself do not bind the courts; it is only the Parliament that enacts them by statute, and it is the statute alone that binds the courts.

PART 3- Proposed clarification of the law

Alternative 1: *Pupino* should not be followed in the UK

47. Analysing *Pupino* from this constitutional prospective, the Interveners submit that it simply should not be followed in the UK.

48. Like *Costa v ENEL*, the *Pupino* case is ***constitutional*** and not ***substantive***; therefore, the EEC Act 1972 cannot and does not incorporate it into the English law. Laws LJ says in *Thoburn*: "*there is nothing in the 1972 Act which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's*

legislative supremacy in the United Kingdom"; and in *Pupino*, the ECJ purports to do precisely this.

49. In the light of aforementioned rules of English constitution, *ratio dissedandi* of *Pupino* is fundamentally deficient. An Italian Court considered that certain provisions of the domestic criminal procedure law were in conflict with a Framework Decision. The issue was referred to the ECJ for a preliminary ruling on the interpretation of that Framework Decision, which raised a preliminary issue of profound constitutional importance: how could a Framework Decision, which had no direct effect, have any bearing on an actual criminal case in Italy? Whatever its correct interpretation, how could it trump the domestic Italian law?

50. Somewhat ironically in view of the present case, these were the UK and the Swedish governments who raised similar objections in *Pupino* on the grounds that all *Police and Judicial Cooperation* provisions were intergovernmental in nature. The Italian, French and Dutch governments also objected on the grounds, in summary, that Framework Decisions had no direct effect and consequently no supremacy in national law. Furthermore, the UK and other intervening states argued that there was no express or implicit obligation in the Treaty to interpret the national law in conformity with Framework Decisions.

51. The ECJ held:

40. That argument must be rejected.

41. The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, which is founded on the European Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

42 It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation.

43. In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2) (b) EU.

44. It should be noted, however, that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity.

[…]

47 The obligation […] ceases when the [national law] *cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of interpretation in conformity with Community law cannot serve as the basis for an interpretation of national law* contra legem.

52. As is often the case in Luxemburg jurisprudence, the judgement substantively mirrors the Opinion of the Advocate-General in the same case. The following passage from that Opinion sheds further light on the *ratio* of the judgement. The Advocate-General in para 32 rejected the argument on inter-governmental nature of *Police and Judicial Cooperation* on these grounds:

"the Treaty on European Union, as stated in the second paragraph of Article 1, marks a new stage in the process of creating an ever closer union among the peoples of Europe. To that end it supplements the activities of the Community with new policies and forms of cooperation. The term ***policies*** *indicates that, contrary to the view of the Swedish Government, the Treaty on European Union includes not only inter-governmental cooperation, but also joint exercise of sovereignty by the Union.*"

53. To sum up, the *ratio dissedandi* of *Pupino* is based on the following crucial elements:

(a) The Framework Decisions on Police and Judicial Cooperation are binding, because to rule otherwise would make it more "*difficult*" for the Union to

"*organise… relations between the Member States and between their peoples*" in the spirit of "*solidarity*".

(b) The principles of '*loyalty to the Union*' and '*loyal cooperation*' between the member-states

(c) The transfer of *sovereignty* from the member-states to the Union by force of the EU Treaty.

54. The judgement is evidently contingent on each and every one of these elements, all of them incompatible with the British constitution. (a) is clearly political and thus incompatible with the rule of law. The courts in the country cannot reach their decisions on the basis of whether it will make life easier or more difficult for the European Union. (b) may be valid and valuable principles for international relations, but they are also incompatible with the rule of law. The government may or may not owe duties of loyalty and cooperation to its foreign partners; the courts certainly owe no such duty to anyone. Finally, (c) is simply invalid under the British constitution as explained in *Thoburn.* As far as English law is concerned, there has been no transfer of sovereignty to the European Union. No ECJ case premised on a contrary assumption binds UK courts.

55. Holding so won't be inconsistent with the EU law. The ECJ held in *Pupino* itself that the duty of confirming interpretation does not authorise an interpretation *contra legem.* Under the English constitutional law, *Pupino* interpretation as such is *contra legem*. Further, the Framework Decision on European Arrest Warrant provides in recital (12):

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process [and some other constitutional freedoms].

56. *'Due process'* here, in our submission, should include the constitutional rules on the interpretation of the statutes in accordance with parliamentary sovereignty and the rule of law.

57. As for the domestic case-law, the correct approach to the interpretation of a statute implementing a Framework Decision is given in *Office of the King's Prosecutor, Brussels v Cando Armas*. It is the statute, not the Framework Decision, that regulates the EAW regime in this country; and the ambiguities must be resolved by looking at

the ***statutory language in the common law context***. It may be necessary to look at the Framework Decision, too, insofar as it may help to ascertain the actual intention of the legislature; and where the statute deviates from it, the courts should assume that the Parliament intended this as a safeguard of liberty.

58. *Dabas v High Court of Justice in Madrid* should be regarded simply as an endorsement of *Armas*, and an authority to the effect that a certificate under S. 64(2) of the 2003 Act may be contained in the EAW itself. **It is not an authority for *Pupino* interpretation of other provisions of the 2003 Act or of the rules of law relating to abuse of process**, and the case-law of lower courts applying *Dabas* in this way should not be followed.

Alternative 2: Clear limits of conforming interpretation

59. In alternative, even if *Pupino* is good law, conforming interpretation should be limited to the specific substantive provisions of the Framework Decision. There is no obligation to interpret the law in conformity to the general political objectives of the EU such as an '*area of freedom, security and justice*'. Such an obligation would undermine the rule of law by substituting it for the rule of ideology. It would be *contra legem*, and inconsistent with *Pupino* itself, where the principle of confirming interpretation was *'limited by general principles of law, particularly those of legal certainty and non-retroactivity'*. General political objectives, such as '*area of freedom, security and justice*', obviously lack legal certainty.

60. So the phrase '*the result to be achieved*' in Article 34(2)(b) of the EU Treaty refers **only to substantive provisions** of the Framework Decision. It does not include the general political declarations as to the goals which the Framework Decision is ultimately meant to contribute to.

61. Such a re-formulation of the law is perfectly in line with *Armos*. *Dabas* seems more difficult in this context, and the Interveners shall invite Your Lordships to limit its application to the interpretation of S. 64(2) of the 2003 Act. In all other cases, the dissenting opinion of Lord Scott should be followed.

Conflict of interpretative rules

62. Further or in alternative, the obligation to interpret the legislation in conformity to the EU law should be reconciled with other rules of statutory interpretation.

63. Firstly, the interpretation of the statute must in any event reflect the Parliament's legislative intention – a rule which is strongly reasserted both in *Armos* and in *Dabas*. Rules of conforming interpretation may create presumptions as to what that intention was; they do not override that fundamental principle and do not authorise an interpretation contrary to the express intention of Parliament. Such an interpretation would be *contra legem* and violate the principle of legal certainty. In the present case, it is very clear that the Parliament used the words '*judicial authority*' in their ordinary common law meaning.

64. Secondly, there are Sections 2 and 3 of the Human Rights Act 1998. In the present case, Luxembourg jurisprudence comes into conflict with Strasbourg jurisprudence over the definition of '*judicial authorities*'. It is submitted that the obligation to interpret legislation in a Convention-compatible manner should trump the similar obligation in relation to the EU law. The strict constitutional position explained in *Thoburn* is that the EU legislation, in spite of its supremacy, is ***secondary*** to the EEC Act 1972. As '*subordinate legislation*', it falls within the scope of S. 3 of the Human Rights Act 1998. Before it comes to the interpretation of the statute, the EU legislation itself must be interpreted in a Convention-compatible manner.

65. Thirdly, quite apart from the Human Rights Act, there is a common law doctrine of interpreting legislation in accordance with the fundamental principles of English constitution. There is no end of authority to support this – from *Dr Bonham's Case* (1610) 8 Co Rep 114a to *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 223 to *Jackson v Attorney-General* [2005] UKHL 56. Among the principles defended in these cases, **the most prominent one is that a partisan prosecutor has no judicial power**. In *Dr Bonham's Case,* Lord Coke CJ considered a statute purporting to give an administrative body - the College of Physicians - a judicial power to fine or imprison medics who practiced in London without its approval. Coke CJ held: "*it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometime adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void.*"

66. Facing a similar issue in *Day v Savadge* (1614) Hob 85; 80 ER 235, Hobart CJ held: "*Even an Act of Parliament, made without natural equity, as to make a man judge in his own case, in void in itself, for* jura naturae sunt immutabilia*, and they are* leges legum." See also *R v Love* (1653) 5 State Tr 825.

67. In modern times, however, the constitutional position of the courts has been modified: as Dicey explains (p.p. 19-20), courts cannot void an Act of Parliament, and will '*controul*' it only through interpretation. Yet, that power to bring legislation in line with *jura naturae* is only slightly less formidable than it was suggested in 17th century authorities. Such cases as *Anisminic* demonstrate only too clearly that the modern courts can and should go a great length in interpreting legislation so as to safeguard the rule of law. The courts would go much further down that road than to interpret '*judicial authority*' as meaning no more than a judicial authority. If any interpretive power can override the express legislative intention, it is this; and if any *lex legum* is indisputable, it is the rule that a prosecutor can never be a judge in his own case.

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