Neutral Citation Number: [2019] EWHC 394 (Admin)

Case No: CO/4609/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2019

Before :

LORD JUSTICE SINGH
AND
MR JUSTICE DINGEMANS

- -

Between:

GUY JANE	**Applicant**
- and -	
WESTMINSTER MAGISTRATES' COURT	**Respondent**
CROWN PROSECUTION SERVICE	**First Interested Party**
NATIONAL CRIME AGENCY	**Second Interested Party**

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Mark Summers QC and Ben Cooper (instructed by **Dalton Holmes Gray Solicitors**) for the **Applicant**
The **Respondent** did not appear and was not represented
Hannah Hinton (instructed by **the Crown Prosecution Service**) for the **First Interested Party**
Clair Dobbin (instructed by **the National Crime Agency**) for the **Second Interested Party**

Hearing date: 5 February 2019

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is an application for habeas corpus pursuant to CPR r.87; in the alternative, if this Court considers that the procedure for habeas corpus is inappropriate, it is an application for permission to bring a claim for judicial review.

2. The extradition of the Applicant was requested by a judicial authority in Lithuania, by means of an "accusation" European Arrest Warrant ("EAW") dated 30 July 2015, to face six allegations of fraud arising from illegal business dealings dating from July 2010 to June 2011. His extradition was ordered by Deputy Senior District Judge ("DSDJ") Ikram sitting at Westminster Magistrates' Court on 3 November 2017. After various appeals, there arose a statutory obligation upon UK authorities to remove the Applicant to Lithuania by the end of 8 November 2018. However, owing to various administrative errors and shortness of time, the Applicant was not removed within that time. The Applicant subsequently brought proceedings to be discharged pursuant to section 36(8) of the Extradition Act 2003 ("the 2003 Act"), on the ground that the time limits imposed by statute to remove him had expired. On 18 November 2018, DSDJ Ikram refused that application, giving rise to the present proceedings.

3. The application for habeas corpus and interim relief was refused on the papers by Nicol J on 20 November 2018.

Factual and Procedural Background

4. On 30 July 2015, the Deputy Prosecutor General of Lithuania, a judicial authority, requested the extradition of the Applicant by means of an accusation EAW dated 30 July 2015, in order for him to face allegations of fraud dating from 2010 to 2011. His extradition was ordered by DSDJ Ikram on 3 November 2017.

5. That decision was the subject of an appeal under section 26 of the 2003 Act. The appeal was heard by the Divisional Court, comprising Hickinbottom LJ and Dingemans J, on 25 April 2018. In a judgment dated 15 May 2018, the Court decided that there was a real risk that Mr Jane would be subjected to treatment contravening Article 3 of the European Convention of Human Rights in the Lukiskes remand prison, and sought assurances from the Lithuanian authorities to dispel the risk of such treatment: *Jane v Prosecutor General's Office, Lithuania* [2018] EWHC 1122 (Admin). After considering such assurances, the Court found them to be sufficient and, on 16 October 2018, dismissed the appeal: [2018] EWHC 2691 (Admin).

6. The 14-day time limit for the Applicant to make an application to certify under section 32 of the 2003 Act expired at the end of 29 October 2018. Once this period expired (with the Applicant having made no such application), following *Re Owens* [2009] EWHC 1343 (Admin); [2010] 1 WLR 17, the 10-day "required period" for the Applicant's removal under section 36(3)(a) began. Thereupon, it is common ground that, under section 36(2) of the 2003 Act, there arose a statutory obligation upon the UK authorities to remove the Applicant to Lithuania by the end of 8 November 2018.

7. However, the relevant period expired without the Applicant's removal or an extension of time. According to the evidence (which is summarised in the witness statement of Renata Pinter, Mr Jane's solicitor), what had happened was as follows:

    (1) Following the expiry of the section 32 14-day period on 29 October, the National Crime Agency ("NCA") failed to contact the Administrative Court Office ("ACO") to determine whether the appeal decision had become final. For its part the ACO only contacted the NCA on 5 November.

    (2) Once notified, the NCA contacted Devon and Cornwall police, who did not respond.

    (3) On 5 or 6 of November, the NCA first contacted Lithuania to arrange surrender. That arrangement was not possible because of the late notification; Lithuania was unable to conduct the handover in the required time.

    (4) No section 36(3) application was made to extend time before the required period expired because the NCA miscalculated the last day as 9 November (rather than 8 November).

8. Consequently, there was a failure to surrender the Applicant within the statutory time limits.

9. Giving evidence in a witness statement on the practical realities of extradition proceedings, Graham Dineen, an Officer at the NCA, notes that there are often "serious logistical barriers to meet the ten-day deadline". Moreover, it "is often the case that the UKICB [the UK International Crime Bureau] applies for a time extension as a result of either a UK police force or the issuing State not being able to facilitate removal within ten days". He adds that the "UK has one of the highest volume [*sic*] of Part 1 extraditions in the European Union".

10. Were a discharge ordered in a case such as the present one, Mr Dineen states that, in terms of practical realities, "assuming a further EAW is issued the requested person would be re-arrested and the extradition process would start again".

11. A notification of an application to discharge pursuant to section 36(8) of the 2003 Act was lodged on behalf of the Applicant on 9 November 2018. Subsequently, an application to extend time was lodged by the CPS pursuant to section 36(3). That extension was granted by Jeremy Baker J on 9 November 2018. It is common ground that that extension does not affect the task of this Court.

12. On 16 November 2018, after a hearing which had taken place on 13 November, DSDJ Ikram refused the application to discharge brought by the Applicant. On 20 November 2018 Nicol J considered the papers and refused his applications for habeas corpus and for interim relief.

13. On 26 November 2018, Supperstone J ordered the application to be adjourned and the removal of the Applicant pursuant to the 2003 Act to be stayed until the conclusion of this application or further order. He referred the application to the Divisional Court.

Material legislation

14. Section 26 of the 2003 Act provides:

> "(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order…"

15. Section 36 of the 2003 Act prescribes the period within which an unsuccessful appellant must be removed. It provides, so far as relevant:

> "(1) This section applies if—
>
> (a) there is an appeal to the High Court under section 26 against an order for a person's extradition to a category 1 territory, and
>
> (b) the effect of the decision of the relevant court on the appeal is that the person is to be extradited there.
>
> (2) The person must be extradited to the category 1 territory before the end of the required period.
>
> (3) The required period is—
>
> (a) 10 days starting with the day on which the decision of the relevant court on the appeal becomes final or proceedings on the appeal are discontinued, or
>
> (b) if the relevant court and the authority which issued the Part 1 warrant agree a later date, 10 days starting with the later date…
>
> (4) The relevant court is—
>
> (a) the High Court, if there is no appeal to the Supreme Court against the decision of the High Court on the appeal;
>
> (b) the Supreme Court, if there is such an appeal.
>
> (5) The decision of the High Court on the appeal becomes final—
>
> (a) when the period permitted for applying to the High Court for leave to appeal to the Supreme Court ends, if there is no such application;
>
> …

(6) There must be ignored for the purposes of subsection (5)—

(a) any power of a court to extend the period permitted for applying for leave to appeal;

(b) any power of a court to grant leave to take a step out of time.

…

(8) If subsection (2) is not complied with and the person applies to the appropriate judge to be discharged the judge must order his discharge, unless reasonable cause is shown for the delay."

16. Section 213 of the Act provides that:

"(1) A Part 1 warrant issued in respect of a person is disposed of—

(a) when an order is made for the person's discharge in respect of the warrant and there is no further possibility of an appeal;

(b) when the person is taken to be discharged in respect of the warrant;

(c) when an order is made for the person's extradition in pursuance of the warrant and there is no further possibility of an appeal.

(2) A request for a person's extradition is disposed of—

(a) when an order is made for the person's discharge in respect of the request and there is no further possibility of an appeal;

(b) when the person is taken to be discharged in respect of the request;

(c) when an order is made for the person's extradition in pursuance of the request and there is no further possibility of an appeal."

Relevant case law

17. The case of *In re Oskar* (unreported, 29 February 1988) was a decision of the Divisional Court concerned with section 10 of the Fugitive Offenders Act 1967, in

which the Home Office wrongly construed the effect of the statutory time limit after a House of Lords judgment. Watkins LJ, with whom Nolan J agreed, said that:

> "administrative inertia … was not reasonable but inexcusable … I do not see how the description 'reasonable' can apply to these errors in fact and in law. They are I feel bound to say inexcusable and come nowhere near constituting sufficient cause to allow us to refrain forthwith the discharge from custody of the applicant".

18. However, it is common ground that, under the 2003 Act, the "reasonable cause" provision has been broadly construed by the domestic courts. For example, administrative errors may qualify as reasonable causes for delays. In *Re Owens* Pill LJ said, at para. 50:

> "The attempt by the requesting authority to extradite the applicant for his trial on very serious charges has been prolonged and strongly contested. Expedition, for which the Framework Decision and the 2003 Act provide, is primarily in the interests of the administration of justice in the jurisdiction to which removal is sought. Delay is to be avoided. The interests of persons resisting extradition must also be respected, but provisions plainly directed to ensuring prompt extradition in the interests of the requesting authority (article 23 and section 36) should not readily be defeated by an administrative error, or an error of law in considering the length of time allowed, which has resulted in a very short delay in protracted proceedings involving very serious offences."

19. In *R (Melchinski) v Westminster Magistrates' Court* [2015] EWHC 2043 (Admin), Bean LJ and Mitting J agreed that "[a]dministrative error may amount to a reasonable cause for the delay": para. 9.

European Union law

20. The relevant EU law is set out in the European Arrest Warrant Framework Decision (2002/584/JHA) ("the Framework Decision"). With effect from 1 December 2014 the United Kingdom opted back into the Framework Decision under Protocol No. 36 to the Treaty of Lisbon.

21. Article 23 of the Framework Decision provides:

> "Time limits for surrender of the person
>
> 1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

> 2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.
>
> 3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
>
> 4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
>
> 5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released."

22. The Court of Justice of the European Union ("CJEU") interpreted what Article 23 means in the case of C-640/15 *Criminal Proceedings concerning Vilkas* [2017] 4 WLR 69. Mr Vilkas, who was resident in Ireland, was the subject of two European Arrest Warrants which had been issued by a Lithuanian court. He was to be surrendered no later than 3 August 2015. Two consecutive surrender attempts took place, but Mr Vilkas forcibly resisted them (paras. 14-16) and the time limit expired. The CJEU, noting that the Article 23(2) time limit is breached when it expires without surrender, subject to the exceptions outlined in Article 23(3) and 23(4), held that the:

> "EU legislature [did not] intend… to make the rule set out in the first sentence of Article 23(3) of the Framework Decision applicable to situations other than those where the surrender of the requested person proves impossible by reason of a case of *force majeure* in one or other of the Member States": para. 52.

23. The Court continued:

> "It is apparent from settled case-law, established in various spheres of EU law, that the concept of *force majeure* must be understood as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not

> have been avoided in spite of the exercise of all due care": para. 53.

24. Further, it added:

> "it is to be recalled that Article 23(3) of the Framework Decision constitutes an exception to the rule laid down in Article 23(2). Accordingly, the concept of *force majeure* as provided for in Article 23(3) must be interpreted strictly": para. 56.

25. The CJEU then turned to the question of whether any other consequences follow from the expiry of the time limits prescribed in Article 23. It said:

> "68. … it should be pointed out that it follows from settled case-law of the Court that the principle of mutual recognition, which is the 'cornerstone' of judicial cooperation, means, pursuant to Article 1(2) of the Framework Decision, that Member States are in principle obliged to give effect to a European arrest warrant (see, by analogy, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 36).
>
> 69. Therefore, in the light, first, of the central function of the obligation to execute the European arrest warrant in the system put in place by the Framework Decision and, secondly, of the absence of any explicit indication in the Framework Decision as to a limitation of the temporal validity of that obligation, the rule set out in Article 15(1) of the Framework Decision cannot be interpreted as meaning that, once the time limits prescribed in Article 23 of the Framework Decision have expired, the executing judicial authority is no longer able to agree on a new surrender date with the issuing judicial authority or that the executing Member State is no longer required to carry on with the procedure for execution of the European arrest warrant (see, by analogy, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 37).
>
> 70. Moreover, whilst the EU legislature expressly specified, in Article 23(5) of the Framework Decision, that expiry of the time limits referred to in Article 23(2) to (4) means that the requested person is to be released if he is still being held in custody, it did not confer any other effect on the expiry of those time limits and did not, in particular, provide that their expiry deprives the authorities concerned of the possibility of agreeing on a surrender date pursuant to Article 23(1) of the Framework Decision or that it releases the executing Member State from the obligation to give effect to a European arrest warrant (see,

> by analogy, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 38).
>
> 71. Furthermore, an interpretation of Articles 15(1) and 23 of the Framework Decision to the effect that the executing judicial authority should no longer surrender the requested person or agree, for that purpose, on a new surrender date with the issuing judicial authority after the time limits referred to in Article 23 of the Framework Decision have expired would run counter to the objective pursued by the Framework Decision of accelerating and simplifying judicial cooperation, since such an interpretation could, in particular, force the issuing Member State to issue a second European arrest warrant in order to enable a new surrender procedure to take place within the time limits laid down by the Framework Decision (see, by analogy, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 40).
>
> 72. It follows from the foregoing that the mere expiry of the time limits prescribed in Article 23 of the Framework Decision cannot relieve the executing Member State of its obligation to carry on with the procedure for executing a European arrest warrant and to surrender the requested person, and the authorities concerned must agree, for that purpose, on a new surrender date."

26. On the facts, although the resistance of Mr Vilkas constituted "an abnormal circumstance outside the control of the authorities concerned", nonetheless "the fact that certain requested persons put up resistance to their surrender cannot, in principle, be classified as an unforeseeable circumstance", paras. 58-59.

27. I will return below to how the case was then dealt with by the Irish courts after the preliminary ruling had been given by the CJEU.

The decision of the District Judge in the present case

28. The hearing before DSDJ Ikram took place on 13 November 2018. He announced his decision with reasons on 16 November.

29. DSDJ Ikram considered the question of whether there was "reasonable cause" for the delay in extradition after having considered the evidence proffered by Narinder Dhillon (a specialist prosecutor), John Traynor (an NCA officer) and Emily McEnnerney-Whittle (another NCA officer). He stated that, "on the face of it, [there is] tension between [*Vilkas*] and the approach taken by the High Court". But there were some important factual differences between the two cases. For example, *Vilkas* "at paragraph 73 suggest[s] that on account of expiry of the time limit, the RP [Requested Person] must be released if held in custody. In this particular case, the RP

is on bail". Further, *Vilkas* "was dealing, of course, with a factual basis very different than [*sic*] I deal with": para. 10.

30. He concluded by saying that:

> "I am quite satisfied that there is reasonable cause for the delay i.e. the late notification by the High Court resulting in the indication by the Lithuanian authorities that they could not facilitate surrender within 3 days. I am quite satisfied that those circumstances were 'abnormal and unforeseeable' as far as the NCA were concerned (per Vilkas, para. 53). I also find no 'lack of due care' on the part of the NCA (per Vilkas, para. 53). This is not the only case the NCA would be dealing with and I am quite satisfied they acted entirely reasonably on waiting on notification from the High Court first. I find nothing at all to suggest error or negligence on the part of the NCA as to why extradition could not place [*sic*] in the required period": para. 12.

31. He accordingly refused the application to discharge: para. 14.

Grounds of Challenge

32. On behalf of the Applicant Mr Mark Summers QC advances three grounds.

33. Ground 1: there was no reasonable excuse for the delay in extraditing the Applicant. The reason given by the NCA (that an officer miscalculated the last day for making the application) was insufficient. Mr Summers also submits that the District Judge focussed exclusively on the conduct of the NCA and had no regard to the earlier conduct of the ACO and whether there was any reasonable cause for the delay at that stage, before the NCA was notified of the outcome of the proceedings in the appeal before the High Court. He submits that what matters is the overall conduct of all state authorities and not only the NCA.

34. Ground 2: the evidence adduced by the NCA and CPS was not rigorously scrutinised by the District Judge. Mr Summers submits that the conclusion that there was reasonable cause in this case was irrational and was not open to the District Judge.

35. Ground 3: Whatever earlier domestic case law may say must now be revisited in the light of the judgment of the CJEU in *Vilkas*. Mr Summers submits that the strict standard in that case was not satisfied and was not properly applied by the District Judge. At the hearing before us, it was this third ground which formed the mainstay of Mr Summers' submissions.

36. Towards the end of the hearing, in his reply, after a question from the Court as to what had happened in Ireland after the preliminary ruling of the CJEU, Mr Summers sought to rely on the reasoning in the decision of the Supreme Court of Ireland in *Minister for Justice and Equality v Vilkas* [2018] IESC 69. That was an unsatisfactory course, which necessitated an opportunity for all parties to have time to

submit brief written submissions after the hearing. Mr Summers then took the opportunity in those written submissions for the Applicant to refer to another decision of the Supreme Court of Ireland, *Minister for Justice and Equality v Skiba* [2018] IESC 68, which is a separate judgment from the *Vilkas* decision, albeit one that was delivered on the same day and one that concerns the same section of the Irish European Arrest Warrant Act 2003. No permission had been given to cite it. However, the Interested Parties were able to deal with it in their written submissions. Mr Summers then sought, and was granted, permission to file a brief written reply to the Interested Parties' written submissions. We have taken all of those submissions into account as well as those which were made before and at the hearing.

Submissions of the Parties

37. On behalf of the Applicant Mr Summers submits that the writ of habeas corpus should issue, or, in the alternative, the application for judicial review should be granted.

38. Mr Summers submits that the term "reasonable cause" in section 36(8) of the 2003 Act should be interpreted in harmony with the CJEU decision in *Vilkas*. He submits that that decision means that the "reasonable cause" excuse can only be applicable in cases of *force majeure*, where the delay was caused by "abnormal and unforeseeable circumstances which were outside the control of both the UK and Lithuania". On any view, he submits, what occurred in the instant case did not amount to *force majeure*, meaning that the District Judge made a manifest error of law in deciding against the Applicant.

39. Mr Summers submits that what follows is that the Applicant is entitled to be "discharged unconditionally" from the bail conditions presently imposed on him. Further, although *Vilkas* holds that the EAW is still operative after such a discharge, as a matter of domestic law, section 213 of the 2003 Act expressly provides that "the act of discharge disposes of the warrant", and such a conclusion is not precluded by European law. He accordingly contends that the writ of habeas corpus, which remains available under the 2003 Act, should be issued in this case. However, if that is not accepted, then, in the alternative, the application for judicial review should be granted.

40. On behalf of the NCA submissions were made by Ms Clair Dobbin.

41. She submits that the present application is faced with a number of insurmountable barriers. These include:

    (1) The premise of the Applicant's argument that *Vilkas* imposes a more stringent test as to what constitutes "reasonable cause" is fundamentally flawed. In fact, to the contrary, *Vilkas* shows that the expiry of time limits contained in Article 23 does not give rise to the termination of the surrender process. It requires only that a person who is in actual custody must be released.

    (2) *Vilkas* demonstrates that English courts have been correct in their approach to section 36(8) of the 2003 Act.

(3) The Applicant's argument, if accepted, would produce the effect that it is easier for the individual to secure the termination of the extradition process, an outcome which is fundamentally at odds with *Vilkas*, and with the overarching aims of the Framework Decision.

(4) If the Applicant is correct that the District Judge ought to have discharged him, the extradition process would inevitably have been recommenced, with a further EAW issued.

(5) This application ought to have been brought by way of an application for judicial review rather than an application for a writ of habeas corpus.

42. The CPS represents the interests of the Prosecutor General's Office, Lithuania. On behalf of the CPS submissions were made by Ms Hannah Hinton, who adopted the submissions made by Ms Dobbin and made brief additional submissions at the hearing before this Court.

43. Ms Hinton cites *Criminal Proceedings Against Pupino* (Case 105/03) [2006] QB 83, which holds that, while a national court may not interpret a national law *contra legem*, it must do so as far as possible in light of the wording and purpose of the Framework Decision in order to attain the result which it pursues and thus comply with Article 32(2)(b) EU. The CJEU in *Vilkas* was at pains to indicate that the purpose of the Framework Decision centres around the obligation on Member States to carry out the extradition procedure. The Applicant's approach would render the system unworkable, since there is "nothing 'abnormal' about a delayed plane or a delay of a few days or weeks due to an over-booked flight". Occasional "slippages" due to human error should not mean the EAW is automatically defeated. As such, section 36 as presently interpreted should be deemed to be compatible with the letter and purpose of the Framework Decision.

44. In any event, submits Ms Hinton, habeas corpus is not the appropriate mechanism by which to determine the present proceedings, since the Applicant is not a "detained person". Judicial review is the appropriate mechanism, although there would be no substantive difference of approach under such a procedure. Accordingly, the Court is invited to dismiss the Applicant's challenge.

The correct procedure

45. The first issue which arises is whether this application should have been brought by way of judicial review rather than for the writ of habeas corpus. The Court has the power to treat an application for habeas corpus as one for judicial review: see CPR r.87(5)(d). I have reached the clear conclusion that the procedure of habeas corpus is inappropriate in this case.

46. It may be that Mr Summers is right to submit that the fact that the Applicant is on bail and not in actual custody is not fatal to an application for habeas corpus. There is old authority to that effect: see *Re Amand* [1941] 2 KB 239, at 249 (Viscount Caledcote CJ). There are also more recent statements to similar effect: see *R v Secretary of State for the Home Department, example p. Launder (No. 2)* [1998] QB 994, at 1000-1001

(Simon Brown LJ) and 1011 (Mance J); *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20; [2012] 1 WLR 1604, at paras. 25-26 (Lord Mance JSC). On behalf of the Interested Parties it has been submitted that the current framework of public law has superseded that old case law. We have not heard full argument on this point. It may be important in other cases in the future, so I would prefer to express no concluded view on it here.

47. However, there is a more fundamental difficulty in the way of the Applicant's use of habeas corpus in a case like this. Even if the Applicant were in detention, it is that a complete answer to the writ of habeas corpus would be provided by the fact that there is lawful authority for his detention. That authority is provided by the order of a court. The gaoler (for example a prison governor) would be able to cite the order of the court as providing the lawful authority for the detention.

48. What the Applicant in truth needs to attack, and indeed does attack, is the order of the court by which the District Judge refused his application for discharge. The Applicant submits that the decision of the District Judge is flawed on various public law grounds, including an error of law in misunderstanding the effect of the judgment of the CJEU in *Vilkas*; and irrationality. Those are grounds of judicial review.

49. The appropriate procedure for setting aside the order of the court which on its face authorises the Applicant's detention is an application for judicial review to have that order quashed.

50. In support of his submission that habeas corpus is the appropriate remedy in a case like the present, Mr Summers relies on the decision of the Divisional Court in *Nikonovs v Governor of Brixton Prison* [2005] EWHC 2405 (Admin); [2006] 1 All ER 927, at paras. 9-20 (Scott Baker LJ, with whom Rafferty J agreed). In that case the Court considered an argument that the 2003 Act, in particular by virtue of section 34, had the effect of no longer permitting habeas corpus proceedings to be brought in the context of extradition. There can be no doubt that habeas corpus had played an important part in extradition law before the 2003 Act: see, for example, the decision of the House of Lords in *R v Governor of Brixton Prison, ex p. Armah* [1968] AC 192.

51. Section 34 of the 2003 Act provides that decisions made under Part 1 of that Act by a judge cannot be questioned except on an appeal. An appeal is not always available, in that case against a decision under section 4(5). The Divisional Court rejected the argument, noting that it was not persisted with "very strongly" in any event: see para. 16.

52. The Divisional Court had regard to Hansard pursuant to the rule in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. The parliamentary material cited at para. 17 of the judgment made it clear that it had not been the intention of Parliament in enacting the 2003 Act to abrogate the common law remedy of habeas corpus.

53. At paras. 18-19 Scott Baker LJ said:

> "18. Habeas corpus is directed to the lawfulness of a person's detention. Section 34 is silent as to the right to challenge by habeas corpus the lawfulness of continuing detention resulting from an erroneous decision of a judge under sub-s 4(5) not to

> discharge the claimant. True by sub-s 4(6) a person is to be treated as continuing in legal custody until he is discharged under sub-s (5) but I would not regard lawful custody as continuing after a decision is taken not to discharge him when he should have been discharged. Absent a right of appeal, did Parliament really intend habeas corpus should not be available? Did Parliament really intend that a person who ought to have been discharged because he should have been brought before the appropriate judge sooner, but nevertheless remains in custody, should have no remedy? In my view the passages from Hansard that I have cited make the answer clear beyond a peradventure. It would in my judgment require the strongest words in a provision such as s 34 to remove the ancient remedy of habeas corpus.
>
> 19. In *Linnett v Coles* [1986] 3 All ER 6523 at 656, [1987] QB 555 at 561 Lawton LJ said that a writ of habeas corpus was probably the most cherished sacred cow in the British Constitution; but the law had never allowed it to graze it in all legal pastures. However, the one legal pasture in which it has grazed freely for many years is extradition, as is apparent from the House of Lords debate to which I have referred. For my part I am unpersuaded the 2003 Act has condemned this pasture to set aside. In my judgment the remedy is available in this case and the court has jurisdiction to entertain the claimant's application."

54. However, I would observe that the issue which Scott Baker LJ was addressing in *Nikonovs* was different from the issue which this Court is faced with now. The issue in that case was whether the appeal procedure provided by the 2003 Act was an exclusive one. This Court held that it is not. This Court was not addressing the question of whether, in a given situation, the appropriate procedure is habeas corpus or judicial review. To the contrary, at para. 15, Scott Baker LJ said that, in the circumstances of that case "there is no relevant distinction" between habeas corpus and judicial review. The crucial question which this Court decided in *Nikonovs* was that, in principle, those procedures are available even when the 2003 Act has not provided for an appeal. That decision provides no assistance in answering the question which the Court must answer in the present case, namely in what circumstances judicial review is the appropriate procedure as opposed to habeas corpus.

55. Mr Summers also relies on what was said in the Supreme Court in *H v Lord Advocate* [2012] UKSC 24; [2013] 1 AC 413, at para. 32, where *Nikonovs* (para. 18) was cited with approval by Lord Hope of Craighead DPSC. That may well be so but, in my view, does not alter the legal analysis which I have set out above. In particular, the availability in principle of habeas corpus in extradition cases does not answer the crucial question which arises in the present case, namely in what circumstances judicial review will be the more appropriate procedure as opposed to habeas corpus.

56. It is true, as Mr Summers points out, that there have been cases (even since the coming into force of the 2003 Act) in which this Court has considered applications for habeas corpus in the context of extradition: see e.g. *In re Owens*. However, in that case, there appears to have been no argument about the appropriate procedure.

57. I have found more useful the discussion (albeit *obiter*) in the judgment of Richards LJ, with whom Gibbs J agreed, in *Gronostajski v Government of Poland* [2007] EWHC 3314 (Admin), at paras. 8-9:

> "8. I have to say at the outset, although this point has not been taken by the requesting authority, that I have real doubts as to whether habeas corpus is the appropriate procedure in this case. The claimant is detained in prison pursuant to an order of the court that is, on its face, perfectly valid and within the jurisdiction of the court. That is not in dispute. The true target of the challenge is not the prison governor but the district judge, the case being that he erred in declining to order discharge. That seems to me to be a challenge properly brought by way of judicial review against the Magistrates' Court, not by way of habeas corpus against the prison governor. One can look, for example, to *R v Oldham Justices ex p Cawley* [1997] 1 QB 1 and to the White Book at paragraph 54.1.5. Miss Powell has referred us to *Nikonovs v Governor of HMP Brixton* [2005] EWHC Admin 2405, paragraph 19, as to the availability of habeas corpus. It does not seem to me that the issue I have raised is addressed in that judgment.
>
> 9. I do not propose to insist on the procedural niceties in the present case or to direct that the case proceed as a claim for judicial review. I shall simply deal with the substantive issues raised. That should not however be taken as an endorsement for the future of the procedure that has been adopted here."

58. I respectfully agree with that analysis. It is consistent with what I regard as the correct legal analysis, which is to be found in two decisions of the Court of Appeal and a decision of the Divisional Court. Those cases are *R v Secretary of State for the Home Department, ex p. Cheblak* [1991] 1 WLR 890; *R v Secretary of State for the Home Department, ex p. Muboyayi* [1992] QB 244; and *R v Oldham Justices, ex p. Cawley* [1997] QB 1.

59. In *Cheblak*, at p.894, Lord Donaldson of Lymington MR said:

> "A writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant

> matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken. In such a case the decision or action is lawful, unless and until it is set aside by a court of competent jurisdiction. In the case of detention, if the warrant or underlying decision to deport, were set aside but the detention continued, a writ of habeas corpus would issue."

60. *Cheblak* was a decision where the applicant sought to challenge a deportation order. It was followed in *Muboyayi*, which concerned a decision not to permit the applicant entry and not to consider his application for asylum.

61. *Cawley* concerned a warrant for the committal of a person by Justices of the Peace. In *Cawley*, at pp.16-19, Simon Brown LJ, with whom Scott Baker J and Latham J agreed, considered the earlier decisions of the Court of Appeal in *Cheblak* and *Muboyayi* and applied them to the context before the Divisional Court.

62. At p.16 Simon Brown LJ said:

> "The reality is that as judicial review has developed into an ever more flexible and responsive jurisdiction, the need for a parallel, blunter remedy by way of habeas corpus has diminished. That said, this ancient writ plainly remains part of our constitutional heritage and it is certainly not for this Court to deny a jurisdiction which in law it enjoys. The question is: in what circumstances is it available?"

63. At p.17, he continued that:

> "Clearly it is not available in all cases by the mere fact of the applicant being in custody."

64. It is true that later at p.17, Simon Brown LJ acknowledged that extradition cases are ones in which habeas corpus has become "the accepted remedy" (citing Sharpe, The Law of Habeas Corpus (2nd edition), chapter 2, pp. 62-63). Nevertheless, in my view, what is important is the legal analysis set out by Simon Brown LJ at p.19:

> "I return to the present case. In my judgment habeas corpus has no useful role to play in reviewing decisions of the nature here under challenge. I recognise, of course, that where it applies, it enjoys precedence over all other court business, reverses the presumption of regularity of the decisions impugned, and issues as of right. In practice, however, no less priority is accorded to judicial review cases involving the liberty of the subject; the presumption counts for little in such

> cases (is indeed effectively reversed by a defective warrant), and the court would be unlikely in its discretion to withhold relief if the actual decision to detain were found legally flawed. Importantly, moreover, in judicial review the court has wider powers of disposal: whereas in habeas corpus the detention is either held unlawful or not, and the applicant accordingly freed or not, on judicial review the matter can be remitted to the justices with whatever directions may be appropriate. Furthermore, on judicial review the challenge is directed where it should be – at the justices – rather than at the prison authorities whose involvement is in truth immaterial. For my part, therefore, I would hold that habeas corpus is neither a necessary, recognised nor appropriate remedy in the present case; rather the applicants' detention can in my judgment only properly be challenged by judicial review."

65. I recognise that the decisions in *Cheblak* and *Muboyayi* continue to be controversial. They are the subject of criticism, for example, in Sharpe (3rd edition, 2010, edited by Judith Farbey (now Farbey J) as well as the Canadian judge, Robert J. Sharpe), at pp.56-63. At p.58, it is suggested that *Muboyayi* is wrong and inconsistent with the decisions of the House of Lords in *Armah* and *Khawaja* on the basis that the majority took the view that the scope of review on habeas corpus is restricted to jurisdictional error. The authors also criticise the cases of *Cawley* and *Gronostajski*, to which I have referred above. As the authors of that work observe, the late Sir William Wade was also critical of the decisions in *Cheblak* and *Muboyayi* and preferred a wider reading of *Armah* than has been given to it in recent years. The authors cite the article by Sir William Wade, 'Habeas Corpus and Judicial Review' (1997) 113 LQR 55. In that article Professor Wade suggested that whether there is "an underlying administrative decision" is irrelevant. The question is whether a person's detention is lawful or unlawful. He also observed that what he regarded as "judicial enthusiasm for exclusive forms of action" threatens to weaken habeas corpus in at least three ways: first, by imposing procedural complexity and uncertainty; secondly, by substituting discretionary remedies for remedies as of right; and, thirdly, by disallowing legitimate collateral pleas, so preventing a person from pleading his whole case.

66. In *Cawley* itself, at p.18, Simon Brown LJ also acknowledged that the decisions in *Cheblak* and *Muboyayi* had been criticised by the Law Commission in its report "Administrative Law: Judicial Review and Statutory Appeals (Law Com No. 226, 1994). The Law Commission suggested that the case of *Armah* is authority for a wider scope of review on habeas corpus. Simon Brown LJ commented:

> "Perhaps it is, but it seems to me difficult for this Court now to say so."

He continued that *Muboyayi* certainly was not a case decided *per incuriam.* It was fully argued and the cases of *Armah* and a large number of others were cited to the Court of Appeal.

67. In the light of developments in modern public law, I would respectfully follow the decisions of the Court of Appeal in *Cheblak* and *Muboyayi* and the analysis of this Court in *Cawley* and (*obiter*) in *Gronostajski*. Accordingly, I have come to the conclusion that the appropriate procedure in the present case is an application for permission to bring a claim for judicial review and not habeas corpus.

68. In all the circumstances of this case, I consider that the just course would be to grant permission to bring a claim for judicial review. I therefore turn now to consider the merits of that claim for judicial review.

The merits of the application

69. Turning to the merits of the application for judicial review, I am of the opinion that it should be dismissed.

70. The fundamental premise on which the Applicant's grounds of challenge are based is the judgment of the CJEU in *Vilkas* (Ground 3). This is because it is common ground that the previous case law of courts in this country is to the effect that there can be reasonable cause even if, for example, there has been administrative error which has caused some delay. However, in my view, the judgment in *Vilkas* is not to the point in this case.

71. For the purpose of analysis, the terms of Article 23 can be broken down into three stages. At stage one, Article 23(2) requires a Requested Person to be "surrendered no later than 10 days after the final decision on the execution of the European arrest warrant". It imposes an obligation on Member States.

72. At stage two, Article 23(3) and 23(4) provide for instances where a new time limit can be agreed in light of some intervening event. Those provisions are structured in the following way: "if X, then the relevant judicial authorities will contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed". Those provisions do not modify the conditions which give rise to the Article 23(2) obligation. They simply prescribe sets of circumstances in which the time limit can be extended by agreement.

73. Whether X applies or not, at stage three, Article 23(5) provides that: "Upon expiry of the time limits referred to in paragraphs (2) to (4), if the person is still being held in custody he shall be released".

74. Furthermore, and very importantly, release from custody is the *only* consequence that Article 23 prescribes as resulting from the expiry of the time limit. Put simply, given that the present Applicant is not in custody, Article 23 does not have an effect on his situation. What it prescribes is that Requested Persons *must* be surrendered (an obligation), but in terms of *consequences* of the breach of such an obligation, it remains silent in respect of all applicants bar those who are in custody.

75. The passages of *Vilkas* upon which the Applicant relies, being concerned with Article 23(3) (a provision concerning circumstances in which an extension to time limits is permissible), simply do not relate to the present application.

76. In fact, the consequences of the breach of the 23(2) obligation in relation to those not in custody are made very clear in *Vilkas*. At para. 70, the CJEU makes clear:

> "whilst the EU legislature expressly specified, in Article 23(5) of the Framework Decision, that expiry of the time limits referred to in Article 23(2) to (4) means that the requested person is to be released if he is still being held in custody, *it did not confer any other effect on the expiry of those time limits* and did not, in particular, provide that their expiry deprives the authorities concerned of the possibility of agreeing on a surrender date pursuant to Article 23(1) of the Framework Decision or *that it releases the executing Member State from the obligation to give effect to a European arrest warrant*". (Emphasis added)

77. It follows that:

> "the mere expiry of the time limits prescribed in Article 23 of the Framework Decision cannot relieve the executing Member State of its obligation to carry on with the procedure for executing a European arrest warrant and to surrender the requested person": para. 72.

78. Mr Summers places considerable reliance on what was said by Advocate-General Bobek in his Opinion, at para. 35, about the possible consequences of a breach of the time limits in Article 23 of the Framework Decision. The Advocate-General said that what is required is "genuine and unconditional release" as opposed to "provisional release" under Article 12. Mr Summers submits that, when applied to the facts of the present case, that means that the Applicant cannot have any conditions attached to his bail. He submits that the Applicant can no longer be the subject of any coercive steps to secure his extradition to Lithuania; he can only be returned on a voluntary basis.

79. I would observe that there are passages in the CJEU's judgment where it expressly cited the Opinion of Advocate-General Bobek and did so with approval: e.g. para. 42, citing para. 37 of his Opinion. However, what the Advocate-General said at para. 35 was not cited with approval by the CJEU in its judgment. Indeed, in my view, it is inconsistent with the tenor of that judgment, which makes it clear that the only consequence of a failure to meet the time limits in Article 23 is that a person who is in custody must be released and that the duty of Member States to co-operate so as to fulfil the purposes of the Framework Decision continues to apply.

80. In short, I do not think the judgment in *Vilkas* has any material impact on this case. The fundamental premise on which much of the argument for the Applicant is based falls away. I now turn to two recent decisions of the Supreme Court of Ireland, upon which Mr Summers placed reliance in his written submissions after the hearing before this Court, to see if they alter that analysis.

The Supreme Court of Ireland decision in *Vilkas*

81. After the preliminary ruling in *Vilkas* had been given by the CJEU the case returned to the Court of Appeal of Ireland. That Court allowed the Minister's appeal from the High Court. The Court of Appeal considered that the Irish legislation could be interpreted in a way which conformed with the CJEU's interpretation of the Framework Decision.

82. Mr Vilkas appealed to the Supreme Court of Ireland. His appeal was allowed by that Court: see *Minister for Justice and Equality v Vilkas* [2018] IESC 69. The essential basis for that outcome was that the terms of section 16(5) of the European Arrest Warrant Act 2003 ("the Irish Act") were clear and unambiguous. They could not be given a conforming interpretation with the Framework Decision. Although it was clear from the CJEU's judgment that, as a matter of EU law under the Framework Decision, multiple extensions were permitted, the domestic statute was unambiguous and could not be interpreted in that way.

83. The judgment of the Supreme Court was given by McKechnie J.

84. He stated at para. 2 that the appeal concerned a single issue relating to the interpretation of section 16 of the Irish Act. That section, insofar as is relevant, provides:

> "…
>
> (4) Where the High Court makes an order [for surrender], it shall … —
>
> (a) …
>
> (b) order that that person be detained in a prison … for a period not exceeding 25 days pending the carrying out of the terms of the order, and
>
> (c) direct that the person be again brought before the High Court—
>
> (i) if he or she is not surrendered before the expiration of the time for surrender under subsection (3A), as soon as practicable after that expiration, or
>
> (ii) if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that person will not be surrendered on the expiration referred to in subparagraph (i), before that expiration.
>
> (5) Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall—
>
> (a) if satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the

> person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered—
>
> (i) with the agreement of the issuing judicial authority, fix a new date for the surrender of the person, and
>
> (ii) order that the person be detained in a prison …
>
> (b) in any other case, order that the person be discharged."

85. At para. 2, McKechnie J said:

> "This appeal raises a single issue relating to the interpretation of various subsections of section 16 of the 2003 Act … where a requested person has not been surrendered within the time limits firstly prescribed, by that section, due to circumstances beyond the control of the state (meaning a *force majeure*), it is possible, pursuant to section 16(5)(a), to extend the time for surrender and to fix a new date for that purpose."

86. At para. 79 of his judgment McKechnie J explained the European concept of "*contra legem*" as follows:

> "It is clear from the above that the principle of conforming interpretation cannot be used to lead to an interpretation of national law *contra legem*. This concept of '*contra legem*' is frequently used in EU law. The Latin phrase means 'against the law'. Often the case law of the CJEU will simply refer to the prohibition on a *contra legem* interpretation without elaborating on what precisely this means. However, the meaning of the concept is somewhat intuitive although generally well understood at a surface level: it is that a court cannot adopt an interpretation which goes against the express wording of a provision. Put differently where it is not reasonably possible to construe a national measure in conformity with its EU counterpart, to do so would be against the law. If a conflict of that scale exists, a court must give preference to its domestic provisions."

87. McKechnie J expressed the view, at para. 87, that there was no ambiguity in the terms of section 16(5). At para. 88 he said that the critical provision for present purposes was section 16(5)(a).

88. At para. 96, McKechnie J said:

> "… we now know, as did the Court of Appeal, what precisely is meant by Article 23 [of the Framework Decision]. Multiple extensions are permissible. However, as stated, the unambiguous wording of section 16 leads to the opposite conclusion in the domestic context: no more than one new date may be set under the Act. The question, therefore, remains whether the principle of conforming interpretation can be utilised so as to, in effect, displace the view based on the plain terms of the section, and thus arrive at the contrary conclusion. In my opinion, it cannot. Notwithstanding the importance of this principle, there are, as above described, clear limits to its breadth. Any ambiguity in the section could properly be resolved by reference to the EU instrument sought to be transposed. Where, however, there is no ambiguity in the words of the domestic provision to begin with, it would be too much of a stretch on the principle of conforming interpretation to arrive at an interpretation that the plain terms of the section simply cannot bear."

89. This led the Supreme Court to the conclusion, at para. 101, that the Court of Appeal had erred in its interpretation of the relevant provisions of section 16.

90. As was expressly made clear at para. 102, what then follows in the judgment of McKechnie J is *obiter*.

91. The judgment summarised what had been said by the CJEU might be the consequences of the expiry of time limits under Article 23 of the Framework Decision. In particular, at para. 105, McKechnie J said:

> "… In short, it determined that the mere expiry of those periods cannot relieve the executing Member State of its obligation to carry on with and to finalise the execution process, by ultimately having the requested person surrendering: new dates must be agreed for this purpose. The only consequence of non-compliance was that the subject person must be released if still being held in custody (Article 23(5))."

92. At para. 106, McKechnie J observed that the CJEU "did not specifically address what form or manner of release it had in mind. Whether for example such was intended as 'provisional', as Article 12 permits or in some other way being restrictive or curtailing of movement. Perhaps some form of bail, but how could that be administered and pursuant to what lawful authority? Might it instead require simply the immediate re-arrest of the person concerned? …" McKechnie J did not regard the answer as "obviously evident" although it was for Advocate General Bobek, who had no doubt in this regard: see para. 35 of the Advocate General's Opinion, where he said that release must amount to genuine and conditional release as opposed to provisional release under Article 12.

93. At para. 107 McKechnie J said:

> "It is undoubtedly true that Article 23 does not mandate or regulate custody issues: such is a matter for the Member State concerned. However, it is difficult to see how if release is to be truly unqualified, unrestricted and without any form of constraint, that State can comply with its obligations under the [Framework Decision]. …"

94. At paras. 111-113, McKechnie J said the following:

> "111. The views of the CJEU on this issue may have immediate consequences for the provisions referred to at para. 103 above. As noted, the Irish Act uses the term 'discharge' rather than 'release'. The issue thus arises as to whether that word in both s. 16(5A)(b) and s. 16(5)(b) can be given a conforming interpretation which accords with the meaning intended by the CJEU?
>
> 112. As a matter of Irish law, certainly in the criminal and related spheres, the 'discharge' of a person from custody means a full and unconditional discharge from the process that he has been subject to. Such marks the end of whatever proceedings are then in train. It is also my understanding that, prior to the decision of the CJEU in this case, as a matter of practice where a requested person was 'discharged' pursuant to section 16(5)(b) or 16(5A)(b), that meant an unrestrictive and unequivocal discharge, as in fact occurred in this instance. No case was cited and I know of none where the consequence did not follow.
>
> 113. On the other hand the word 'release' has a much more restricted meaning which is entirely different from what a discharge entails. A release generally though not always, is conditioned either by duration, terms or obligations. The phrase 'release on bail' is a good illustration of what the term means. Even when unconditioned however, its meaning is generally regarded as being a considerable distance from that of the word discharge."

95. In my view, the decision of the Supreme Court of Ireland in *Vilkas* turns on a question of interpretation of an Irish statute, in particular section 16 of the European Arrest Warrant Act 2003. In my respectful view, construing as we are a statute of the United Kingdom Parliament, which is different from the Irish statute construed in *Vilkas*, we are not required to arrive at the same outcome.

96. Furthermore, if anything, the judgment of McKechnie J supports the view which I have come to in relation to the meaning of the term "release". As he said in his judgment, that concept is very different from the concept of "discharge". If anything, the judgment of McKechnie J differs from the opinion of the Advocate General in *Vilkas*. Furthermore, in my view, it is consistent with my understanding of what the CJEU said in *Vilkas*, which I have set out above. McKechnie J recognised, as I do, the very real difficulties which would be caused to the system of European Arrest Warrants created by the Framework Decision if the interpretation which is urged upon us were to be adopted.

97. Accordingly, I have reached the conclusion that the submissions advanced by Mr Summers based on the decision of the Supreme Court of Ireland in *Vilkas* must be rejected. I turn to his submissions based on the decision of that Court in *Skiba*.

The Supreme Court of Ireland decision in *Skiba*

98. *Skiba* involved a requested person, due to be surrendered to the Republic of Poland on 22 December 2016, refusing to board a plane (seemingly due to fear of flying). Mr Skiba's solicitor had made a call to the Irish authorities prior to this occurring warning them of Mr Skiba's fear: para. 2.

99. McKechnie J began his judgment by stating that the CJEU in *Vilkas* interpreted the phrase "circumstances beyond the control" of the Member States as referring only to situations of *force majeure* as understood in EU law: paras. 3-5. The issue on the appeal was therefore whether "Mr. Skiba's solicitor's phone call to the Irish authorities rendered it foreseeable that he would refuse to board the aircraft on the 22nd December", meaning his conduct was not "beyond the control" of the State, thus requiring the High Court to discharge Mr Skiba, rather than fixing a new surrender date: para. 5. The secondary issue arising on the appeal concerned the meaning of "discharged" within this context: para. 6.

100. Relevantly, McKechnie J was satisfied that the "phrase in section 16(5)(a), 'circumstances beyond the control of the State or the issuing state concerned', can and must be given the same meaning as its direct EU equivalent, being that in the first sentence of Article 23(3) ..., 'circumstances beyond the control of any of the Member States'", as interpreted by the CJEU in *Vilkas*: para. 69 in McKechnie J's judgment. It must therefore be interpreted as requiring "*force majeure*": para. 71.

101. He gave three reasons as to why such a construction was possible in this case, but no such conforming interpretation was available in the *Vilkas* case. First, although the wording of section 16(5)(a) attempting to transpose Article 23 "did not do so verbatim", the wording was "in essence" the same as in the Framework Decision: para. 71. Secondly, this position was accepted by the Minister for Justice and Equality: para. 72. Thirdly, "the interpretation adopted by the CJEU is one that favours the liberty of the requested person": para. 73.

102. McKechnie J spent the remainder of the judgment determining how the relevant legal principles apply to the facts in the *Skiba* case, which need not detain us here. He dismissed Mr Skiba's appeal at para. 111.

103. In my view, it is clear from the above summary that the decision in *Skiba* turned on a question which does not arise in the present case and has no material impact on the analysis which I have set out above.

104. I hope it will be helpful if, at this stage, I summarise my conclusions about the decisions of the Supreme Court of Ireland in *Vilkas* and *Skiba*. In my view, the following five propositions are established in the light of the caselaw which has been cited to this Court:

(1) First, the decisions of the Supreme Court of Ireland add nothing to what the CJEU had said on matters of EU law.

(2) Secondly, the outcome of the cases depended on questions of Irish law, not EU law.

(3) Thirdly, the decisions of the Supreme Court of Ireland may be of interest because both our legal systems have common roots in history. However, we have to construe our own Act, which is different in its wording and structure from the Irish Act. This is particularly so given that the actual result of the decision of the Supreme Court of Ireland in *Vilkas*, because of the wording of the Irish Act and the principle of *contra legem*, runs "counter to the objective pursued by the Framework Decision of accelerating and simplifying judicial co-operation" as set out in para. 71 of the judgment of the CJEU in *Vilkas*.

(4) Fourthly, our Act has been interpreted in the way it has (particularly section 36(8)) in a number of decisions in this jurisdiction. There is nothing in EU law which requires us to come to a different interpretation of our Act.

(5) Fifthly, there is no issue of EU law which arises which calls for a reference to be made to the CJEU for a preliminary ruling. In my view, it is clear that the only consequence of a breach of the time limits in Article 23 of the Framework Decision is that a person who is in custody must be released. I do not consider that either that provision in Article 23(5) or the judgment of the CJEU in *Vilkas* sheds any light on the meaning of the word "discharge" in our own legislation.

The other grounds of challenge

105. I have dealt at length with the Applicant's Ground 3, which has formed the mainstay of Mr Summers' submissions at the hearing before this Court and in his written submissions after that hearing.

106. As for the other grounds of challenge (Grounds 1 and 2), they amount in substance to no more than a disagreement with the District Judge's assessment of the evidence before him and whether it gave rise on the facts of this case to reasonable cause for the slight delay that there was.

107. In my view, the conclusion which the District Judge reached on that evidence was one that was open to him. It was certainly not irrational.

Conclusion

108. For the reasons I have given I would treat the application for habeas corpus as an application for permission to bring a claim for judicial review of the decision of the District Judge dated 16 November 2018; I would grant permission to bring that claim for judicial review; but I would dismiss the claim for judicial review.

Mr Justice Dingemans:

109. I agree.