Neutral Citation Number: [2020] EWHC 1142 (Admin)

Case No: CO/1380/2020 and CO/1381/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
In the Matter of An Application for Habeas Corpus

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2020

Before:

LORD JUSTICE IRWIN
MR JUSTICE LEWIS

- -

Between:	
ADRIAN DORU COSAR	**Claimant**
- and –	
GOVERNOR OF HMP WANDSWORTH	**Defendant**
-and-	
(1) WESTMINSTER MAGISTRATES' COURT	**Interested Parties**
-and-	
(2) TIRGU LAPUS LOCAL COURT, ROMANIA	
Between:	
MATEUSZ CHMURZYNSKI	**Claimant**
-and-	
GOVERNOR OF HMP WANDSWORTH	**Defendant**
-and-	
(1) WESTMINSTER MAGISTRATES' COURT	**Interested Parties**
-and-	
(2) CIRCUIT COURT IN TORUN, POLAND	

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Alun Jones Q.C., Martin Henley and Samantha Davies (instructed by **AM International Solicitors)** for the **Applicants**
Helen Malcom Q.C. and Saoirse Townshend (instructed by **Crown Prosecution Service**) for the **second interested party in both cases**
The defendant and the first interested party did not appear and were not represented.

Hearing date: 23 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 11 May 2020.

Lewis J. :

INTRODUCTION

1. These are two applications for habeas corpus or, in the alternative, for a direction that they be treated as applications for permission to apply for judicial review pursuant to Part 87.5(d) of the Civil Procedure Rules ("the CPR").

2. In brief, the first applicant, Adrian Cosar, is subject to a European Arrest Warrant ("EAW") issued by the judicial authorities in Romania. A district judge sitting in the Westminster Magistrates' Court ordered that he be extradited to Romania and remanded him in custody pending extradition. Permission to appeal against the extradition order was refused by the High Court on 12 March 2020. The first applicant had, therefore, to be extradited within a period of 10 days from the date on which permission was refused or, if the district judge and the judicial authority issuing the EAW agreed a later date, 10 days from that later date: see section 35(3) and (4) of the Extradition Act 2003 ("the 2003 Act"). The first applicant is currently detained in Her Majesty's Prison Wandsworth awaiting extradition. Due to restrictions imposed as a result of the coronavirus pandemic, it has not been possible to extradite the first applicant to Romania. The district judge has, on two occasions, agreed that the 10 day extradition period should start from a later date. Extradition is currently due to take place within 10 days from 30 April 2020.

3. The first applicant contends that his continued detention is unlawful for three reasons. First, he contends that the 2003 Act only permitted the district judge to agree one extension, or alternatively, to agree only short, temporary extensions of the extradition period. In circumstances where all air travel between the United Kingdom and Romania is suspended indefinitely, the district judge could not lawfully agree extensions of the extradition period. Secondly, he contends that the requirements of section 35(4) of the 2003 Act were not satisfied as, on the facts, there was no agreement between the district judge and the judicial authorities which issued the EAW to extend the extradition period. Thirdly, he contends that any agreement to extend the extradition period was unlawful, as he had not been given notice of any application for an extension nor an opportunity to make representations at a hearing. Further, he had not been provided with any court order or reasons for the extension. The second applicant, Mateusz Chmurzynski, was the subject of an EAW. His extradition had been ordered and he had been remanded in custody. Two extensions of the extradition period had been agreed by the district judge. By the time of the hearing of his application in this court, the EAW had been withdrawn. He had been discharged and was no longer in custody. He contended that the agreement to extend the extradition period in his case was unlawful for the same reasons as the first applicant and so his detention during the extension period was unlawful.

THE FACTS

The First Applicant's Arrest and Detention

4. The first applicant is a Romanian national. He was convicted in Romania of one offence of smuggling cigarettes. That conviction led to a sentence of three years and six months' imprisonment which he has still to serve. On 3 March 2017, the Romanian authorities issued an EAW seeking his extradition to Romania. On 21

March 2017 that EAW was certified by the National Crime Agency ("NCA"). On 26 August 2019 the first applicant was arrested. He was brought before District Judge Zani. Bail was refused and the first applicant was remanded in custody. A second bail application was subsequently also refused.

5. On 4 November 2019, an extradition hearing took place before District Judge Branston. The first applicant contended that there were various statutory bars to extradition. On 7 November 2019, District Judge Branston gave judgment rejecting those contentions. He ordered that the first applicant be extradited to Romania and ordered that he be remanded in custody. That part of the order is expressed in the following terms:

> "To be held in custody awaiting extradition".

6. The first applicant applied for permission to appeal to the High Court. That application was refused on the papers on 24 January 2020. An oral permission hearing took place on 12 March 2020 and permission was refused. Pursuant to section 35(3) and (4) of the 2003 Act, the first applicant had to be extradited within 10 days of the decision of the High Court, that is by midnight on 22 March 2020 unless the district judge and the issuing judicial authority agreed a later starting date for the 10 day period.

Events in Romania

7. On 16 March 2020, the President of Romania declared a state of emergency for 30 days in order to deal with the coronavirus pandemic then spreading throughout the world. Restrictions on movement were imposed over the next few days. From 21 March 2020 all passengers from the United Kingdom entering Romania were required to self-isolate for a period of 14 days on arrival. From 2 April 2020 all passengers entering Romania from the United Kingdom were subject to mandatory quarantine for 14 days at a specified location. On 5 April 2020 all flights between the United Kingdom and Romania were suspended for a 14 day period. Some charter flights were permitted for specific purposes, such as enabling seasonal workers to travel from Romania to the United Kingdom.

8. On 15 April 2020, the President of Romania extended the state of emergency for a further 30 days. On 16 April 2020, flights to and from the United Kingdom were suspended for a further 14 days commencing on 18 April 2020. The President has recently issued a press statement in which he has indicated that a relaxation of the restrictions could come into place after 15 May 2020 and the relaxation measures would be implemented gradually. Any relaxation would depend upon the number of deaths and the number of new cases of Covid-19 infection.

9. Further information on the situation in Romania appears from information provided by Romania (and other states) to the Council of the European Union as to the impact of the spread of Covid-19 on judicial co-operation in the European Union. That report confirms that flights have been cancelled and travel restrictions imposed (whilst recognising that transits are theoretically possible). The execution of EAWs has not been suspended and no Romanian EAW has been withdrawn. In response to a specific question posed, the Romanian authorities indicated that they considered that any delay in transferring prisoners as a result of the imposition of measures to address

the public health consequences of the coronavirus pandemic amounted to circumstances beyond the control of a member state within the meaning of Article 23(3) of the Council Framework Decision, 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member states ("the Framework Decision").

The Extradition of the First Applicant

10. There are arrangements in place for conveying information and requests between the judicial authorities issuing and executing an EAW. These are made pursuant to Council Decision 2007/633/JHA of 12 June of that year on the establishment, operation and use of the second generation Schengen Information System ("the Operating Decision"). Data is provided by the relevant judicial authorities. That information is exchanged through an authority designated in each member state and known as the SIRENE Bureau ("SIRENE" is an abbreviation of Supply of Information Requested at National Entry) in accordance with the Operating Decision and the SIRENE Manual. The SIRENE Manual contemplates that information concerning the arrangements for the surrender of a requested person will be provided by the relevant competent judicial authority and exchanged via the SIRENE Bureaux. The designated SIRENE Bureau in the United Kingdom is located within the NCA.

11. The NCA were informed by the Romanian SIRENE Bureau of a request that extraditions be temporarily suspended in accordance with Article 23(4) of the EAW Framework Decision, because of the Covid-19 crisis. On 16 March 2020, the NCA passed that request to the Westminster Magistrates' Court. On 17 March 2020, a district judge agreed an extension of time for a period of 10 days starting from 14 April 2020. Consequently, extradition would have to be implemented by midnight on 24 April 2020.

12. By e-mail dated 14 April 2020, the NCA wrote to the Westminster Magistrates' Court in the following terms:

> "The NCA has received communication from the Romania SIRENE Bureau that because of the escalation of COVID-19 it has requested that, in accordance with Article 23(4) of the EAW Framework Decision (2002/584/JHA), extradition removals are temporarily postponed. The NCA accordingly seeks an extension of time such that the requested person's removal period is deferred until 10 days after the NCA receives notification from the Romanians that extradition removals can recommence.
>
> *As per s.35(4)(b) of the Extradition Act 2003, we kindly request that the judge and the judicial authority which issued the EAW agree a new handover period within which the subject can be removed. A further 10 days starting on 30th April 2020 is requested*."

13. We were told that an application or request had been made to the district judge on 21 April 2020 and the district judge agreed that the starting date for the 10 day extradition period would now be the 30 April 2020.

The Second Applicant

14. The second applicant, Mateusz Chmurzynski, is a Polish national. He was subject to an EAW seeking his extradition to Poland to serve 3 years and 201 days of outstanding sentences for a number of offences. A district judge ordered his extradition and ordered that he "be held in custody awaiting extradition". Permission to appeal against the extradition order was refused on the papers and then at an oral hearing on 25 February 2020. The second applicant was, therefore, to be extradited by midnight on 5 March 2020.

15. Polish nationals are generally returned to Poland by military flights. The next available military flight was scheduled for 2 April 2020. On 26 February 2020, the district judge agreed that the 10 day extradition period would start on 2 April 2020.

16. Poland then took steps to deal with the escalating coronavirus crisis. On 14 March 2020 a state of emergency came into effect in Poland. Restrictions, including restrictions on movement, were imposed. Only certain categories of persons were allowed to enter Poland. They included Polish nationals. However, all passenger rail and road traffic crossing the border into Poland was suspended. Commercial flights to and from Poland were suspended until 26 April 2020. In addition, the military flights used for transporting persons being extraditing to Poland were suspended until further notice. There are currently no flights scheduled.

17. As military flights were suspended, it was not possible for the second applicant to be extradited to Poland on 2 April 2020. On 19 March 2020, the NCA were notified by the Polish SIRENE Bureau of a request to postpone extraditions temporarily, in accordance with Article 23(4) of the Framework Decision. On 21 March 2020 a district judge agreed that the 10 day extradition period would start on 14 April 2020. Following a further request, a district judge agreed on 15 April 2020 that the 10 day extradition period would start on 7 May 2020.

18. On 17 April 2020, the NCA were notified by the Romanian SIRENE Bureau that the Polish judicial authorities had withdrawn the EAW for the applicant. He was discharged from custody on 22 April 2020 by order of a district judge sitting in the Westminster Magistrates' Court, following an application made pursuant to section 41 of the 2003 Act.

The Procedures Governing Agreements for Extending the Time For Extradition

19. There is before us evidence from Stephen Todhunter, a legal adviser, on the procedures currently adopted in the Westminster Magistrates' Court for dealing with extensions of the period for effecting extradition under the 2003 Act. Mr Todhunter is assigned to work in the international jurisdiction section of that court.

20. Requests for extensions of the extradition period are sent via e-mail by the NCA. The e-mail contains the request and the reasons for it. The request is entered on the court computer system and the request included as part of the list of cases for consideration by a district judge as soon as possible.

21. Prior to the coronavirus pandemic, requests were considered by a district judge sitting in courtroom 3 in the Westminster Magistrates' Court. The NCA was not present. The

CPS were present and could provide the court with further information if requested. The person subject to the extradition order was not told of the request. He was not present and was not in a position to make representations or participate in the consideration of the request, although the practice has been that the district judge might adjourn consideration of the request, if there appeared to be possible issues or a significant delay, in order to enable the person to be informed of the request and to make representations. Once the district judge has made a decision and given reasons, that was recorded on the court file. The court notified the NCA of the decision. The CPS also recorded the decision and notified the NCA. The person subject to the extradition order has not normally been notified of the decision.

22. In the light of the coronavirus pandemic, and the change in work patterns in the court below, the procedure for considering requests has been altered. The number of courtrooms operating has been reduced. The number of requests for extensions of time for extradition has increased. These are now considered by a district judge in chambers who will make a decision and endorse the decision on the case file. If the district judge has any queries about the request, he or she will contact the legal adviser. The person subject to the extradition order is still not notified of the request, does not make representations or participate in the process for considering the request, and is not notified of the decision once it has been agreed[1].

23. Consideration of the request for an extension of time for extraditing the person concerned does not routinely involve consideration of the remand status of the person. He or she will remain remanded in custody or on bail as was ordered at the conclusion of the extradition hearing.

The Current Proceedings

24. Both these applicants issued proceedings for habeas corpus, contending that their detention in HMP Wandsworth was unlawful. Alternatively, they sought a direction that the application be treated as an application for permission to apply for judicial review of the decisions to agree an extension of time. It was agreed that full arguments would be made on the basis that the hearing before this court was either the hearing of an application for habeas corpus or of a claim for judicial review (not merely an application for permission to apply for judicial review). That would enable the court to deal with the cases and make a final disposal of the applications as a result of this oral hearing.

25. The applicants and the second interested party were represented by counsel. The defendant in each case is the Governor of HMP Wandsworth. He filed acknowledgements of service indicating that he would not be participating in the hearing, as the arguments were essentially matters for the second interested party. The hearing was conducted remotely on 23 April 2020. It was a public hearing in that persons had access to a link and could (and at least one reporter did) observe proceedings. We are grateful to counsel for their submissions. We are also grateful to them and their legal teams for the efficient preparation of electronic bundles dealing

[1] This court was informed following the hearing that as from 15 April 2020, the Westminster Magistrates Court in fact adopted the practice of informing the person subject to the extradition order that an extension of the extradition period has been agreed.

with the necessary materials and authorities which enabled the hearing to be conducted quickly and efficiently.

THE LEGAL FRAMEWORK

The 2003 Act

26. Part 1 of the 2003 Act provides for extradition from the United Kingdom to territories designated for this purpose. The 27 member states of the European Union, including Romania and Poland, are designated as category 1 territories, to which Part 1 of the Act applies. Section 2 of the 2003 Act deals with the certification of an EAW, that is the warrant issued by a judicial authority of a category 1 territory seeking the arrest of a person accused, or convicted, of an offence or offences in that country. Section 3 of the 2003 Act provides for the arrest of an individual subject to a certified EAW. The individual is brought before an appropriate judge who fixes a date for an extradition hearing and determines whether to remand the person in custody or on bail (see sections 7 and 8 of the 2003 Act).

27. At the extradition hearing, a district judge will consider whether there are any bars to extradition such as double jeopardy, the absence of a prosecution decision, whether extradition would be unjust or oppressive by reason of the passage of time and other matters (see section 11 of the 2003 Act). If there are no statutory bars to extradition, and where, as in the present cases, the persons concerned have been convicted in the other state, the district judge will consider whether the person was present at his trial or would be entitled to a retrial on return where he was not deliberately absent from the trial. If so, the district judge will consider whether extradition would be compatible with the person's rights under Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") incorporated into domestic law by the Human Rights Act 1998. Section 21 of the 2003 Act provides that:

> "**21. Persons unlawfully at large: human rights**
>
> (1) If the judge is required to proceed under this section (by virtue of section 20 he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.
>
> (4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
>
> (5) If the person is remanded in custody, the appropriate judge may later grant bail.

28. The applicants in the present case were ordered to be extradited pursuant to an order made under section 21(3) of the 2003 Act. Each was remanded in custody pursuant to an order made under section 21(4) of the 2003 Act.

29. There is provision for the person to appeal to the High Court, with leave, against an order for extradition (see section 26 of the 2003 Act). Notice of the application for leave to appeal must be given before the end of 7 days starting with the day when the order is made (see section 26(4) of the 2003 Act). Applications for leave to appeal may be considered without a hearing, but, if permission is refused, a renewed application for permission must be heard at an oral hearing (see Rule 50.17((1)(b)(i) of the Criminal Procedure Rules ("the CrPR"))

30. There is a series of provisions dealing with the time permitted for extradition. The relevant provision in the present case is section 35 of the 2003 Act which deals with the situation where there is no extant appeal to the High Court, either because the person does not appeal or because the High Court has refused leave to appeal. In essence, extradition must be effected within "the required period". That is a period of 10 days beginning with the date when leave to appeal was refused or a later date agreed to by the district judge and the judicial authority which issued the warrant (see section 35(3) and (4) of the 2003 Act). Section 35 provides, so far as material, as follows:

> "**35 Extradition where no appeal**
>
> (1) This section applies if the appropriate judge orders a person's extradition to a category 1 territory under this Part and either—
>
> (a) no notice of application for leave to appeal under section 26 is given before the end of the period permitted under that section, or
>
> (b) notice is given during that period but the High Court refuses leave to appeal to it.
>
> …..
>
> (3) The person must be extradited to the category 1 territory before the end of the required period.
>
> (4) The required period is—
>
> (a) 10 days starting with—
>
> (i) the first day after the period permitted under section 26 for giving notice of application for leave to appeal against the judge's order (where subsection (1)(a) applies), or
>
> (ii) the day on which the decision of the High Court refusing leave to appeal to it becomes final (where subsection (1)(b) applies), or

> (b) if the judge and the authority which issued the Part 1 warrant agree a later date, 10 days starting with the later date.
>
> (4ZA) The decision of the High Court refusing leave to appeal to it becomes final when, in accordance with rules of court, there is no further step that can be taken in relation to the application for leave to appeal.
>
> …..
>
> (5) If subsection (3) 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.
>
> (6) These must be ignored for the purposes of subsections (1) to (4A) —
>
> (a) any power of a court to extend the period permitted for giving notice of application for leave to appeal;
>
> (b) any power of a court to grant leave to take a step out of time.
>
> (7) If leave to appeal to the High Court is granted on an application notice of which was given after the end of the period permitted under section 26, this section ceases to apply (but section 36 applies instead)."

31. Materially similar provisions apply in relation to appeals to the High Court (or Supreme Court): see section 36(2) and (3) of the 2003 Act).

32. Finally, section 41 of the 2003 Act deals with the withdrawal of the EAW. If the district judge is informed at any time between the person first being brought before the judge and the person's extradition that the EAW has been withdrawn, section 41(3) provides that:

> "(3) The judge must order the person's discharge".

33. That happened in the case of the second applicant. The district judge was informed on 22 April 2020 that the EAW affecting him had been withdrawn. The district judge therefore ordered his discharge under section 41(3) of the 2003 Act and he was released from custody.

The Framework Decision

34. European Union law relating to extradition is contained in the Framework Decision. The recitals to the Framework Decision record that the intention was to introduce a simplified system of surrender of convicted or suspected persons and reduce delay in the present extradition system. The aim, essentially, was to provide for a system of surrender between judicial authorities issuing the EAW and the extraditing state. The role of central authorities in the execution of an EAW was to be limited to practical

and administrative assistance (recital 9). Article 1 provides that the EAW is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person. General principles are set out in chapter 1 of the Framework Decision. Chapter 2 deals with the surrender procedure. It provides for the transmission of the EAW. Article 12 of the Framework Decision provides that where a person is arrested, the executing judicial authority will decide whether the requested person will remain in detention or be released provisionally, so long as the member state takes all measures deemed necessary to prevent absconding. There is provision governing the hearing before a judicial authority in a member state. Article 22 of the Framework Decision provides for the executing judicial authority to notify the issuing judicial authority immediately of the decision on the action to be taken on the EAW. Article 23 deal with time limits for surrender. It provides:

> "**Article 23**
>
> **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 ten 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 ten 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 ten 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."

35. Article 23 of the Framework Decision was considered by the Court of Justice of the European Union in Case C-640/15 *Criminal Proceedings concerning Vilkas* [2017] 4 WLR. 69. The executing judicial authority in Ireland had decided to extradite Mr Vilkas to Lithuania. Two attempts to extradite him failed because of his behaviour in resisting attempts to put him on a plane bound for Lithuania. The issuing and executing judicial authorities had on two occasions agreed to extend the extradition period. The Court of Justice held that Article 23 did not expressly limit the number of

new surrender dates that may be agreed between the executing and issuing judicial. Further, limiting the authorities from agreeing further surrender dates when the executing authority was prevented by circumstances outside its control from agreeing to a new date, would not contribute to the objective of accelerating judicial co-operation. Accordingly, the Court of Justice held that Article 23 of the Framework Decision permitted the judicial authorities concerned to agree, in appropriate circumstances, a new surrender date on more than one occasion (see paragraphs 25, 33 and 44 of the judgment). The Court of Justice further held that the concept of *force majeure* must be understood as referring to "abnormal and unforeseeable circumstances which were outside the control of the party against whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care" (see paragraph 57 of the judgment). In applying that understanding to *force majeure* as provided for in Article 23(3) of the Framework Decision, account must be taken of the general scheme and purpose of the Framework Decision. We were not addressed on the relationship between the Framework Decision and the 2003 Act. However, the background is familiar. The United Kingdom opted back into the Framework Decision under Protocol 36 to the Treaty of Lisbon, with effect from 1 December 2014. Section 7A of the European Union (Withdrawal) Act 2018 gives effect to right, powers, liabilities and obligations arising under the Withdrawal Agreement between the United Kingdom and the European Union. Article 61(2) of the Withdrawal Agreement provides that the Framework Decision applies in respect of persons arrested prior to the end of the transition period provided for by the Withdrawal Agreement (i.e. 31 December 2020).

THE ISSUES AND SUBMISSIONS

36. Against the background of the applications, and the written and oral submissions, the following issues arise:

    i) Should these applications have been brought by way of claim for judicial review rather than application for habeas corpus?

    ii) Is the decision of the district judge agreeing to extend the period for extradition unlawful because the 2003 Act permits only agreement to short extensions of time, whereas the current extensions are said to be in substance indefinite and open ended, given the suspension of air travel? Can that principle be undermined by a succession of extensions, (a) where it is obvious that extradition cannot take place for several months at least, or (b) because a district judge cannot agree more than one extension of the extradition period (ground 1 in the consolidated grounds)?

    iii) By an amendment for which we gave permission: did the district judge and the issuing judicial authority in fact agree to a later starting date for the extradition period? Was the decision to agree an extension unlawful because the applicants were not given notice of the request to extend time, were not represented or able to make submissions at a hearing to consider the request, and were not notified of it? (ground 3, originally ground 2).

Submissions

37. Mr Jones, for the applicants, contends firstly that applications for habeas corpus are, in principle, available as the applicants seek to challenge the lawfulness of their detention. The applicants were detained pursuant to orders extending the time for extraditing the applicants made pursuant to section 35 of the 2003 Act and those orders replaced or superseded the earlier orders for detention. He accepted that application for habeas corpus was no longer an appropriate step in relation to the second applicant, as he had been released from custody. However, he submitted that the court should direct the application continue as a claim for judicial review pursuant to CPR 87.5(d) to enable the second applicant to obtain a ruling on the lawfulness of his detention.

38. In terms of substance, Mr Jones submitted that the power conferred by section 35 of the 2003 Act should be used only in accordance with the purpose underlying the provision. The 2003 Act (and the Framework Decision) were intended to ensure that extradition was carried out quickly. Any extension had to be temporary and agreement had to be for a fixed date. In the present case, given that flights had been suspended indefinitely, any extension of time would not be temporary nor, in truth, could it be said the agreement was in relation to a fixed date, as the date when flights (and hence extraditions) might resume was not known. He submitted that that problem could not be surmounted by a series of agreements. First, the Act only permitted one extension. Mr Jones relied upon the dicta of King J. at paragraph 36 of his judgment in *R (Neteczca) v Governor of Holloway Prison* [2015] 1 W.L.R. 1337 that it was arguable that there was no power to make a second or repeated agreement to extend time. Secondly, he submitted that, in fact, the series of agreements with fixed dates here was illusory as it was known and clear that extradition would be unlikely to be effected by that date.

39. In relation to issue 3, Mr Jones submitted that the agreement had to be made between the district judge and the issuing judicial authority (here the Romanian and Polish courts which issued the EAWs). It could not be agreed to by government departments or bureaux such as the SIRENE Bureaux. He submitted that there was no evidence that the issuing judicial authority had, in fact, agreed any extension with the district judge.

40. In terms of procedure, Mr Jones submitted that the common law principles of fairness required that a person subject to an extradition order be notified of an application to extend the time for extradition, and be given the opportunity to make representations at a hearing held in public. Further, notice of the result should be given. Alternatively, that was required by the provisions of CrPR Part 50. That had not happened in either of these cases and the detention, or the agreement to extend the time for detention, was unlawful. Alternatively, that resulted in detention being arbitrary and contrary to Article 5 of the Convention.

41. Ms Malcom, for the second interested party, submitted that habeas corpus was not an available procedure. The detention was authorised by the order made by the district judge pursuant to section 21(4) of the 2003 Act and that order was not replaced or superseded by an agreement relating to the date by which extradition had to be effected. Ms Malcolm submitted that the power conferred by section 35 of the Act, and Article 23 of the Framework Decision, permitted postponing extraditions for serious humanitarian reasons or where extraditions were prevented by circumstances beyond the control of any of the member states. Delays in extradition arising out of

the current coronavirus pandemic satisfied either or both of those criteria. In such cases, the power was not limited to any particular period. Rather, agreement might be reached for an extension that was the shortest reasonably possible in the circumstances.

42. In relation to issue 3, Ms Malcolm submitted that it was clear from the Operating Decision that the SIRENE Bureaux were simply a mechanism by which information from the relevant issuing judicial authority was exchanged with the executing judicial authority. The Romanian and Polish judicial authorities wished to postpone extradition because of the coronavirus crisis. That information was conveyed via the relevant SIRENE Bureau to the district judge, who agreed that the extradition could begin on a later, specified date. That was sufficient to satisfy the requirements of section 35(4) of the 2003 Act.

43. In relation to the procedure, Ms Malcolm submitted that section 35 of the 2003 Act involved agreement between the district judge and the judicial authority in the requesting state. The statute did not provide for notification to the individual of the request nor for participation in the process of considering a request. Common law principles of fairness did not require that such a process be grafted onto the statutory process, largely for the reasons given, obiter, by Richard L.J. in *Kasprazak v Warsaw Regional Court and others* [2011] EWHC 100 (Admin). Further, she submitted the provisions of the CrPR relied upon by the applicants do not apply to the process of the two judicial authorities reaching an agreement on a later starting date for the extradition period. Nor was there any breach of Article 5 of the Convention.

THE FIRST ISSUE – THE AVAILABILITY OF HABEAS CORPUS

44. The first question is whether habeas corpus is the appropriate procedure in this case. The writ of habeas corpus is available to determine the lawfulness of the detention by one person of another. It enables the court to enquire into the lawfulness of the detention and, if it is unlawful, to order the release of the person being detained. The fact that a person is detained by the lawful authority of a court is, however, a complete answer to a writ of habeas corpus. An order of a court authorising detention is, therefore, sufficient authority for the detention: see *Jane v Westminster Magistrates' Court* [2019] 4 W.L.R. 95 at paragraph 47.

45. Dealing first with the first applicant, the position is as follows. First, he is detained by the order of the district judge made at the conclusion of the extradition hearing that he "be remanded in custody to await extradition" pursuant to powers conferred by section 21(4) of the 2003 Act. That is the order justifying detention. That order is sufficient authority for his detention.

46. The first applicant, in truth, is seeking to challenge the agreement of the district judge to a later starting date for the extradition period in the exercise of power conferred by section 35(4) of the 2003 Act. The exercise of that power, however, deals with the machinery of implementing extradition. It is not an agreement providing the authority for the detention of the first applicant. Contrary to the submission of Mr Jones, that agreement does not replace or supersede the order made under section 21(4) of the 2003 Act and does not itself provide the authority for detention. Rather, it is an agreement dealing with the date of extradition. At most, if the agreement extending the period for extraditing the first applicant were quashed, that would enable him to

make an application that he be discharged under section 35(5) of the 2003 Act if the original period within which he should have been extradited had passed.

47. Secondly, and separately, the first applicant is seeking to establish that the agreement to extend the period for detention is unlawful at public law because it was not within the powers conferred by the 2003 Act or was procedurally improper. Such challenges are, however, ones that are to be brought by way of a claim for judicial review not an application for habeas corpus. That was the approach adopted by the Divisional Court in the recent decision of *Jane*. As Singh L.J., with whom Dingemans J., as he then was, agreed, observed:

> "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 [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 Justice, Ex p. Cawley [1997] QB 1* and to the *White Book* at para 54.1.5. Miss Powell has referred us to *R (Nikonovs) v Governor of Brixton Prison [2005] EWHC 2405 (Admin): [2006] 1 WLR 1518*, at para 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 W.L.R. 890, R v Secretary of State for the Home Department, Ex p. Muboyai [1992] QB 244 and R v Oldham justices, Ex p Cawley [1997] 1 Q.B. 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."

48. Singh L.J. then considered academic criticism of the case law and observations by Simon Brown L.J., as he then was. He concluded at paragraph 67 that:

> "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 *Gronowstajski*. Accordingly, I have come to the conclusion that the appropriate procedure in the present case is an application for judicial review and not habeas corpus."

49. We are bound by the decisions of the Court of Appeal, and we should follow the decision of the Divisional Court in *Jane*. For that second, separate, reason, the challenge to the lawfulness of the exercise of the power to agree a later starting date for the "required period" is not one that should be brought by way of an application for habeas corpus. The habeas corpus applications are, therefore, dismissed. It is appropriate, however, to direct that the first applicant's application be treated as an application for permission to apply for judicial review, pursuant to CPR 87.5(6). The grounds of claim are arguable and permission to apply for judicial review is granted. As indicated, the court heard full argument on the claim so that it is able to deal with the substantive claim in this judgment.

50. In relation to the second applicant, there is a further reason why an application for habeas corpus should be refused. The writ of habeas corpus is intended to provide a remedy where a person is in fact detained and the detention or custody is unlawful. The writ will not be granted when the person has ceased to be detained and is no longer in custody: see *Barnardo v Ford* [1892] A.C. 326. The second applicant was discharged on 22 April 2020 and is no longer in custody. Mr Jones correctly withdrew

the application for a writ. In this case it is not appropriate to direct that the application continue as a claim for judicial review, as such a claim is academic and will serve no purpose. The detention of the second claimant has been lawful throughout for the reasons given at paragraphs 46 to 47 above. Permitting a claim in relation to the agreement to extend the period for extraditing him cannot be a means of enabling him to challenge the lawfulness of the detention. Even if the extension agreement were found to be unlawful, it would at most lead to the extension of the extradition period being quashed. That would enable him to apply to be discharged under section 35(4), as the original period for extraditing him had passed. The applicant has already been discharged by the district judge (albeit under section 41) as the EAW had been withdrawn. In those circumstances, any claim for judicial review would be academic and serve no purpose. Permission to apply for judicial review would be refused in those circumstances. There is, therefore, no point in directing his application for habeas corpus be treated as an application for permission to apply for judicial review. The application that this court should give such a direction is, therefore refused.

THE SECOND ISSUE – GROUND 1 AND THE LAWFULNESS OF THE AGREEMENT TO EXTEND THE EXTRADITION PERIOD.

The Purposes for Which the Power to Agree an Extension of the Extradition Period May be Exercised

51. The next issue concerns the lawfulness of the agreement to extend the period for extraditing the first applicant. In general terms, the statutory regime is intended to ensure that extradition is carried out quickly once extradition has been ordered and all possible avenues of appeal have been exhausted. That is apparent from section 35(3) of the 2003 Act which provides that a person "must be extradited" before "the end of the required period". That is specified as a period of 10 days starting with the first day after the end of the period for giving notice of an application for leave to appeal or, if an application is made, when a decision refusing leave becomes final. Similar provisions require a person to be extradited within a period of 10 days after the conclusion of any appeal where leave to appeal is granted (see section 36(2) and (3) of the 2003 Act). Those provisions reflect the terms of Article 23(1) and (2) of the Framework Decision. That provides that a requested person "be surrendered as soon as possible" and "no later than 10 days after the final decision on the execution of the European arrest warrant".

52. There may, however, be occasions when it does not prove possible to extradite the individual within that period. These may be to do with circumstances beyond the control of the authorities in the states concerned and it may be necessary (as Article 23(3) of the Framework Decision recognises) for the judicial authorities to agree a new starting date for the 10 day period within which extradition must take place. An example may be the cancellation of the flight on which the person was to be returned (as occurred initially in relation to the second applicant).

53. As already stated, in the present case, the reason for the delay in extraditing the first applicant arises out of measures that have been taken to deal with the coronavirus pandemic.

54. The situation that has arisen does, in my judgment, give rise to serious humanitarian reasons justifying the postponement of extradition within the meaning of Article 23(4) of the Framework Decision. Mr Jones submitted that the serious humanitarian reasons had to arise in the state executing the EAW not in the state to which the person will be extradited. He submitted that that conclusion follows from the third sentence of Article 23(4) which refers to the executing judicial authority informing the issuing authority. Given the fact that the executing judicial authority is the one to give notice of the existence of serious humanitarian reasons, Mr Jones submits that that presupposes that the serious humanitarian reasons have arisen in the territory of the executing judicial authority. I do not consider that that is a correct interpretation of Article 23(4) of the Framework Decision.

55. The governing principle of Article 23(4) is that surrender may temporarily be postponed for serious humanitarian reasons. The wording of the article contemplates a state of affairs existing which justifies the postponement of surrender. There is no reason on the wording to indicate that the serious humanitarian reasons must have arisen in the territory of the executing rather than the issuing judicial authority. It is likely mostly that will be the case. That is likely to be why the Article goes on to state that the executing judicial authority must inform the issuing judicial authority. But for example, a serious epidemic confined to the requesting state might also easily satisfy this requirement. The provision is intended to ensure rapid notification and agreement on a new date. It is not intended to restrict or limit the triggering events to one state. Furthermore, such a construction would make no sense objectively. Article 23(4) is a general article dealing with potentially a wide range of situations. The suggestion that Article 23(4) was intended to permit the postponement of extradition if a virus caused the executing judicial authorities to request a postponement but not if the request came from the issuing judicial authorities is illogical and inimical to the purpose underlying Article 23(4) of the Framework Decision.

56. Furthermore, I would also regard the situation as falling within the scope of Article 23(3) of the Framework Decision. This is a situation where extradition is prevented by circumstances outside the control of the United Kingdom or any member state of the European Union. The need to suspend flights between countries arises because cessation of movement is seen by some countries as one of the few ways capable of contributing to stopping the spread of coronavirus. Romania has suspended flights to prevent people entering the country who may be infected (symptomatically or asymptomatically) with coronavirus and may, therefore, pass the infection to others. The need to take such steps to address the situation created by the coronavirus pandemic is entirely beyond the control of any state.

57. In general terms, therefore, agreeing to extend the period for extradition as a result of the steps taken to stem the coronavirus pandemic is within the purposes permitted both by section 35 of the 2003 Act and Article 23 of the Framework Decision.

Whether A District Judge May Agree More than One Extension of the Extradition Period

58. Mr Jones submitted that the district judge and the issuing authority can only agree one extension. First, the wording of section 35(4) of the 2003 Act does not contain any express limit to that effect nor is it implicit in the wording of the section. The starting point is that section 35(3) provides that a person must be extradited in the required period. That period is then defined 10 days from the day when the refusal of leave to

appeal to the High Court became final or from a later date agreed by the district judge and the issuing authority. There is nothing expressly, or impliedly, requiring that a later date can be agreed only once.

59. Secondly, the context of section 35(4) of the 2003 Act is one where there may reasonably be expected to be cases where the starting date for the extradition period may have to change on more than one occasion. Examples can readily be thought of. There may be cases where a requested person is ill and the extradition period has to be altered so that he is only extradited when medically fit to travel. Travel conditions in the issuing state may change, and change more than once, for example adverse weather conditions closing airports in a small state on more than one occasion. There is no apparent reason why the context indicates that the extradition period can be extended once and once only.

60. Thirdly, the Court of Justice accepted that there may be more than one agreement to change the surrender date in *Vilkas*. It is difficult to imagine any reason why Parliament would have intended that the power in section 35(4) of the 2003 Act was more narrowly confined (particularly bearing in mind that Part 1 of the 2003 Act is intended, at least in part, to give effect to the arrangements set out in the Framework Decision). For all those reasons, I do not consider that the decision of the district judge to agree, for a second or subsequent time, to a later starting date for the extradition period was for that reason only unlawful.

61. It is correct that other provisions of the 2003 Act expressly make clear that a specific power may be exercised more than once. Section 31(4) of the 2003 Act, for example, provides for the period for beginning the hearing of an appeal to be extended. It specifically provides that "this subsection may apply more than once". That subsection puts beyond doubt that that specific power may be exercised more than once. It is not conclusive of whether a different provision, differently expressed, conferred for a different purpose and operating in a different context can be used more than once. Furthermore, in relation to the observations of King J. in *R (Neteczca) v Governor of Holloway Prison* [2015] 1 W.LR. 1137, he expressed the view that it was arguable that there could only be one extension, although he noted that the issue did not arise on the facts of that case and the court had not heard argument on the issue. In the light of the full argument heard in this case, it is clear that section 35(4) of the 2003 Act 2003 does permit a district judge to agree on more than one occasion to a later starting date for the extradition period.

Whether the agreements were in substance an attempt to postpone extradition indefinitely rather than to a period starting with a specific date?

62. Mr Jones submitted that the agreement was unlawful as, in reality, it failed to fix a specific date. In the circumstances, extradition was likely to be postponed indefinitely given the indefinite suspension of flights to Romania.

63. In general, I agree that any agreement for an extension of the extradition period should be for as short a time as possible in the circumstances giving rise to the need for postponement of extradition. Furthermore, given that the restrictions on travel are temporary, or are being periodically reviewed, it is permissible to agree a later starting date for the extradition period and then, if extradition cannot be carried out within that period, agree a later starting date on a subsequent occasion. That is what happened

here. On 17 March 2020, the district judge agreed that that extradition could take place within 10 days starting from 14 April 2020. That was a time when the state of emergency declared in Romania on 16 March 2020 was due to last for 30 days. On 16 April 2020, the suspension on flights was extended for a further 14 days and was due to last until 2 May 2020. On about 21 April 2020, the district judge agreed a new, later starting date so that extradition should take place within 10 days from the 30 April 2020. It is not known whether the restrictions on flights will have been lifted or relaxed by the end of the extradition period or whether the difficulties continue. If the later, it would again be permissible for the district judge to agree a later starting date.

64. I do not consider that such an approach, or indeed a variant of that approach, is unlawful. It is consistent with the wording and purpose of the 2003 Act. It is consistent with the provisions of Article 23(4) of the Framework Decision which contemplates that extradition would take place as soon as the grounds, that is the serious humanitarian reasons, have ceased.

65. I would leave open the question of whether the agreed new date has to be a specific calendar date so that the extradition period runs for 10 days from that date or whether the extradition period could be agreed to be 10 days from a particular event occurring, e.g. 10 days from the lifting of the restrictions on flights to Romania. That is not what happened on this occasion. For completeness, I note that I do not consider that there is any substance in the submission that the agreement of a specific date in this case was illusory or intended to conceal the fact that extradition may need to be postponed again. The evidence indicates a considered decision to agree a new date reflecting the exigencies of the current crisis in an awareness that circumstances, and therefore the prospects for extradition, may change.

THE THIRD ISSUE – GROUND 2 AND THE EXISTENCE OF AN AGREEMENT

66. Mr Jones submitted in his skeleton argument that the evidence did not establish that the district judge had agreed a later starting date with the issuing judicial authority in Romania. He submitted that the e-mails initially produced to the applicants' lawyers indicated simply that a national body in Romania had informed the NCA that extraditions to Romania had been suspended indefinitely. He submitted that the later starting date was fixed by the district judge either of his own motion or following the suggestion by the NCA or the CPS.

67. It is understandable that those submissions were made at the time when the skeleton argument was prepared. Since that time, further documentation has been submitted. More significantly, the role of the SIRENE Bureaux, in the light of the Operating Decision and the SIRENE Manual, has been explained. It is clear that the SIRENE Bureaux in the respective countries are the means of facilitating the exchange of information between the issuing judicial authority in Romania and the district judge as the executing judicial authority in the United Kingdom. This was not a case of a national body in Romania simply notifying the NCA that flights had been suspended and the NCA passing on that information to the district judge who then acted unilaterally. The position is that the Romanian judicial authorities wish to postpone extraditions to a later date because of the current difficulties in effecting extradition arising out of the restrictions imposed to address the coronavirus pandemic. The district judge agreed to a later starting date for the 10 day extradition period, initially for a period starting with 14 April 2020 and subsequently starting with 30 April 2020.

That does amount to an agreement between the issuing and the judicial authorities that the extradition period should start at a later date for the purposes of section 35(4) of the 2003 Act.

THE FOURTH ISSUE – GROUND 3 AND THE APPROPRIATE PROCEDURE

68. As outlined above, Mr Jones submitted that common law principles of natural justice or procedural fairness, and specific provisions of the CrPR, required that the first applicant be notified of the request for an extension and be allowed to participate at a hearing to consider that request.

The Position under the Statute and at Common Law

69. First, the statute provides for extradition within a relatively short period of 10 days from the final determination of any application for permission to appeal (or any appeal). Section 35(4) of the 2003 Act provides for the issuing and executing judicial authorities to agree a later starting date for that 10 day period. The statute contains no requirement that the extraditee should be notified of any request for an extension of the extradition period, or that he should be enabled to participate in the process leading to agreement between the two judicial authorities. That is in marked contrast to other provisions of the 2003 Act which do specifically confer rights on the individual. Section 7, for example, requires the individual be brought before an appropriate judge after arrest. Section 8 requires the appropriate judge to fix the date on which the extradition hearing is to begin and specifically requires the appropriate judge to inform the person about certain matters such as the contents of the EAW.

70. Secondly, there is nothing in the context in which such requests occur to indicate that the statutory procedures need to be supplemented by requiring notification to the individual. Agreements arise after the conclusion of the extradition hearing and the making of the extradition order. They are not part of the process of considering whether or not a person should be extradited, or an appeal allowed. A request for an extension of the extradition period does not involve anything resembling litigation between parties, still less litigation between the requested person and either the issuing or the executing judicial authority.

71. Thirdly, no unfairness will arise out of the fact that the process of considering a request for an extension does not involve notification to or participation by the requested person. He will remain subject to the extradition order and will continue to be remanded either in custody or on bail as before. Significantly, he has remedies available in the light of any extension of the extradition period. First, he may apply for judicial review if he considers that the exercise of the power to agree a later starting date is unlawful. That claim, if successful, could result in the quashing of the extension of the extradition period, leaving the individual free to apply for discharge under section 34(5) of the 2003 Act on the grounds that the authorities have not complied with the obligation to extradite him within the original extradition period. Secondly, if in custody, he may apply for bail under section 21(5) of the 2003 Act. If, for example, the person was to be extradited to face a criminal trial, he can apply on the basis that remand in custody has become disproportionate as he will now spend longer in custody as a result of the delay in extraditing him. He may wish to contend that the risk of absconding has altered, given that he may be unable to travel to other countries or will be subject to restrictions in this country. Those would be matters for

a district judge to assess. Thirdly, the individual can apply under CrPR 50.27 to reopen the refusal of permission to appeal (or any decision on appeal) if he considers that it is necessary for the court to reopen the decision to avoid injustice. The individual who wishes to claim, for example, that the delay, and later extradition, would now mean that extradition would not be compatible with his rights under Article 3 or 8 of the Convention (by reason of changes in his circumstances or changes in prison conditions in the state to which he will be returned) may make an application under CrPR 50.27 if the requirements of that rule permit.

72. For those reasons, the common law principles of procedural fairness do not require the supplementation of the statutory process by grafting on a requirement that the individual be notified of any request or be permitted to participate in the consideration of that request for agreement.

73. In *Kasprzak*, Richards L.J., gave guidance, obiter, on the nature of the process to be followed when an extension was requested. He was dealing with requests to the High Court under section 36 of the 2003 Act following an appeal, but he noted that the same considerations applied to requests under section 34. Richards L.J. concluded that there was no obligation to notify the individual of the request or to allow him to participate. He made the following observations, so far as relevant to this issue:

> "42. The first point to consider relates to the nature of the procedure for requesting the relevant court to agree to an extension of the required period. I refer here to a "request", arguably a more neutral term than "application", despite the fact that the requests made in each of the cases before me was expressed as an application. Mr Hardy objected even to the term "request", submitting that all that is needed is some form of contact between the issuing judicial authority and the relevant court with a view to agreement on a later date, and that in reality it is the *executing* judicial authority that needs an extension of the period where removal cannot be effected within the original period. As I see it, however, the reality in each of the cases before me is that the *issuing* judicial authority requested the court to agree to an extension because of difficulties on their side in relation to the removal of the person to be extradited, and I do not think that use of the term "request" is misleading or inappropriate.
>
> 43. A request may be made during the currency of the appeal proceedings but does not have to be made at that point and is much more likely in practice to arise at a later date, when the proceedings are at an end and some difficulty has arisen in effecting removal. That was the position in all the cases before me, in each of which the request was made at a time when the decision of the High Court had become final, the Part 1 warrant was "disposed of" (see s.213(1)(c) of the 2003 Act) and the stage that had been reached was essentially that of making administrative arrangements for removal pursuant to the extradition order. Such a request cannot therefore be accommodated within the procedures governing extradition

> appeals. It has a *sui generis* character, independent of any extant legal proceedings.
>
> 44. I see some attraction in Mr Hardy's submission that no formal procedure is required at all — that nothing is needed beyond informal contact and agreement between the issuing judicial authority and the relevant court, pursuant to the obligations of judicial co-operation on which the Framework Decision is based. Neither article 23 of the Framework Decision nor s.36 of the 2003 Act seems to contemplate any particular formality in relation to the process. On balance, however, I think that it must be open to a Member State to regularise and formalise the process by providing, for example, for such requests to be made and agreement to be given in a prescribed manner.
>
> 45. That said, I do not think that such requests can be treated as being made under the existing CPR Part 23. Part 23 is directed towards applications in the context of civil claims, albeit an application can be made in certain circumstances before a claim has been started. The general rule, in rules 23.3 and 23.4, is that an applicant must file an application notice (defined by rule 23.1 as "a document in which the applicant states his intention to seek a court order") and must serve the application notice on the respondent (defined by rule 23.1 as "(a) the person against whom the order is sought, and (b) such other person as the court may direct"), with various detailed provisions about notice periods and the like. None of this seems apposite in relation to a request to the relevant court to agree to a later date under s.36(3)(b) of the 2003 Act, which is not made in the context of a claim or *inter partes* litigation, whether actual or prospective, and does not seek a court order *against* anyone. It is true that if the court agrees a later date this is generally recorded in a formal order, but that seems to me to be a matter of convenience and good sense rather than a legal necessity. In principle, the court's agreement could be given in the form of a letter."

74. In relation to the question of participation, Richards L.J. said, obiter, at paragraph 49 of his judgment in *Kasprzak,* that

> "49…. I do not think that there is any right on the part of the requested person to be heard or to make representations, though the court can invite such representations if it considers that fairness so requires. The passage in *Szlanny* about the requested person being subject to the constant protection of the court was in fact contained in a summary of the submissions made on behalf of the issuing judicial authority (para 16), but in any event the protection of the court is assured by the procedure outlined by Collins J. Practical considerations also militate against there being any right on the part of the requested person

> to participate in the procedure: one is generally concerned with relatively short extensions, asked for at short notice. My views on this issue also feed back into my reservations about the applicability of CPR Part 23 to a request of this kind."

75. I agree with those observations. They reinforce the conclusion that there is no requirement as a matter of common law that the person subject to the extradition order be notified of the request for an extension of time and no entitlement for him to participate in the consideration of that request.

The CrPR

76. Mr Jones submits that the provisions of the CrPR apply and require notification and the opportunity to make representations at a hearing. He relies on the fact that CrPR Part 1.3 provides that a court exercising any power must further the overriding objective and CrPR Part 2.1(b) provides that the CrPR applies to courts dealing with extradition matters. He relies in particular upon CrPR Part 50.3(1) which requires the magistrates court to exercise its powers at a hearing in public and Part 50.3(6) which requires the court to give a party an opportunity to make representations. He referred to other provisions including CrPR Parts 3 and 50.17.

77. The district judge is exercising a statutory power to agree a later starting date for the extradition period under section 35(4) of the 2003 Act. I assume, in general, that relevant material provisions for the CrPR could apply to the exercise of such a power. The relevant question is whether any applicable provision requires consideration of any request to be notified to the individual, considered at a hearing and with the opportunity of the individual to participate.

78. CrPR Part 50.3 is contained within a section headed "Extradition Proceedings in a Magistrates' Court". It provides, so far as material, that:

> "50.3.— Exercise of magistrates' court's powers
>
> (1) The general rule is that the magistrates' court must exercise its powers at a hearing in public, but—
>
> (a) that is subject to any power the court has to—
>
> (i) impose reporting restrictions,
>
> (ii) withhold information from the public, or
>
> (iii) order a hearing in private; and
>
> (b) despite the general rule the court may, without a hearing—
>
> (i) give any directions to which rule 50.4 applies (Case management in the magistrates' court and duty of court officer), or

(ii) determine an application which these Rules allow to be determined by a magistrates' court without a hearing in a case to which this Part does not apply.

(2) If the court so directs, a person must attend a hearing by live video link.

(3) Where the defendant is absent from a hearing—

(a) the general rule is that the court must proceed as if the defendant—

(i) were present, and

(ii) opposed extradition on any ground of which the court has been made aware;

(b) the general rule does not apply if …..

(4) The court may exercise its power to adjourn—

(a) if either party asks, or on its own initiative; ….

(5) The court must exercise its power to adjourn if informed that the defendant has been charged with an offence in the United Kingdom.

(6) The general rule is that, before exercising a power to which this Part applies, the court must give each party an opportunity to make representations, unless that party is absent without good reason.

(7) The court may—

(a) shorten a time limit or extend it (even after it has expired), unless that is inconsistent with other legislation;

(b) direct that a notice or application be served on any person;

(c) allow a notice or application to be in a different form to one set out in the Practice Direction, or to be presented orally.

(8) A party who wants an extension of time within which to serve a notice or make an application must—

(a) apply for that extension of time when serving that notice or making that application; and

(b) give the reasons for the application for an extension of time."

79. The provisions, read in context, are dealing with the conduct of proceedings before the magistrates' court. They presuppose that there are active proceedings involving a defendant. On their face, the provisions are not applicable to consideration by the district judge of a request from the issuing judicial authority to agree a later date for the required period. That agreement does not occur as part of the procedure leading up to the making of an extradition order. It occurs after the conclusion of the extradition hearing. For the reasons I have given, it does not involve any adjudication on any right of the individual concerned. As Richards L.J. observed in *Kasprzak*, albeit in the context of considering the applicability of the Civil Procedure Rules, consideration of a request for agreeing a later start date for the extradition period "has a *sui generis* character independent of any extant legal proceedings". The observation is equally applicable to the CrPR.

80. In the circumstances, therefore CrPR Part 50.3 does not require the district judge to consider exercising the power to agree a later start date at a hearing in public at which the individual has the opportunity to make representation. None of the other provisions of the CrPR relied upon could reasonably be read as requiring notification of a request to the individual or participation by him in the process of considering the request

Article 5 of the Convention

81. Although reliance was placed on Article 5 of the Convention, nothing in the process governing extradition, or the making of the practical arrangements for implementing extradition, involves any breach of Article 5. That provides, so far as material, that:

> "Everyone has the right to life, liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …..
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

82. Here, the first applicant was detained pursuant to an order made under section 21(4) of the 2003 Act following the conclusion of the extradition hearing. The extradition hearing was conducted in accordance with the relevant provisions of the 2003 Act and the CrPR. The first applicant was able to and did participate in that hearing. The detention was lawful and was not arbitrary. The arrangements for giving effect to the extradition order do not involve any unlawful detention. They are conducted according to law, in particular, the provisions of section 35 of the 2003 Act and the Framework Decision. There is protection available to ensure that any individual's detention does not continue longer than necessary including the ability to apply for release on bail and the ability to seek judicial review of the decision to agree a later start date for the extradition period. There is, therefore, no breach of Article 5 of the Convention.

Generally

83. There is one further matter and that concerns notification to the individual of the agreement that the 10 day extradition period is to start at a later date. The validity of that agreement does not depend upon notification to the individual subject to the extradition order. This is not a case such as *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 A.C. 604 whereby the validity of a decision refusing an application made by an individual (there, an application for asylum) depends upon notification of the decision to the individual applicant.

84. Nonetheless, for the reasons given by Irwin LJ, I consider that it is good practice that an individual be notified that an agreement has been reached on a later start date for the extradition period.

CONCLUSION

85. I would dismiss the applications for habeas corpus. The applicants were lawfully detained pursuant to the order of the district judge made under section 21(4) of the 2003 Act. The first applicant's application is to be treated as an application for permission to apply for judicial review. I would grant permission but dismiss the claim. In my view, the district judge lawfully exercised his power to agree to a later starting date for extradition period because of the difficulties in extraditing the first applicant to Romania given the restrictions imposed to deal with the coronavirus pandemic. The first applicant was not entitled to be notified of the request to agree a later staring date or to participate in consideration of that request.

IRWIN LJ:

86. I agree, and for the reasons given by Lewis J, I would dismiss the application for habeas corpus by the first applicant. I would grant permission to him to apply for judicial review, but dismiss the substantive application. As to the second applicant, I would dismiss both the application for habeas corpus, and that for permission to apply for judicial review.

87. However, I wish to add some observations as to the practice to be followed in the current exceptional circumstances.

88. The whole system of European Arrest Warrants was designed and intended to achieve rapid extradition. Normally, any delay in the process of removal after the conclusion of extradition proceedings has been limited. As Lewis J has observed, the process of agreement is normally engaged to accommodate such eventualities as a cancelled military flight, fog at an airport and so forth. For such short delays, it is entirely comprehensible that the system should be as it is.

89. It also seems to me that somewhat longer delays than those which normally arise will provide no difficulties in most cases. As the Interested Party emphasised in argument, when such an agreement arises, the legal processes are complete, and in practical terms the upshot will be that the Requested Person will spend somewhat longer in custody in England, rather than in custody abroad, or indeed will simply have to wait rather longer in England on bail. However, there will be cases of more difficulty.

90. In addition, the current exceptional circumstances introduce the prospect of considerable delay, uncertain in extent. There may be cases where there are good grounds for a renewed application for bail, or more rarely, for an application for an appeal to be re-opened. I should not be understood as suggesting this will be commonplace, even under current conditions.

91. Nevertheless, under these conditions there is in my view a clear argument for two amendments to historic practice. Firstly, the Requested Persons affected by an agreement to extend the required period should be notified of the extension by the Court. Secondly, such persons should have continued access to representation, so that they can be properly advised as to whether there may be a valid basis for making one or other of the applications we have indicated. The point as to notification was made by Richards L.J. at paragraph 50 of his judgment in *Kasprzak*, and in terms which suggested a system of notification was in place:

> "50. Although there is in my view no entitlement to be notified of the request or to be heard in relation to it, it seems to me that fairness and good administration require that the extraditee be informed of any extension agreed by the relevant court, since it bears directly on his right to apply for discharge under s.36(8) if extradition has not been effected before the end of the required period. It is wasteful and undesirable for a person to be informed for the first time of an extension only by way of defence to an application under s.36(8). I understand that the existing practice is for the court to send a copy of the court's order recording the extension to the extraditee as well as to the CPS. That seems to me to be sufficient. I do not consider it necessary for the CPS to serve on the extraditee copies of the written request and supporting material submitted to the relevant court. The exceptional disclosure made by the CPS in this case (para 3 above) does not have to become the norm."

92. I agree with those observations. The responsibility for ensuring that notice is given to the person subject to the extradition order is, in my view, that of the magistrates' court. It is the district judge who is agreeing the extension of the extradition period. That court will need to make appropriate arrangements to ensure that the individual is notified of the agreement.

93. I turn to representation. In this case, the applicants were able to obtain legal advice and representation from Mr Jones Q.C. and others acting *pro bono*, that is acting unpaid and in the public interest. I commend the lawyers for acting in that way. It is in the best spirit and tradition of the English bar and the solicitors' profession. However, it will not be possible for litigants in all cases to obtain free legal representation, nor is it reasonable to expect legal representatives to act *pro bono* in all such cases.

94. We have not been addressed in detail on the position relating to legal aid. We were told that representation orders granting legal aid may in fact continue in force after the extradition hearing and while the individual is remanded in custody, or on bail pending extradition. There may be practical difficulties in that solicitors are required to submit a bill for fees within three months of the last piece of work undertaken.

That is, usually, the advice given after the extradition hearing (or any appeal). We consider that it would be beneficial if consideration could be given to making the necessary practical arrangements, or amendments to any relevant rule, to enable legal advice and representation to be available in respect of any issue arising out of an agreement to a later starting date for the extradition period. Common sense suggests that might be achieved as simply as extending the period within which the bill for fees must be submitted.