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Neutral Citation Number: [2020] EWHC 1219 (Admin)

Case No: CO/1426/2020

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: 15/05/2020

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

MARIAN VERDE **Applicant**

- and -

THE GOVERNOR OF HMP WANDSWORTH **Defendant**

- And -

(1) WESTMINSTER MAGISTRATES' COURT

(2) JUDGE OF INSTRUCTION'S OFFICE, HOLLAND

Interested Parties

- -

Alun jones Q.C., Martin Henley and Samantha Davies (instructed by **AM International Solicitors**) for the **Applicant**
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 dates: 28 April 2020

- -

Approved Judgment

THE HONOURABLE MR JUSTICE LEWIS:

INTRODUCTION

1. This is an application for habeas corpus or, in the alternative, for a direction that it 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 applicant, Marian Verde, also known as Marian Stan, is subject to a European Arrest Warrant ("EAW") issued by the judicial authorities in Holland. He consented to be extradited at a hearing before a district judge sitting in the Westminster Magistrates' Court on 13 March 2020. The district judge, therefore, ordered that he be extradited to Holland. He refused bail and remanded the applicant in custody pending extradition. The applicant is currently detained in Her Majesty's Prison Wandsworth awaiting extradition.

3. The applicant had to be extradited within a period of 10 days from the making of the extradition order or, if the district judge and the judicial authority issuing the EAW agreed a later date, 10 days from that later date: see section 47(2) and (3) of the Extradition Act 2003 ("the 2003 Act"). Due to restrictions imposed as a result of the coronavirus pandemic, it has not been possible to extradite the first applicant to Holland. A district judge has, on three occasions, agreed that the 10 day extradition period start from a later date. Extradition is currently due to take place within 10 days from 30 April 2020.

4. The applicant submits that his continued detention is unlawful for two reasons. First, he submits 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 Holland is suspended indefinitely, the district judge could not lawfully agree extensions of the extradition period. Secondly, , he submits 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 issues are materially similar to those recently considered by the Divisional Court in *Cosar and others v Governor of HMP Wandworth and others* [2020] EWHC 1142 (Admin) save that, in that case, the applicants had sought to appeal against the extradition order rather than consented to extradition

THE FACTS

The Applicant's Arrest and Detention

5. The applicant is a Romanian national. He was convicted in Holland of two offences, one of theft and one of attempted theft. That resulted in a sentence of six months' imprisonment of which the applicant has 161 days to serve. On 5 March 2019, the Dutch authorities issued an EAW in the name of Marian Stan, seeking his extradition to Holland. On 24 December 219 that EAW was certified by the National Crime Agency ("NCA").

6. On 8 January 2020, the applicant was arrested in London for an offence of attempted theft committed in England. On 9 January 2020 he was sentenced to 16 weeks' imprisonment. The applicant was also arrested on that date under the EAW in respect of the conviction for the offences committed in Holland. He was brought before an appropriate judge on the same day. Bail was refused and the applicant was remanded in custody. The case was adjourned under section 8B of the 2003 Act because the applicant had already been sentenced to 16 weeks in custody for the domestic offence.

7. On 4 March 2020, the applicant appeared before a district judge. At that stage, he refused to consent to extradition. He contended that there was a statutory bar to extradition in that the EAW did not comply with the requirements of section 2 of the 2003 Act and that extradition would be incompatible with his rights under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case was adjourned to an extradition hearing on 30 April 2020. As the custodial element of the sentence for the offence committed in England had passed, it seems that the district judge remanded the applicant in custody under section 8 of the 2003 Act.

8. On 13 March 2002, the applicant again appeared before a district judge. He consented in writing to extradition under section 45 of the 2003 Act. It is said on his behalf that he believes that he will have a better chance of obtaining parole or otherwise not having to serve his sentence in custody in Holland. No basis for that belief is given. The district judge ordered that the applicant be extradited. He also ordered that the applicant be remanded in custody pursuant to section to section 46 of the 2003 Act. The material part of the order said this:

> "to be held in custody to await extradition to the Netherlands".

9. A custody warrant was also issued to the Governor of HMP Wandsworth in respect of the applicant. It is dated 13 March 2020 and records the fact that Mr Marian Verde has consented to extradition to the Netherlands. It includes the following direction:

> "**Direction**
>
> The person shall be taken to the above prison establishment and held in custody and delivered in due course of law, and is to be held in custody until he is extradited under the Extradition Act 2003 or conveyed to the said territory to which the person is to be extradited under the Extradition Act 2003."

10. Mr Jones Q.C. for the applicant criticised aspects of that warrant but accepted that none of the alleged defects affected the validity of the warrant.

11. Pursuant to section 47(2) and (3) of the 2003 Act, the applicant had to be extradited within 10 days of the making of the extradition order, 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 Holland

12. Holland, in common with other states in Europe, have experienced difficulties and disruption to normal life as a result of the coronavirus pandemic. Information on the

situation in Holland appears from information provided by Holland (and other states) to the Council of the European Union on the impact of the spread of Covid-19 on judicial co-operation in the European Union. The execution of EAWs has not been suspended. Surrenders using transport over land are possible between Holland and neighbouring countries, namely Belgium and Germany. The number of flights leaving and arriving in Holland are very limited and no surrenders of persons are being carried out by air at present. In response to a specific question posed, Dutch 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/JHA0of 13 June on the European arrest warrant and the surrender procedures between member states ("the Framework Decision").

13. At the hearing, the question arose as to the possibility of a transfer of the Applicant from the United Kingdom via France (by land or sea) and then by land from France via Belgium to Holland. I was told that this was not possible because of staffing problems and the difficulties in satisfying any requirements that the applicant and guards escorting him be placed in quarantine, or self-isolate, in the various countries. Furthermore, any transit through France and Belgium would be subject to the provision of information to each of those states in accordance with Article 25 of the Framework Decision.

The Extradition of the Applicant

14. On 18 March the NCA were informed by the Dutch SIRENE Bureau that a request had been made to extend the extradition period due to operational problems arranging flights as no flights were available on 19 or 20 March 2020. The request came from the Dutch issuing judicial authorities and was communicated via the Dutch and United Kingdom SIRENE Bureaux to the Westminster Magistrates' Court. The SIRENE Bureaux are bodies set up to manage the exchange of information between judicial authorities in different states. The operation of the SIRENE system is described in *Cosar and others v Governor of HMP Wandsworth* [2020] EWHC 1142 (Admin) at paragraph 10. The request was considered by a district judge at Westminster Magistrates' Court on 19 March 2020 who agreed that the 10 day period for extradition should start on 22 March 2020.

15. On 19 March 2020, a further communication was received by the NCA from the Dutch SIRENE Bureau that due to the Covid-19 virus, all transfers were on hold until 6 April 2020. The matter was considered by the Senior District Judge in the Westminster Magistrates' Court on 26 March 2020 and the judge agreed that the 10 day extradition period should start on 6 April 2020.

16. The NCA then received a further communication from the Dutch SIRENE Bureau notifying them that because of the Covid-19 crisis many flights had been cancelled and the transfer of the applicant had proved impossible. A further postponement was requested until after the lockdown in London was lifted. On 14 April 2020, a further communication was received from the Dutch SIRENE Bureau noting that it had not been possible to arrange a flight and requesting that the judicial authority in the United Kingdom to extend the surrender period. The matter was put before the district judge. It is unclear whether the district judge was told of both communications or only

one (and, if so, which one). In any event, a district judge did consider the matter on 15 April 2002 and that judge agreed that the 10 day extradition period would start on 30 April 2020. The applicant has remained in custody in HMP Wandsworth throughout.

The Current Proceedings

17. The applicant issued proceedings for habeas corpus contending that his detention in HMP Wandworth was unlawful. Alternatively, he sought a direction that the application be treated as an application for permission to apply for judicial review of the decision to agree an extension of time. The applicants were represented by Alun Jones Q.C., Martin Henley and Samantha Davies acting pro bono. The second interested party was represented by Helen Malcom Q.C. and Saoirse Townshend. I am grateful to counsel for their submissions. The defendant is the Governor of HMP Wandsworth. He filed an acknowledgement 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 28 April 2020. It was a public hearing in that persons had access to a link and could (and a number of persons, including a newspaper journalist did) observe proceedings

THE LEGAL FRAMEWORK

The 2003 Act

18. 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 Holland, are designated as category 1 territories to which Part 1 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.

19. 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 will fix a date for an extradition hearing and determine whether to remand the person in custody or on bail (see sections 7 and 8 of the 2003 Act). In the present case, as the applicant was already in custody serving a sentence of imprisonment for an offence committed in the United Kingdom, section 8B of the 2003 Act applied. Section 8B(2) provides that:

> "(2) The judge may order further proceedings in respect of the extradition to be adjourned until the person is released from detention pursuant to the sentence (whether or licence or otherwise)."

20. The applicant's case was adjourned to 4 March 2020. At that stage, the applicant did not consent to extradition but contended that the EAW did not comply with the requirements of section 2 of the 2003 Act and that extradition would be incompatible with his rights under Article 8 of the Convention. The district judge on that occasion fixed the extradition hearing for 30 April 2020 to deal with those issues.

21. On 13 March 2020, the applicant appeared before a district judge again. On that occasion, he consented to being extradited to Holland. The relevant provision governing consent is section 45 of the 2003 Act. There are safeguards for the individual. He must have legal representation in the form of counsel or a solicitor or

been informed of his right to apply for legal aid but has refused to apply or been refused it. Consent must be given before the district judge and be recorded in writing.

22. Section 46 of the 2003 Act governs the procedure for making a consent order and remanding a person in custody or bail in cases of extradition following consent. The section provides as follows:

> "**46 Extradition order following consent**
>
> (1) This section applies if a person consents to his extradition under section 45.
>
> (2) The judge must remand the person in custody or on bail.
>
> (3) If the person is remanded in custody, the appropriate judge may later grant bail.
>
> (4) If the judge has not fixed a date under section 8 on which the extradition hearing is to begin he is not required to do so.
>
> (5) If the extradition hearing has begun the judge is no longer required to proceed or continue proceeding under sections 10 to 25.
>
> (6) The judge must within the period of 10 days starting with the day on which consent is given order the person's extradition to the category 1 territory.
>
> (7) Subsection (6) has effect subject to sections 48 and 51.
>
> (8) If subsection (6) is not complied with and the person applies to the judge to
>
> be discharged the judge must order his discharge."

23. There are provisions governing the time within which the person must be extradited. Section 47 of the 2003 Act provides:

> "**47 Extradition to category 1 territory following consent**
>
> (1) This section applies if the appropriate judge makes an order under section 46(6) for a person's extradition to a category 1 territory.
>
> (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 order is made, 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.
>
> (4) If subsection (2) is not complied with and the person applies to the judge to be discharged the judge must order his discharge, unless reasonable cause is shown for the delay.
>
> (5) If before the person is extradited to the category 1 territory the judge is informed by the designated authority that the Part 1 warrant has been withdrawn—

(a) subsection (2) does not apply, and

(b) the judge must order the person's discharge."

24. Materially similar provisions apply in cases where the applicant does not consent to extradition but an order for extradition is made at an extradition hearing. A person must be extradited within a period of 10 days starting from the date of refusal of permission to appeal, or, if permission has been granted, the final conclusion of the appeal: see sections 35 and 36 of the Act. It was section 35(3) and (4) of the 2003 Act which was in issue in *Cosar and others v Governor of HMP Wandsworth* [2020] EWHC 1142 (Admin).

The Framework Decision

25. 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 person 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 released provisionally so long as the member state takes all measures deemed necessary to prevent absconding. Article 13 of the Framework Decision deals with the procedure where the arrested person consents to extradition. Other provisions deal with the situation where the person does not consent. 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."

26. The scope of Article 23 has been considered by the Court of Justice of the European union in Case C-640/15 *Criminal Proceedings concerning Vilkas* [2017] 1 W.L.R. 69, discussed in *Cosar* at paragraph 35. I was not addressed on the relationship between the Framework Decision and the 2003 Act. In essence, 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 effects 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

27. Against the background of the application, and the written and oral submissions, the following issues arise:

(1) Should the application have been brought by way of a claim for judicial review rather than an application for habeas corpus?;

(2) Is it appropriate now to direct that the application continue as an application for permission for judicial review of the decision of the district judge agreeing to extend the extradition period on the grounds that the extension is unlawful as:

(a) the 2003 Act does not permit the district judge to agree more than one extension of the extradition period or, alternatively, it only permits agreement to short extensions of time whereas the current extensions are in substance indefinite and open ended given the suspension of air travel and that principle could not be undermined by a succession of extensions where it is obvious that extradition cannot take place for several months at least (ground 1)?; or

(b) the applicant was not given notice of the request to extend time, and was not represented or able to make submissions at a hearing to consider the request, and was not notified of the decision to agree to extend time (ground 2)?

Submissions

28. Mr Jones, for the applicant, contends firstly that an application for habeas corpus is, in principle, available as the applicant seeks to challenge the lawfulness of his detention. He is 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 any earlier order for detention. Alternatively 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 applicant to obtain a ruling on the lawfulness of his detention.

29. In terms of substance, Mr Jones submitted that the power conferred by section 47 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 agreement 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 and 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.

30. 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.

31. 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 46 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 carried out. Ms Malcolm submitted that the power conferred by section 47(3) of the 2003 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 difficulties created by the current coronavirus pandemic satisfied either 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.

32. In relation to the procedure, Ms Malcolm submitted that section 47 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 grated 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

33. 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 any 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 *Cosar v Governor of HMP Wandwsworth* [2020] EWHC 1142 (Admin) at paragraph 44 and *Jane v Westminster Magistrates' Court* [2019] 4 W.L.R. 95 at paragraph 47.

34. The position is as follows. First, the applicant 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 46(2) of the 2003 Act. That is the order justifying detention. That order is sufficient authority for his detention.

35. The 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 47(3) 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 46(2) 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 47(4) of the 2003 Act if the original period within which he should have been extradited had passed.

36. In that regard, the position is identical to that in *Cosar*. There, the applicant had not consented to extradition but an order for extradition had been made at the conclusion of the extradition hearing. The district judge also remanded the applicant in custody pursuant to section 21(4) of the 2003 Act 2003. Extradition should have been carried out within 10 days of the decision of the High Court refusing permission to appeal. The district judge agreed to a later starting date for the extradition pursuant to section 35(5) of the 2003 Act which is in materially identical terms to section 47(3) of the 2003 Act in the present case. The Divisional Court held that the applicant's detention was lawful. He was detained pursuant to a lawful order of the district judge made pursuant to section 21(4) of the 2003 Act. The agreement made under section 35(4) of the 2003 Act did not itself provide authority to detain. It dealt only with the time limits for carrying out extradition.

37. 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 *Jane v Westminster Magistrates' Court* [2019] 4 W.L.R. 95. 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. "

38. 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."

50 That approach was followed by the Divisional Court in *Cosar*. I am bound by the decisions of the Court of Appeal and I should follow the decisions of the Divisional Court in *Jane* and *Cosar*. For that second, separate, reason the challenge to the lawfulness of the exercise of the power to agree a later starting date for the extradition period is one that is to be brought by way of a claim for judicial review not an application for habeas corpus. The habeas corpus application is, therefore, dismissed.

THE SECOND ISSUE – SHOULD THE PROCEEDINGS PROCEED BY WAY OF A CLAIM FOR JUDICIAL REVIEW?

51 A court has power to direct that an applicant's application be treated as an application for permission to apply for judicial review pursuant to CPR 87.5(6). That course will, generally, not be appropriate where the grounds of claim are not arguable and permission to apply for judicial review would be refused in any event.

52 In the present case, the two grounds of claim are identical to grounds which have already been fully considered by the Divisional Court in *Cosar*. There, the court held that a district judge can agree a later starting date for the extradition period in circumstances where extradition cannot be carried out because of circumstances arising out of the current coronavirus pandemic. That constitutes both serious humanitarian reasons justifying postponement of extraditions and also amounts to a situation where extradition is prevented by circumstances beyond the control of any member state. Agreeing a later date for the starting of the extradition period for either, or both, of those reasons is permitted by section 35(4) of the 2003 Act. It is in accordance with Article 23(3) and (4) of the Framework Decision. The Divisional Court further held that the power to agree a later starting date could be exercised on more than one occasion.

53 The grounds of claim in the present case are the same. Section 47(2) of the 2003 Act, the relevant provision in the present case, is in materially identical terms to section 35(4) of the 2003 Act. The factual circumstances are, so far as relevant, materially similar. The restrictions in Romania, which were in issue in *Cosar,* and the position in Holland are different in some respects. There were no flights allowed between Romania and the United Kingdom. In the case of Holland, it seems that flights have not been suspended but there are, in fact, few flights operating because of the coronavirus pandemic and there no flights presently available to take the applicant to Holland. The essence of the problem is the same. The attempts to stop the spread of coronavirus had led to major difficulties in travel between states It is, consequently, not possible, at present, to arrange for the applicant to be extradited to Holland

because of the difficulties created by the coronavirus pandemic. It is also the case that the applicant in this case has consented to go to Holland and wants to be extradited unlike the applicant in *Cosar*. That, however, does not affect the power of the district judge to agree a later starting date for the extradition period when, in fact, it is not possible at present for the applicant to be extradited.

54 In terms of procedure, the Divisional Court has already held that a person subject to an extradition order does not have a legal entitlement to be notified of a request for an extension of the extradition period. Nor does he have a right to make representations on the request at a hearing. Whilst it is good practice to inform a person of an agreement that the extradition period start at a later date, the validity of the agreement is not dependent on that. See *Cosar* [2020] EWHC 1142 (Admin) at paragraphs 83 and 91 to 92. There is no breach of Article 5 of the Convention. The applicant was detained in accordance with Article 5(f) as he was detained with a view to extradition. That was ordered following an extradition hearing held before a district judge on 13 March 2002) where the applicant had legal representation. The detention was lawful and not arbitrary. The arrangements governing the period within which extradition must be carried out are conducted in accordance with law, i.e. section 47 of the 2003 Act. There is protection to ensure that an individual's detention does not continue longer than necessary in that the applicant has the opportunity to apply for bail or seek judicial review of the decision to extend the extradition period. The applicant suggests in his written skeleton argument that there was in fact no agreement between the Dutch issuing judicial authority and the district judge; there was [merely notification by a Dutch national body that extraditions are suspended]. It is clear from the facts, and the way in which the SIRENE Bureaux operates (described in detail in *Cosar*) that the SIRENE Bureaux is a means of communication between relevant judicial authorities.

55 For those reasons, it is clear that the grounds of claim are not arguable. They have already been determined by the Divisional Court in *Cosar*. In those circumstances, it is not appropriate to direct that the application proceeds as an application for permission to apply for judicial review as permission would be refused in any event.

CONCLUSION

56 The application for habeas corpus is dismissed. The applicant is lawfully detained pursuant to the order of the district judge made under section 46(2) of the 2003 Act. The application to direct that it be continued as an application for permission to apply for judicial review is refused. The Divisional Court has already concluded that a district judge may lawfully exercise the power to agree to a later starting date for extradition period because of the difficulties in extraditing persons arising out of the coronavirus pandemic. The Divisional Court has also held that a person subject to an extradition order is not entitled to be notified of the request to agree a later staring date or to participate in consideration of that request. There is no entitlement to be notified of any agreement fixing a later start date for the extradition period but good practice requires that an individual subject to an extradition order be notified of any such agreement. The proposed grounds of judicial review are not arguable. In the circumstances, there is no purpose in directing that the application continue as an application for permission to apply for judicial review.