Supreme Court of Ireland Decisions

Judgment

Title:	The Minister for Justice & Equality v Vilkas
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Composition of Court:	Clarke C.J., O'Donnell Donal J., McKechnie J., MacMenamin J., O'Malley Iseult J.
Judgment by:	McKechnie J.
Status:	Approved
Result:	Appeal allowed

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THE SUPREME COURT

[Supreme Court Appeal No. 2018/32]

[Court of Appeal Record Nos. 2015/445 and 2015/451]

[High Court Record Nos. 2014/81 EXT and 2014/115 EXT]

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.

O'Malley J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED
Between /
THE MINISTER FOR JUSTICE AND EQUALITY
Applicant/Respondent
-and-

TOMAS VILKAS

Respondent/Appellant

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 5th day of December, 2018

Introduction
1. These proceedings arise out of the issuing by a court in Lithuania of two European Arrest Warrants seeking the surrender of Mr Tomas Vilkas ("the appellant") to that country. He is wanted in that jurisdiction due to the circumstances later referred to (para. 15 *infra*). On the 9th July, 2015, the High Court made two orders pursuant to section 16(1) of the European Arrest Warrant Act 2003, as amended ("the 2003 Act"), ordering that the appellant be surrendered as requested. However, Mr Vilkas twice successfully frustrated his surrender to that State by refusing to board the commercial airline flights which were due to take him there.

2. At its core, this appeal raises a single issue relating to the interpretation of various subsections of section 16 of the 2003 Act. As explored in detail later in this judgment, where a requested person has not been surrendered within the time limits firstly prescribed, by that section, due to circumstances beyond the control of the State (meaning a *force majeure*), it is possible, pursuant to section 16(5)(a), to extend the time for surrender and to fix a new date for that purpose. Simply stated, the net point on this appeal is whether it is possible to so extend the time and fix a new date more than once, or whether instead the extension procedure is confined to a single occasion. The High Court held that it did not have jurisdiction to entertain an application for a second date, and so "discharged" the appellant.

3. The Minister for Justice and Equality ("the respondent") appealed that decision to the Court of Appeal, which referred two questions concerning the interpretation of Article 23 of the Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) to the Court of Justice of the European Union ("the CJEU"). One such question asked whether Article 23 contemplates or allows for the agreement of a new surrender date on more than one occasion. The CJEU answered that question in the affirmative, holding that the provision in question contains no express limitation on more than one renewal of the extension procedure: in so doing it looked to the purpose and goals of the Framework Decision in order to ascertain the meaning of Article 23. Having done so, the Court concluded that it would be contrary to the objectives of that Decision if only one extension period was permissible under that Article.

4. It is common case that one of the intentions of the Oireachtas in enacting section 16 of the 2003 Act was to transpose Article 23 of the Framework Decision. Following receipt of the opinion of the CJEU, the Court of Appeal held that the relevant subsections of section 16 can and should be given an interpretation which conforms with the construction of Article 23 as stated by the Court of Justice. Accordingly, more than one new surrender date could be set, provided of course that the pre-condition therefore,

namely the existence of *force majeure* is made out on each such occasion.

5. The appellant now appeals that finding to this Court and does so on the grounds upon which leave was granted (para. 47 *infra*). Although he accepts the judgment of the CJEU as binding in respect of the interpretation of Article 23 of the Framework Decision, it is his position that the clear, literal meaning of section 16 of the 2003 Act is that only one extension of the surrender procedure is possible, and that the words used in that provision cannot validly be interpreted as providing for multiple extensions. Needless to say the Minister stands over the decision of the Court of Appeal. This case therefore raises interpretative issues: more accurately, what limits are there to the principle of conforming interpretation, when construing a statute which seeks to transpose an EU Framework Decision. The end point of this appeal is of some considerable significance to the operation of the surrender procedure, in general.

6. As may be apparent, these proceedings have reached this Court via a rather circuitous route involving three hearings before the High Court, an appeal to the Court of Appeal, the preliminary reference to the CJEU and then the subsequent judgment of the Court of Appeal. The case was complicated somewhat further by the fact that another judgment of this Court delivered today also concerns the interpretation of section 16 of the 2003 Act, albeit different subsections thereof: see *Minister for Justice and Equality v. Piotr Pawel Skiba ("Skiba")* . That appeal also directly concerns the judgment of the CJEU in this, the *Vilkas* case. Similar residual issues arose in both appeals and for that reason the Court saw fit to permit the parties in *Skiba* to make submissions at the hearing of the within appeal. It follows that issues relating to the interpretation of section 16 are determined in both judgments, and to that extent they should be read together for a full understanding of the section. Having said that, the principal issues raised in each case are, for the most part, discrete and separate from each other.

7. Before moving to the background facts and procedural history of the case, it will be helpful to cite, at the outset, the provisions applicable to this appeal.

Legal Framework

Council Framework Decision on the European Arrest Warrant

8. The relevant enactment at EU level is Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA; Official Journal L 190, 18/07/2002), as amended by Council Framework Decision 2009/299/JHA ("the Framework Decision" or "F.D."). This was the instrument which established the EAW system. The EU's objective of becoming an area of freedom, security and justice led to the abolition of extradition between Member States and its replacement by a system of surrender between judicial authorities. A new simplified procedure for surrender was put in place by the Framework Decision with a view to removing the complexity and potential for delay inherent in the then-prevailing extradition procedures.

9. Paragraph 1 of Article 1 of the Framework Decision defines a European arrest warrant as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. Per Article 1(2), Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision. Article 12 provides that when a person is arrested on the basis of an EAW, the executing judicial authority shall take a decision on whether the requested person

should remain in detention, in accordance with the law of the executing Member State; the person may be released at any time in conformity with the domestic law of the executing Member State, provided that it takes all measures deemed necessary to prevent the person from absconding. In accordance with Article 15(1), the executing judicial authority shall decide, within the time limits and under the conditions defined in the Framework Decision, whether the requested person is to be surrendered.

10. The provision most relevant to these proceedings (and to the *Skiba* case) is Article 23 F.D., which provides, *inter alia* , for the time limits for the surrender of the person requested. It provides as follows that:

> "1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.
>
> 2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.
>
> 3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
>
> 4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European Arrest Warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
>
> 5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released."

This Article is also referred to in this judgment as "Article 23 F.D."

The European Arrest Warrant Act 2003

11. The Framework Decision is given effect in domestic law by the 2003 Act. The relevant provisions for present purposes are contained in section 16 thereof; they read as follows:

> "16. Committal of person named in European Arrest Warrant
>
> (1) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under s.13 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—
>
> (a) the High Court is satisfied that the person before

it is the person in respect of whom the European Arrest Warrant was issued,

(b) the European Arrest Warrant, or a true copy thereof, has been endorsed in accordance with s.13 for execution of the warrant,

(c) the European Arrest Warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012),

(d) the High Court is not required, under s.21A, 22, 23 or 24 (inserted by ss.79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(e) the surrender of the person is not prohibited by Part 3.

(2) Where a person does not consent to his or her surrender to the issuing state, the High Court may, upon such date as is fixed under section 14 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—

(a) the European Arrest Warrant, including, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012), is provided to the court,

(b) the High Court is satisfied that the person before it is the person in respect of whom the European Arrest Warrant was issued,

(c) the High Court is not required, under s.21A, 22, 23 or 24 (inserted by ss.79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(d) the surrender of the person is not prohibited by Part 3.

(2A) Where the High Court does not—

(a) make an order under subs.(1) on the date fixed under s.13, or

(b) make an order under subs.(2) on the date fixed under s.14,

it may remand the person before it in custody or on bail and, for those purposes, the High Court shall have the same powers in

relation to remand as it would have if the person were brought before it charged with an indictable offence.
(3) An order under subsection (1) or (2) shall, subject to section 18, take effect upon the expiration of 15 days beginning on the date of the making of the order or such earlier date as the High Court, on the application of the Central Authority in the State and with the consent of the person to whom the order applies, directs.

(3A) Subject to subsections (5) and (6), a person to whom an order for the time being in force under subsection (1) or (2) applies shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect in accordance with subsection (3).

(4) Where the High Court makes an order under subsection (1) or (2), it shall, unless it orders postponement of surrender under section 18—

(a) inform the person to whom the order relates of his or her right to make a complaint under Article 40.4.2Â° of the Constitution at any time before his or her surrender to the issuing state,

(b) order that that person be detained in a prison (or, if the person is not more than 21 years of age, in a remand institution) for a period not exceeding 25 days pending the carrying out of the terms of the order, and

(c) direct that the person be again brought before the High Court—

(i) if he or she is not surrendered before the expiration of the time for surrender under subsection (3A), as soon as practicable after that expiration, or

(ii) if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that person will not be surrendered on the expiration referred to in subparagraph (i), before that expiration.

(5) Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall—

(a) if satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered—

(i) with the agreement of the issuing judicial authority, fix a new date for the surrender of the person, and

(ii) order that the person be detained in a prison (or, if the person is not more than 21

years of age, in a remand institution) for a period not exceeding 10 days after the date fixed under subparagraph (i), pending the surrender, and

(b) in any other case, order that the person be discharged.

(5A) A person to whom an order for the time being in force under subsection (5)(a) applies—

(a) shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect, or

(b) if surrender under paragraph (a) has not been effected, shall be discharged.

(5B) …

(6) Where a person—

(a) lodges an appeal pursuant to subsection (11), or

(b) makes a complaint under Article 40.4.2Â° of the Constitution,

he or she shall not be surrendered to the issuing state while proceedings relating to the appeal or complaint are pending."

(7) Where the High Court decides not to make an order under subs (1) or

(2) -

(a) it shall give reasons for its decision, and

(b) the person shall, subject to subs (8) be released from custody.

(8) - (12) …"

12. In essence, the major issues on this appeal relate to the proper construction of subsections (3), (3A), (4)(c)(ii), (5) and (5A) of section 16. The competing interpretations of the parties are set out in detail below. The subsections mentioned reflect section 16 in its current form and are the applicable provisions on this appeal. It should be noted that various subsections of section 16 have been amended and/or substituted on multiple occasions since 2003, including by section 76 of the Criminal Justice (Terrorist Offences) Act 2005 and by section 12 of the Criminal Justice (Miscellaneous Provisions) Act 2009. Subsections (3) to (13) inclusive were substituted in their entirety by section 10(a) to (e) of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 ("the 2012 Act") with effect from the 24th July, 2012. The appellant has made some submissions based on the difference between the pre-2012 versions of certain subsections and their current iterations; where relevant, the old subsections are addressed below.

13. A final provision must also be mentioned. At its core this case concerns a net point of statutory construction. However, a central issue on the appeal concerns the

applicability of section 5 of the Interpretation Act 2005 ("the 2005 Act") to section 16 of the 2003 Act. Section 5 of the 2005 Act provides as follows:

> "Construing ambiguous or obscure provisions, etc.
>
> 5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."
>
> (2) …"

The parties are at odds as to whether the relevant subsections of section 16 relate to "the imposition of a penal or other sanction". This point is again referred to at paras. 92 and 93 of this judgment.

Background and Procedural History

14. The procedural history of this case is relatively short in duration but quite complicated to follow. For the introductory context, however, the broad outline can be simplified:

> - Two EAWs were issued seeking the surrender of Mr Vilkas to Lithuania. The High Court made orders directing that he be so surrendered.
>
> - Mr Vilkas frustrated the first attempt at surrender by refusing to board the aeroplane that was to take him to Lithuania.
>
> - He was brought back before the High Court, which set a new date for his surrender.
>
> - The appellant again frustrated this second surrender attempt by refusing to board the plane.
>
> - He was brought back before the High Court once more with a view to fixing another new surrender date, but the Court

determined that it did not have jurisdiction to do so.

- The Minister appealed that decision to the Court of Appeal.

- The Court of Appeal, having held an initial hearing, referred two questions to the Court of Justice of the European Union ("CJEU"). The questions related directly to the proper interpretation of Article 23 F.D.

- The opinion of Advocate General Bobek was delivered on 27th October, 2016, with the judgment of the court following on the 25th January, 2017.

- The Court of Appeal, in applying that decision ultimately allowed the Minister's appeal, determining that the High Court did have jurisdiction under section 16 of the 2003 Act to set multiple new dates for surrender, subject to certain strict criteria being fulfilled.

- Mr Vilkas now, with leave, brings an appeal against that judgment to this Court.

Before addressing the legal issues which arise, however, it will be necessary to further outline in more detail the underlying facts and the judgments that have led us to this point.

Factual Background and High Court proceedings

15. Mr Vilkas is the subject of two European arrest warrants issued by a Lithuanian court. Those warrants relate to convictions for 6 offences which he committed in that country between September 2009 and October 2011. The offences, all of which are set out and defined in the Criminal Code of the Republic of Lithuania, include theft, robbery, unauthorised possession of a firearm and violation of public order. He was sentenced to a total of 4 years imprisonment on the 28th September 2012 in the Plungé District Court in Lithuania. On the 4th February 2013 the Lithuanian authorities announced him as having breached a written obligation not to leave the country and also as failing to report periodically to the police. These matters lead directly to the issue of the warrants in question, both of which were addressed to the Minister for Justice, Equality and Law Reform; the first on the 17th March 2014 and the second on the 9th April 2014.

16. On foot thereof, the High Court, (Donnelly J.) on 9th July, 2015, made orders on both warrants pursuant to section 16(1) of the 2003 Act, directing that the appellant be surrendered to the issuing State. Orders were also made under subs (4)(b) and (c) of that section which are later referred to. Per s. 16(3) of the 2003 Act, those orders were to take effect upon the expiration of 15 days beginning on the date of their making, i.e. on the 24th July, 2015. Thereafter the Minister was required by Article 16(3A) to actually surrender Mr Vilkas to Lithuania "not later than 10 days" after the orders took effect; in other words, by the 3rd August, 2015.

17. Arrangements were made to effect the surrender in the usual manner, that is, by means of a commercial flight. To that end, a ticket was purchased on a Lufthansa flight from Dublin to a destination in Lithuania, scheduled for the 31st July, 2015. Needless to say, the surrender did not go smoothly. Mr Vilkas frustrated that intention by refusing to board the plane; indeed, so aggressive was his resistance to embarking that the pilot refused to allow him on-board. In the circumstances it was not possible to proceed with

the surrender as planned, and the flight departed without him.

18. As a result, the Minister applied to the High Court later that same day for orders pursuant to section 16(5)(a)(i) and (ii) of the 2003 Act respectively, fixing a new date for surrender and, pending that, remanding him in custody for a period not exceeding 10 days from that date. The High Court as the executing judicial authority (s. 9 of the 2003 Act), with the agreement of the Lithuanian judicial authority, fixed the 6th August, 2015, as the new "date for the surrender" and made the remand order sought. In fact the actual date fixed under that subsection is the date on which the order takes effect, unlike a s. 16(1) or (2) order which has a grace period of 15 days. Accordingly, the actual surrender was to be effected within 10 days of that date, namely not later than 16th August. It was again envisaged that the surrender would take place via a commercial flight, and plans to that end were put in place on the 13th August. Unfortunately for the authorities, however, when that date arrived the appellant again frustrated the surrender attempt as he had on the first occasion.

19. The Minister, as the Central Authority, immediately contacted the Lithuanian authorities with a view to arranging a third surrender attempt, and for that purpose sought to agree a new date which could be proposed to the High Court as part of a further application pursuant to section 16(5)(a) of the 2003 Act. It now being abundantly clear that surrender by commercial airline was not going to be successful, it was agreed that the appellant would be transported by ferry and subsequently over land. As such an arrangement would take more time to organise than those originally proposed, it was agreed by the authorities that the new date should be set for the 15th September, 2015, subject of course to approval by the High Court.

20. To that end, on the 14th August the Minister again applied seeking orders pursuant to section 16(5)(a), fixing the 15th September, 2015 as the new "date for surrender" and for the further remand of the appellant for a period not exceeding 10 days after the new proposed date. Evidence was given of Mr Vilkas's obstruction and non-cooperation, on the pervious day at Dublin Airport.

21. The High Court (Keane J.) held, however, that on a proper construction of section 16 of the 2003 Act it lacked jurisdiction to hear the application. The learned judge's reasons for so holding were given in an ex tempore judgment. The following extract therefrom illustrates why he reached this conclusion:

> "Well it seems to me, for all of the reasons I've outlined, I'm not in a position to entertain an application in relation to the respondent in this case as a person brought before the Court pursuant to subsection 4(c) of section 16 of the European Arrest Warrant Act as amended. And in those circumstances the application fails *in limine* , or rather it seems to me that under the statutory framework of the legislation, and in particular, as I say, the provisions of section 16(5) of the Act, because it in turn refers to subsection 4(c), which is in itself a provision which relates to an order made under section 16(1) or subsection 2, and because I must have regard to the provisions of section 16(5A), which appear to suggest that a person to whom an order for the time being in force under subsection 5(a) applies, in circumstances where it is common case that the respondent is such a person, shall either be (a) surrendered to the issuing state concerned not later than 10 days after the order takes effect - and we are talking here of the order made on the 31st of July - or (b) if surrender under paragraph (a) has not been effected, shall be discharged. And I simply cannot reconcile with the clear and express and

> simple binary terms of that subsection the suggestion that in fact those words are entirely superfluous, and it is in fact possible in relation to somebody who is a person to whom an order for the time being in force under subsection 5(a) applies, instead of doing one or other of the two alternatives contemplated by the Oireachtas in that subsection, that it is in fact possible to make a further application under subsection 5(a) in relation to that person, and if it is possible to do that once in relation to a person properly the subject of subsection 5A then it is plainly possible to do that an unlimited number of times, subject only to the qualification identified on behalf of the applicant that of course that can only arise in circumstances where the Court is satisfied that the inability to effect the surrender of the person concerned has come about through circumstances beyond the control of the State. So, as I say, for those reasons it seems to me that on a proper construction of the provisions of section 16 of the European Arrest Warrant Act as amended that I have no jurisdiction in relation to this respondent, the subject of the order of Ms Justice Donnelly made on the 31st of July 2015, to entertain an application made in respect of that respondent through the invocation of the provisions of section 16(5) of the Act. And therefore I cannot hear the application."

22. Accordingly, the learned judge refused the relief sought: his ruling is reflected in the terms of the two perfected orders dated the 14th August, 2015:

> "THE COURT DOTH FIND that the High Court does not have jurisdiction to hear the said application in circumstances where an Order pursuant to the said Section had previously been made and is currently in force pursuant to Section 16(5)(a) of the said Act."

Rather surprisingly however, the formal order is silent as to what should then happen to the appellant. However, the parties accept that the judge released him from custody and discharged him from being the subject matter of the warrants. They also understood that the existing EAW process was at an end at that point.

Having been so released, it appears that Mr. Vilkas travelled to Northern Ireland sometime afterwards where he was arrested and detained on foot of two EAWs, in identical terms to the within warrants. No further details are presently available as to where the surrender process is, in that jurisdiction.

Court of Appeal

23. The Minister appealed the decision of Keane J. to the Court of Appeal. It was argued that the High Court had jurisdiction to make a further order under section 16(5)(a) notwithstanding the existence of a previous one, also made pursuant to that section. Following an initial hearing, the Court expressed itself satisfied that the intention of the legislature in enacting section 16(3) to section 16(5A), inclusive, of the 2003 Act was, in general terms, to faithfully transpose Article 23 of the Framework Decision into Irish domestic law. However, the Court was also of the view that this was of limited assistance in circumstances where the correct interpretation of Article 23 F.D. was itself unclear, specifically in terms of whether it contemplated and allowed for the fixing of a new surrender date on more than one occasion.

24. The Court of Appeal therefore decided to stay the proceedings and refer two questions to the Court of Justice of the European Union pursuant to Article 267 TFEU, in order to obtain clarification on whether its provisional view was correct. The questions

posed were as follows:

> "1. Does Article 23 of the Framework Decision contemplate or/and allow for the agreement of a new surrender date on more than one occasion?
>
> 2. If so, does it do so in any, or all, of the following situations: i.e., where the surrender of the requested person within the period laid down in [Article 23(2)] has already been prevented by circumstances beyond the control of any of the Member States, leading to the agreement of a new surrender date, and such circumstances:
>
> (i) are found to be ongoing; or
>
> (ii) having ceased, are found to be reoccurring; or
>
> (iii) having ceased, different such circumstances have arisen which have prevented, or are likely to prevent, surrender of the requested person within the required period referable to the said new surrender date?"

Court of Justice of the European Union ("CJEU"):

25. The Opinion of Advocate General Bobek was delivered on the 27th October, 2016. It begins with an enhancing feature, a reference to the 1988 Robert De Niro film *Midnight Run* , which is not something that can be said of many Opinions. The Advocate General was of the view that the language of Article 23(3) is ambiguous and therefore that a teleological approach was appropriate. Construed in this manner, he concluded that the measure in issue ought to be interpreted as allowing the agreement of a new surrender date on more than one occasion. Such conclusion, in his view, was not inconsistent with the right to liberty contained in Article 6 of the Charter of Fundamental Rights of the European Union ("CFREU"). In response to the second question posed, he advised that Article 23(3) F.D. should apply but only if the new or reoccurring circumstances having prevented surrender, constitute in themselves a new instance of *force majeure* (see para. 30, *infra*).

26. The judgment of the Court (Third Chamber) was delivered on the 25th January, 2017 (see Case C-640/15 *Tomas Vilkas*). Broadly speaking, its decision can conveniently be considered as containing three parts. The first addresses whether Article 23 contemplates and/or allows for the agreement of a new surrender date on more than occasion (paras. 19-43). The second concerns the meaning of the phrase "circumstances beyond the control of the Member States" as contained in Article 23(3) F.D. (paras. 44-65). The final portion of the judgment addresses the consequences of the expiry of the time limits prescribed in Article 23 F.D. and how the surrender request should be processed at that point (paras. 66-73). This judgment is primarily concerned with what the CJEU said in the first part of its decision, as just described; the judgment of this Court in *Skiba* relates to the second part. In addition, the final part of the court's opinion is of some relevance to both the within decision and that in *Skiba.*

27. The CJEU addressed the two questions posed by the Court of Appeal together and framed the issue as being whether Article 23 of the Framework Decision must be interpreted as precluding, in a situation such as that at issue in these proceedings, the executing and issuing judicial authorities from agreeing on a new surrender date under Article 23(3) where the repeated resistance of the requested person has prevented his

surrender within 10 days of a first new surrender date agreed on pursuant to that provision.

28. As noted, the Court first dealt with the issue of whether, in principle, Article 23 permits the agreement of a new surrender date on multiple occasions. Its analysis on that point may be summarised as follows:

i. The Court first noted the terms of Articles 15, 23(1) and 23(2), as well as the exceptions to the latter provisions which are contained in Article 23(3) and (4) (paras. 20-23).

ii. It then referred to the first sentence of Article 23(3) which provides for the setting of a new date if the surrender cannot be or was not effected within the period laid down by Article 23(2), due to circumstances beyond the control of the Member States concerned; moreover, Article 23(3) does not expressly limit the number of new surrender dates that may be agreed on by the relevant authorities where the surrender has been prevented by such circumstances (paras. 24-25).

iii. However, notwithstanding the point last made, the CJEU acknowledged that the first sentence of Article 23(3) refers to surrender being prevented within "the period laid down in" Article 23(2), i.e. "no later than 10 days after the final decision on the execution of the European arrest warrant". The question, therefore, was whether the rule in the first sentence of Article 23(3) applies to situations where such circumstances, *arising after the expiry of that period* have prevented the requested person from being surrendered within 10 days of a first new surrender date agreed pursuant to that provision (paras. 26-27).

iv. The Court pointed out, first, that a literal interpretation of Article 23(3) does not necessarily preclude such applicability. Where surrender within 10 days of a first new surrender date is prevented by circumstances beyond the control of the Member States, the specified criteria for the granting of the first new surrender date must by definition have been fulfilled.

v. Next the Court referred to its well settled approach when interpreting an EU provision, which is to consider the wording used, the context in question and the objectives sought to be achieved.

vi. The Framework Decision contributes to the EU becoming an area of freedom, justice and security. Article 23 is designed, in particular, to accelerate judicial cooperation by imposing time limits for adopting decisions relating to EAWs. To hold that the executing judicial authority cannot be granted a new period for surrender where, in practice, the surrender within 10 days of the first new surrender date agreed by the Member States is prevented by circumstances beyond their control would be tantamount to making the authority subject to an obligation that it is impossible to fulfil and would not contribute in the slightest to the objective of accelerating judicial cooperation (paras. 30-33).

vii. The Court also had regard to Article 23(5) in interpreting

Article 23(3). The former provides that, upon expiry of the time limits referred to in Article 23(2) to (4), if the person is still being held in custody he is to be released. If Article 23(3) were interpreted such that the first sentence did not apply where surrender within 10 days of a first new surrender date, is prevented by circumstances beyond the States' control, that person would, necessarily have to be released if still in custody, irrespective of the circumstances of the case, simply because the time limit referred to in that provision would have expired. Such an interpretation would limit appreciably the effectiveness of the procedures provided for by the Framework Decision and would stymie the objective of facilitating judicial cooperation (paras. 35-37).

viii. The Court added that such interpretation could lead to the release of the requested person in situations where the extension of his detention did not result from lack of diligence on the part of the executing authority and the total duration of his detention is not excessive in the light, in particular, of any contribution on his part to the delay in the procedure, of the sentence he may be facing and of the existence, if any, of the risk of absconding (para. 38).

ix. Accordingly, the Court concluded that Article 23(3) is to be interpreted as requiring the authorities concerned also to agree on a new surrender date under that provision where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision is prevented by circumstances beyond one of the Member States' control (para. 39).

x. In the Court's view, such conclusion was not called into question by the obligation to interpret Article 23(3) in light of the right to liberty and security of the person enshrined in Article 6 of the Charter of Fundamental Rights of the European Union (CFREU) (para. 40).

xi. The Court acknowledged that the interpretation of Article 23(3) at (viii), *supra* , means that the executing judicial authority is not necessarily required to release the requested person if he is still being held in custody where his surrender within 10 days of a first new surrender date agreed upon is prevented by circumstances beyond the control of the States. Nevertheless, its interpretation does not *require* the requested person to be held in custody, as Article 12 provides that it is for the executing judicial authority to take a decision on whether the person should remain in detention, and that person may be released provisionally at any time in conformity with the law of that Member State, provided all necessary measures are taken to prevent the person from absconding (paras. 41-42).

xii. Finally, the Court noted in that context that where the authorities agree a second new surrender date under Article 23(3), the executing judicial authority will still be able to hold the requested person in custody, in accordance with Article 6 CFREU, only insofar as the surrender procedure has been carried out in a

> sufficiently diligent manner and the duration of the custody is not excessive. The authority will be required to carry out a concrete review of the situation, taking account of all relevant factors, to ensure that that is the case (para. 43).

29. Having conducted this analysis, the Court moved on to the second part of its decision (para. 26 *supra*); the issue of whether the relevant authorities have to agree on a second new surrender date pursuant to Article 23(3) in a *Vilkas* type situation, *i.e* . where the repeated resistance of the subject person has prevented his surrender within 10 days of a first new surrender date. This involved consideration of the meaning of the phrase "circumstances beyond the control of any of the Member States" as contained in the first sentence of Article 23(3) F.D.

30. This portion of the CJEU's opinion is addressed at length in the judgment of this Court in *Skiba* , as that case concerns the proper construction of the corresponding phrase as contained in section 16(5)(a) of the 2003 Act; it is therefore not necessary to repeat in detail, the Court's discussion of this point in this judgment. It will suffice to say that the CJEU concluded that the phrase "circumstances beyond the control of any of the Member States" should be read as meaning *force majeure* , as that concept is understood in EU law (para. 52). It is therefore defined as referring to "abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care" (para. 53). Such concept for present purposes, must be interpreted strictly and can justify extending the period for surrender only where it *prevents* that step; rendering it more difficult is not sufficient.

31. The Court went on to acknowledge however that "resistance" put up by a requested person may properly be considered as an abnormal circumstance and thus outside the control of the authorities: however it qualified this by saying that in the case of "certain persons" resistance cannot, in principle, be classified as an unforeseeable circumstance. It also said that in a case such as this, where a person has already frustrated a first surrender attempt, the fact that he may also resist a second such attempt cannot normally be regarded as unforeseeable. Even with such a person however, it was accepted that there could be exceptional circumstances which would render such resistance, when viewed objectively, unforeseeable and therefore despite due care the consequences thereof could not have been avoided. As above stated however, these issues are explored in greater detail in the *Skiba* judgment.

32. In the final section of its judgment, the Court added some further remarks on the consequences of its interpretation of Article 23(3). It should immediately be said that the questions referred by the Court of Appeal did not appear to squarely raise this further issue for determination. Indeed Advocate General Bobek noted in the postscript of his Opinion that he had not addressed every interpretive problem posed by the current wording of Article 23 F.D., and in particular that he had taken no view "on the legal status or validity of an EAW once Article 23(5) of the Framework Decision is triggered, leading to the obligatory release of the requested person from custody" (para. 89).

33. Be that as it may, the Court took the opportunity to address this issue head on. It observed that since it is possible that repeated resistance to surrender may not constitute a *force majeure* , it should be decided whether that conclusion relieves the executing and issuing authorities from having to agree on a new surrender date despite the expiry of the time limits prescribed in Article 23 F.D. It noted that whilst Article 15(1) F.D. provides that the executing judicial authority is to decide within the time limits laid down whether the requested person is to be surrendered, the wording of that provision is not sufficient to determine whether an EAW must still be executed once

those time limits have expired: in particular, whether in such circumstances the surrender process must still continue and for that purpose whether the judicial authorities of the States concerned must agree on a new surrender date.

34. In the Court's view, the principle of mutual recognition means that, pursuant to Article 1(2) F.D., Member States are typically obliged to give effect to an EAW. Thus, in light of the central function of the EAW system and the absence of any explicit time limitation on that obligation, the rule set out in Article 15(1) F.D. does not mean that once the Article 23 time limits have expired, the process has ended: the executing Member State should continue with the procedure for execution and to that end both national authorities should agree on a new surrender date. In making these observations, the Court was guided, by analogy, by its judgment in Case C-237/15 PPU *Lanigan,* judgment of the 16th July, 2015.

35. Although the EU legislature expressly specified in Article 23(5) F.D. that expiry of the relevant time limits means that the requested person is to be released if still in custody, the Court noted that it did not provide for any other consequence to follow from such expiry. In particular, it did not prevent the authorities from agreeing on a surrender date pursuant to Article 23(1) F.D., nor did it release the executing authority from the continuing responsibility to give effect to an EAW. An interpretation of Articles 15(1) and 23 to the contrary would run counter to the objectives of the Framework Decision by forcing the issue of a second EAW within the time limits therein laid down. In light of such considerations, the CJEU concluded that the mere expiry of the time limits in Article 23 F.D. cannot relieve the executing Member State of the obligation to carry on with the surrender procedure, and the authorities concerned must agree on a new surrender date for that purpose.

36. However, the Court did emphasise that in such a situation, it follows from Article 23(5) F.D. that, on account of the expiry of the time limits prescribed in Article 23, the requested person must be released if he is still being held in custody. This and the other observations of the Court on this point (paras. 66 to 73) have given rise to another issue on this appeal and in the *Skiba* appeal also. This issue concerns the interpretation of section 16(5)(b) (and 5A(b)) of the 2003 Act and is addressed later in this judgment.

37. Ultimately, the Court answered the questions posed as follows:

> - Article 23(3) of the Framework Decision must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities may agree on a new surrender date under that provision where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proves impossible on account of the repeated resistance of that person, in so far as, on account of exceptional circumstances, that resistance could not have been foreseen by those authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities, which is for the referring court to ascertain.
> - Articles 15(1) and 23 of the Framework Decision must be interpreted as meaning that those authorities remain obliged to agree on a new surrender date if the time limits prescribed in Article 23 have expired.

Court of Appeal

38. The Court of Appeal received written and oral argument both before and after the

judgment of the CJEU, with the supplemental submissions being addressed to the application of that decision to the within proceedings. All of these are comprehensively set out in the judgment of that Court (see paras. 20-80 of thereof). Unsurprisingly, the Minister regarded the opinion of the CJEU as confirming the correctness of his position, as adopted from the outset. Mr Vilkas, on the other hand, although accepting the CJEU judgment as binding in respect of the proper interpretation of Article 23, argued that the relevant provisions of section 16 of the 2003 Act could not be interpreted in the manner asserted by the Minister, notwithstanding the intention behind the section and despite being subject to the conforming principle. That remains his primary contention on this appeal.

39. The Court first assessed the controversial provisions on their own, taking account of their positioning within section 16 and the place of that section in the overall scheme of Part 2 of the Act: it also had regard to the expressed purpose of the Act as stated in the Long Title and the overall objectives of the legislation as such. The aim of that exercise was to ascertain whether the natural and ordinary effect of the provisions was clear, or whether there was ambiguity. Mr Vilkas maintained that clarity was abundantly evident and that a new date for surrender under section 16(5)(a)(i) can be fixed only once. He argued that any other interpretation would distort the language of the section and would authorise an endlessly circular procedure. By contrast, the Minister submitted that the meaning of the subsections is ambiguous and admits of an alternative interpretation according to which multiple new dates may be fixed. Having considered the arguments on both sides, Edwards J. stated as follows:

> "I am satisfied that the ambiguity identified by [the Minister] does exist. That having been said, I must also acknowledge that on a strict literal construction of the provisions at issue, the interpretation contended for by [Mr Vilkas] appears somewhat more cogent than that contended for by [the Minister], but not to such an extent as to resolve the issue in my mind. I therefore remain of the view that the ambiguity contended for does exist." (para. 84)

40. Next the Court asked what the consequences were of having found such: was it bound to adopt the literal construction favoured by Mr Vilkas, or could it adopt a purposive interpretation taking account of the intention of the legislature? This involved a consideration of s. 5 of the 2005 Act. Mr Vilkas had argued that that section could not apply in this case on two grounds. The first concerned the excluding *proviso* within s. 5(1) itself, to the effect that it does not apply to a provision "that relates to the imposition of a penal or other sanction". Secondly, he relied upon the common law rule of statutory interpretation which provides that where there is an ambiguity in a proviso affecting personal liberty, that cannot otherwise be resolved, it must be strictly construed in favour of the affected person so as to prevent "doubtful penalisation". On the basis of *Mullins v. Harnett* [1998] 2 ILRM 304 and *Kadri v. Minister for Justice and Equality* [2012] IESC 27 (" *Kadri* "), it was argued that this principle relates not just to punishments or sanctions, but to any form of analogous detriment, including measures affecting one's liberty. The Minister, on the other hand, was of the view that section 5 does apply, and that given the intention of the legislature, the same could resolve the ambiguity, apparently present on a literal approach.

41. The Court of Appeal accepted that *Mullins v. Harnett* is authority for the proposition that the doubtful penalisation principle has the wider application contended for by Mr Vilkas, meaning that it extends to any form of detriment and not just to the imposition of penalties or sanctions. However, and crucially, Edwards J. held that the principle long pre-dated the creation of the EU and predecessors, and therefore also pre-dated the concept of domestic legislation intended to transpose supranational provisions. In his

view, it is highly desirable that the construer of such legislation should have the ability to have regard to the underlying instrument, and where necessary to afford the national measure a purposive and teleological interpretation, consistent with that instrument. In this regard he noted the potential relevance of the fact that section 5 of the 2005 Act, enacted at a time when the principle of conforming interpretation had become commonplace, was ostensibly narrower in scope than the common law rule of doubtful penalisation.

42. The Court also considered *Kadri.* At issue there was section 5 of the Immigration Act 1999, dealing with the arrest, detention and removal of non-nationals. For present purposes it is enough to say that despite recognising a superficial similarity between the circumstances of *Kadri* and those of the within case, Edwards J. took the view that there are also significant differences between the two and that *Kadri* is capable of being meaningfully distinguished. First, unlike the instant case, the enactment at issue in *Kadri* was purely a domestic statute with no international overlay. Second, the provision in issue in Kadri contained in itself the primary safeguard against potential abuse by placing an eight-week outer limit on cumulative detention: on the other hand the primary safeguard for the EAW process is the fact that the s. 16 procedure is subject to express judicial oversight by a High Court judge.

43. Moreover, the learned judge observed that the existence of the specific safeguard requirement in section 16(5A) was not inconsistent with the views last mentioned. That section offers protection for the benefit of a person "to whom an order *for the time being under subsection (5)(a) applies* " (his emphasis). In his view, if, within the ten days provided for under section 16(5A), the matter is again brought before the High Court pursuant to the section 16(4)(c) direction, the existing subsection (5)(a) order is liable to be vacated, and thus it no longer "for the time being … applies". If the High Court is satisfied that there has been a fresh *force majeure* , it is expected that it will be asked to vacate its previous subsection (5)(a) order, pending the agreement of a new surrender date and the making of a new order under subsection (5)(a), which application would likely be acceded to. Under such circumstances, the requested person would be protected against potential abuse of their right to liberty by the statutory requirement for direct supervision of the process by the High Court.

44. Edwards J. acknowledged that this Court had held in *Aamand v. Smithwick* [1995] I.L.R.M. 61 that extradition statutes should be considered as penal in nature, as they affect the rights and liberties of the subject person: as a result, not by anything other than an unambiguous provision should a person be subjected to detention and extradition. However, from his point of view, the 2003 Act is to be regarded differently and should be construed in accordance with the Interpretation Acts 1937 to 2005. Thus although section 5 of the 2005 Act mandates that those sections of the 2003 Act which provide for "penal or other sanctions" should be construed strictly, he was satisfied that it was not appropriate to apply the wider common law principle against doubtful penalisation to transposing legislation such as the 2003 Act. He found support for this view in Farrell and Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press, Dublin, 2011) at paragraph 1-42, citing *Minister for Justice, Equality and Law Reform v. Biggins* [2006] IEHC 351.

45. Ultimately, the learned judge considered that the provisions at issue do not create penal or other sanctions within the meaning of section 5 of the 2005 Act. Accordingly, as the provisions seemed ambiguous, s. 5 applies: and in their construction one must necessarily have regard to the terms of the Framework Decision. The judgment of the CJEU in this case made clear that Article 23(3) does not preclude the agreement of a new date for surrender on more than one occasion: it therefore follows that the relevant subsections of section 16 of the 2003 Act must be given an interpretation conforming to Article 23, provided that it is possible to do so. As such was entirely feasible, Edwards J.

favoured the submissions of the Minister in this respect.

46. The learned judge thus concluded as follows:

> "111. The appellant's contention is that if there is a new or repeated frustration of an attempt to give effect to an order for surrender there is nothing on the face of it in s.16(5A) to prevent the case being brought back before the High Court judge again, as long as it is within the ten days provided for in s.16(5A), in accordance with the direction given under subsection (4)(c) at the time of the making of the original surrender order. While subsection (4)(c) does refer to the time for surrender under subsection (3A), the time limit in subsection (3A) itself is qualified as being "subject to subsections (5) and (6)", and subsection (5)(a)(i) expressly allows for the setting of a new surrender date. The combined effect of subsection (5)(a)(i) and subsection (5A) is, it is said, to create a new time for surrender under subsection 3(A). I agree that this is the appropriate and correct interpretation of the provisions in controversy. It is consistent with the purpose of the legislation as ascertained by me from the Act of 2003 viewed as a whole, namely that it was to give faithful transposition to Article 23 of the Framework Decision."

The Court therefore allowed the appeal.

Issue on Appeal to this Court

47. Mr. Vilkas sought leave to appeal to this Court from the judgment and order of the Court of Appeal. By Determination dated the 15th May, 2018 ([2018] IESC DET. 71), he was granted leave to do so, having satisfied the public importance aspect of the constitutional criteria. The permitted grounds were as follows:

> 1. The Court of Appeal erred in failing to accept that the appellant's analysis reflected the plain, literal meaning of section 16(5) and instead finding that there was ambiguity in the words of section 16(5). The Court erred in overruling the Learned Trial Judge's finding that the respondent's 'endlessly circular' construction of section 16(5) was to be rejected in favour of the 'clear and express and simple binary' interpretation urged by the appellant. In adopting the convoluted and implausible construction contended for by the respondent, the Court of Appeal Judgment has effectively re-written the section, impermissibly adding words which are absent and ignoring words which are present.
>
> 2. The Court of Appeal erred in overturning the Learned Trial Judge's finding that Donnelly J did not have jurisdiction to direct that the appellant could be brought back before the Court under section 16 of the 2003 Act. An order under section 16(4)(c) is made only once, and contemporaneously with the making of the final surrender order under section 16(1). This undermines the analysis of section 16(3)-(5) urged by the respondent and adopted by the Court of Appeal. Moreover, when making the initial extension, Donnelly J did not direct that the Applicant could be brought back before the Court under section 16.

3. The Court of Appeal failed to have regard to the fact that section 16(5) directs that a requested person shall be 'discharged' if they have not been surrendered within the time limit provided for in that section. The CJEU in *Vilkas* applied a caveat to the corresponding provision in Article 23(5) - that a requested person 'shall be released' once the time limits for surrender have expired - to the effect that the surrender procedure must continue even if the requested person has been released from custody.
4. In light of the foregoing, the domestic legislation cannot be read so as to conform with Article 23: if a requested person has been 'discharged', there can be no continuation of the surrender procedure. The literal words of section 16(5) set out the procedure intended by the Oireachtas: after an extension period has been granted, the requested person must be either surrendered or unconditionally discharged.

5. In light of the unclear and absurd implications of the construction urged by the respondent, their proposed surrender procedure would fail the Article 5 ECHR test of 'accessibility, foreseeability, and precision' referred to by Advocate General Bobek in *Vilkas* and would amount to an unconstitutional interference with the right to liberty.

6. The section retains a presumption of constitutionality and it should therefore be given its literal interpretation, as opposed to a purposive construction which would lead to a breach of the right to liberty.

7. The Court of Appeal erred in failing to have sufficient regard to the warning of Clarke J in *Kadri* that it must be clear that the procedure proposed on foot of a purposive interpretation is exactly what the Oireachtas would have intended. If they had so intended, then the Oireachtas would have set that procedure out in clear language. Section 16 does not set out an express procedure providing for multiple extensions of the surrender procedure. It cannot be said that the proposed procedure is clearly what was intended by the Oireachtas.

8. The Court of Appeal erred in finding that the *proviso* contained in section 5 of the Interpretation Act 2005 has no application to the EAW Act. Further or in the alternative, the Court of Appeal erred in finding that the common law principle of construing statutes strictly so as to avoid doubtful penalisation no longer has application, having regard to the enactment of section 5 of the Interpretation Act and having regard to the imperative to construe transposing legislation so as to conform with its primary European legislation. Section 16(5) of the 2003 Act, and *a fortiori* the construction of it adopted by the Court of Appeal, amounts to a significant interference with the liberty of the requested person. Applying the *dicta* of this Honourable Court in *Kadri,* it was incumbent on the Court of Appeal to construe the provision strictly in favour of liberty.

48. While all such matters are addressed in the course of this judgment, the essential points on this appeal can be more simply stated: they are, first, whether there is any ambiguity in the relevant subsections such that a purposive interpretation thereof is necessary, and, second, whether interpreting section 16 so as to permit for more than

one extension of time would be *contra legem.*

Submissions

49. The Court received written and oral submissions from the parties, for which it is grateful to counsel. The reader can also have regard to paragraphs 37-50 and 72-80 of the judgment of the Court of Appeal, where the submissions of the parties in response to the judgment of the CJEU are set out in detail. There is a substantial similarity between those submissions and the arguments made on this appeal.

Those of the Appellant

50. Mr Vilkas submits that the clear, literal meaning of section 16 of the 2003 Act is that only one extension of the surrender procedure is possible. The requested person must either be surrendered within that period, or discharged. He suggests that the Minister's interpretation of the section is untenable and that it stretches credulity to suggest that the Oireachtas would legislate in such an unclear manner. It is submitted that, ultimately, the fact that Article 23 of the Framework Decision permits multiple extensions does not impact on the conclusion that section 16 provides for one only. To interpret section 16 otherwise would be to act *contra legem* : the words used cannot validly be interpreted as providing for multiple extensions, so there is no basis to apply a purposive approach. Thus the Court of Appeal erred in its interpretative approach and in the conclusion which that led to: it was overtly influenced in that regard by the view that the Oireachtas intended to faithfully transpose Article 23, *via* s. 16 of the 2003 Act. Although a conforming interpretation is required when implementing EU law, this does not negate the responsibility to ensure that legislation affecting liberty is obvious in its impact and that the intention of the Oireachtas can clearly be understood from it.

51. In the instant context, the Oireachtas in enacting section 16, as amended, sought to replicate the literal words of Article 23. Those words appear to limit the number of extension periods to one; the CJEU had to utilise a purposive approach to conclude that multiple extensions are allowed. Nowhere in section 16 is there a reference to multiple extension periods. As such regime could potentially involve indefinite detention, it is submitted that the Oireachtas would not have countenanced such a consequence, save by express declaration supported by detailed safeguards.

52. The appellant makes a number of subsidiary points in support of his overall contention. The first relates to the legislative history of section 16. He points out that the original surrender procedure under the 2003 Act was deleted and replaced by the 2012 Act. The original section 16 had contained an open-ended power of remand pending surrender. As Mr Vilkas puts it, the Minister must now argue that despite deleting this provision, the Oireachtas nonetheless intended to retain an open-ended procedure providing for multiple extensions. The appellant submits that the section was amended to bring it in line with the literal words of Article 23, which on their face appear to require release after one extension. It is argued that if the drafters had understood Article 23 the way it was subsequently construed by the CJEU, it is inconceivable that section 16 would have been drafted the way that it was. He argues that in fact the old section 16 is compatible with the interpretation of Article 23 ultimately favoured by the CJEU.

53. Second, it is submitted that the Minister's interpretation, favoured by the Court of Appeal, is highly-convoluted and untenable. The appellant submits that this interpretation stretches two subsections in particular - 16(3A) and 16(4)(c) :- far beyond what could have been intended. As to section 16(3A), it is said that that subsection merely sets out a ten-day window for surrender and contains no basis for

multiple extensions. Although the Minister relies on the fact that (3A) is "subject to subsections (5) and (6)", in reality the interaction of the various subsections is unproblematic: subsections (3) and (3A) set out the time limit for compliance, subsection (5) permits an extension in circumstances of force majeure, and subsection (6) stays the period pending an appeal or a *habeas corpus* application. Moreover, it is further said that the reference in section 16(5)(a) to subsection (3A) supports the appellant's case that the section 16(5)(a) extension is a once-off procedure, as this merely recites that the person has been brought back before the Court in circumstances where the initial (3A) surrender period has not been complied with.

54. In respect of section 16(4)(c), it is submitted that an order under that subsection is made once, at the same time as the surrender order. That subsection sets out that when making a surrender order, the High Court shall also direct that the person may be brought back before the Court if not surrendered within the permissible 25-day time period. It is submitted that it is clear from the section as a whole that this (4)(c) direction is made only once, contemporaneously with the s. 16(1) or 16(2) order. It is said that this interpretation is consistent with what actually happened in this case. When Mr Vilkas was brought back before Donnelly J. on the 31st July, 2015 after his first refusal to board the plane, it was on foot of a direction under section 16(4)(c) made at the same time as the surrender order on the 9th July. It is central to the Minister's case that when the appellant was before the High Court on the 14th August he was again there pursuant to an order under section 16(4)(c). However, it is clear from the order of the 31st July that Donnelly J. did not direct that he be brought back before the Court again, be it under section 16(4)(c) or otherwise. He was to be surrendered or released within the extension period ordered. Thus it is incorrect to submit that the appellant was before the High on the 14th August pursuant to section 16(4)(c). This is highly relevant as section 16(5), setting out the extension procedure, is predicated on the assumption that the requested person has been "brought before the High Court pursuant to subsection (4)(c)". Moreover, leaving aside what was actually ordered in this case, it is submitted that section 16(4)(c) was never intended to be invoked repeatedly.

55. Mr Vilkas additionally submits that section 16 impacts on liberty and therefore the literal words of the section must be applied. In this regard he cites a passage from Dodd, *Statutory Interpretation in Ireland* (Tottel Publishing, Dublin, 2008) at para. 11.51, and also relies on the judgments of Clarke J. (as he then was) and MacMenamin J. in *Kadri.* He submits that the Oireachtas would not have used an oblique and vaguely-defined route to legislate for an onerous procedure affecting the liberty of the person. Even if they had done so, it is submitted that the lack of clear words delineating the procedure would have been fatal to the attempt (see paras. 3.09 to 3.10 of Clark J. in *Kadri*). The appellant points out that the requirement of precision in provisions affecting liberty is also reflected in EU law, including in paras. 50-53 of the Opinion of Advocate General Bobek in this very case, and in the case-law of the ECtHR. Conditions for deprivation of liberty under domestic law must be clearly defined and the law must be foreseeable in its application. It is submitted that if the section was construed as permitting multiple extensions then the absence of an express extension procedure characterised by accessibility, precision and foreseeability would amount to a breach of Article 5 ECHR and Article 6 CFREU.

56. Finally, Mr Vilkas submits that the plain words of section 16 do not lead to absurdity. By reference to *DPP (Ivers) v. Murphy* [1999] 1 IR 98 and *Kellystown Company v. Hogan* [1985] I.L.R.M. 200, it is submitted that there is a high threshold before legislation can be described as absurd. Usually it involves the frustration of the very thing that the section was designed to achieve. Only in such extreme circumstances could a court be sufficiently confident to declare that a result was clearly unintended. Here, the release of a requested person after two reasonably lengthy periods on remand and after two attempted surrenders cannot be described as ‘absurd'. The plain meaning

of section 16(5A) reflects a rational decision by the Oireachtas to limit the risk of open-ended detention. A similar consideration was held to apply to the legislation at issue in *Kadri.* Even if the outcome seems anomalous or undesirable, an anomaly is not the only criterion in interpreting legislation: the task of a court is to interpret the law, not to legislate.

57. In conclusion, it is submitted that the courts are bound to apply the provisions of Acts of the Oireachtas; where such provisions conflict directly with a provision of the Framework Decision, the courts must give preference to the former. Article 23 F.D. and section 16 of the 2003 Act are incompatible insofar as multiple extensions are permitted under the former, but not the latter. Such an outcome is not unprecedented, even in respect of Article 23, as a similar difficulty arose in the case of *Rimsa v. Governor of Cloverhill Prison* [2010] IESC 47. This Court determined in that case that the domestic provision took precedence. Mr Vilkas submits that the same outcome is unavoidable in this case, as to do otherwise would be to rewrite the legislation.

Those of the Respondent

58. The Minister stands over the decision of the Court of Appeal, and asserts that it is permissible to apply more than once for, and to obtain yet again, a further surrender date under section 16(5)(a) of the 2003 Act.

59. In the Minister's view, the key to interpreting the provisions in issue is a proper construction of the phrase "the time for surrender under subsection (3A)". This phrase appears in section 16(4)(c) and in section 16(5)(a). He submits that it does not mean a period of tens days *simpliciter:* this is clear as the time can be extended in accordance with either section 16(5)(a) or section 16(6). Thus the literal meaning of this phrase should read "10 days or such extended period as may apply by reason of either section 16(5)(a) or section 16(6)". In his view, the appellant ignores the opening phrase of section 16(3A) - subject to subs (5) and (6) :- but such has a meaning and it is that, as asserted by the Minister. If the period was simply 10 days, the provision becomes entirely unworkable in the case of an appeal, as the initial ten-day period will always be exceeded in such circumstances. It is thus submitted that it is impossible to reconcile subsections (3A) and (6|) on the appellant's reading of the section. It is therefore said that although the Court of Appeal held that section 16 is ambiguous, that finding was unnecessary as in fact the literal meaning of the section in any event, provides for a second and subsequent extensions as just explained.

60. Even if this contention is incorrect, the respondent also says that a purposive interpretation of section 16 yields the same result. Using such approach, the Court of Appeal accepted that the Minister's interpretation was consistent with the purpose and objective of section 16, which was to faithfully transpose Article 23 F.D. Given the CJEU view of that Article, a number of surrender dates may be agreed, provided the requisite circumstances are in place. Accordingly, unless such an interpretation would be *contra legem* , a similar approach should be applied to the interpretation of section 16.

61. The Minister submits that, in light of the principle of conforming interpretation, the CJEU judgment was binding on the Court of Appeal in respect of the interpretation of Article 23, and as the relevant subsections of section 16 were intended to transpose Article 23, those subsections required to be interpreted to confirm with that Article. Thus the Court of Appeal was correct in applying section 5 of the Interpretation Act and taking a purposive view of the sections in question. In so doing, it did not violence to the words of the section: it is submitted that those words easily accommodate the interpretation favoured by the Minister.

62. The above submissions represent the core of the affirmative case made by the

Minister. However, he also responds to the various points advanced by Mr Vilkas, as set out above. As to the argument based on the pre-2012 version of the 2003 Act, the Minister submits that no such argument was made in the Court of Appeal and it should not therefore be canvassed in this Court. The Minister suggests that the 2012 amendments may have been made in response to the judgment of this Court in *Rimsa.* In any event, it is clear that the current form of section 16 provides for judicial oversight and includes the substantive criterion in Article 23 F.D. (i.e. "circumstances beyond the control…"). Although the appellant relies on the former provisions of section 16 to suggest that the Oireachtas intended to remove an allegedly open-ended power to detain, the Minister does not contend that the current form of section 16 contains any such open-ended and unrestricted power. At all times the High Court has the sole power to authorise any extension of time, and that is done only on satisfaction of strict criteria which are unlikely to justify multiple extensions of time. Thus all extensions are for a definite period and are granted only in limited circumstances. Moreover, to prevent the Central Authority from seeking a further surrender date in circumstances where a party has wilfully attempted to frustrate their surrender would not meet the aims and requirements of the Framework Decision or the domestic legislation.

63. The Minister's submissions on section 16(3A) are set out above. In relation to section 16(4)(c), the Minister observes that although the appellant seeks to rely on the terms of the orders actually made by the High Court in this case, the same can have no bearing on the proper interpretation of the statute. It is submitted that if this Court upholds the interpretation of section 16 by the Court of Appeal, the case will be remitted to the High Court for a consideration of whether the criteria in section 16 are met and whether a warrant for the arrest of the appellant can issue. The terms of the order may become relevant then, but they are not material at this stage.

64. The Minister points out that section 16(4)(c) does not refer to "10 days after the order takes effect in accordance with subsection 3", but instead refers to the entirety of section 16(3A, and therefore contemplates that it is the "time for surrender" as same may be calculated after the extension of the initial period, whether pursuant to section 16(5) or 16(6). Accordingly, the Minister submits that once the time for surrender has been extended pursuant to subsection (5), the phrase "time for surrender under subsection (3A)" which appears in subsection (4)(c) means that a person who is brought before the High Court when the first extension pursuant to subsection (5)(a) has not been successful is still a person brought before the High Court pursuant to subsection (4)(c) as he or she is a person who has not been surrendered or will not be surrendered before or on the expiration of the "time for surrender under subsection (3A)." It is therefore said that the fact that subsection (3A) is subject to the requirements of subsection (5) and that it is permissible to attend before the High Court again pursuant to subsection (4)(c) when the surrender has been affected indicates that subsection (3A) contains a basis for multiple extensions.

65. As noted above, the appellant has submitted that as section 16 impacts on liberty, a literal interpretation is required and a purposive approach was not appropriate. The appellant further contends that the section relates to the imposition of a penal or other sanction. However, the Minister disputes that this is not so. He says that section 16 regulates the surrender procedure and the duration in custody; it does not in its express terms relate to the "imposition of a penal or other sanction". The Minister endorses the Court of Appeal's view that it is desirable that the construer of transposing legislation should be able to have regard to the instrument to be transposed, and to interpret the domestic legislation in line with that instrument. He says that the principle of conforming interpretation has therefore overtaken the previous strict interpretive approach. He also relies on the manner in which that Court distinguished *Kadri,* where the provision in issue was not designed to implement EU law. The Minister adds that in that case no argument was made that the section in issue related to the imposition of a

"penal or other sanction". The Supreme Court in *Kadri* did not purport to interpret that phrase of the 2005 Act. The Minister thus submits that although section 16 permits of the deprivation of liberty in some circumstances, it is in essence a process of enforcement rather than punishment, and accordingly there is no bar to the application of section 5 of the 2005 Act.

66. The Minister submits that there is no automatic infringement of a person's constitutional or Charter right to liberty by the making of a second or subsequent order extending time for surrender in the circumstances as provided for and determined by the CJEU, particularly as the surrender is subject to judicial oversight and strict criteria. The obligation to respect the right to liberty is distinct from the imposition of a "penal or other sanction" - there is no provision in section 16 for a penal or other sanction against the appellant. The Minister refers to *Michael Cronin (Readymix) Ltd v. An Bord Pleanala* [2017] 2 I.R. 658 in support of the interpretation of "penal or other sanction".

67. Finally, although Mr Vilkas submits that the plain words of section 16 do not lead to absurdity, the Minister argues that the facts of this case themselves disclose absurdity as the appellant seeks to avoid frustration of two High Court orders for surrender by serial frustration of the execution of those orders. That is said to be obviously absurd but the judgment of the CJEU in these proceedings put the matter beyond doubt. The Minister distinguishes *Kadri* on the basis that it was found that the literal construction of section 5 of the Immigration Act 1999 was not absurd. There the Court was troubled by the absence of a specific provision as to how time could be extended, and any mechanism for so doing. By contrast, here section 16 provides the method by which time may be extended and the high threshold for so doing. Thus section 16 does not contain any lacuna of the time which existed in section 5 of the 1999 Act.

68. The Minister concludes by submitting that the Court of Appeal was correct in determining that the relevant subsections of section 16 are required to be given a conforming interpretation with respect to Article 23 F.D. It was therefore correct that it is permissible to make more than one application for a further date for surrender under section 16(5)(a). That Court was correct in determining that the time limit in subsection (3A) is qualified as being "subject to subsections (5) and (6)" and that subsection (5)(a)(i) expressly allows for the setting of a new surrender date. It follows that the Court was correct that section 16(5A) does not prevent the case from being brought back before the High Court judge again, within the ten days provided for in section 16(5A), in accordance with the direction given under subsection (4)(c) at the time of the making of the original surrender order.

Discussion/Decision

Conforming Interpretation

69. The obligation to interpret national law so as to comply with EU law is well understood. In this regard Case C-105/03 *Criminal Proceedings against Pupino* [2005] ECR 1-5285 (" *Pupino* ") is of direct relevance. The case concerned a reference for a preliminary ruling on the interpretation of Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. The precise facts need not detain us, only relevant parts of the judgment, first, the Court's general comments concerning the principle of conforming interpretation, and, second, its observations in respect of the limits of that principle. At paragraphs 33 to 43, the Court explained the general applicability of the principle to framework decisions adopted in the context of Title VI of the Treaty on European Union:

> "33 It should be noted at the outset that the wording of Article

> 34(2)(b) EU is very closely inspired by that of the third paragraph of Article 249 EC. Article 34(2)(b) EU confers a binding character on framework decisions in the sense that they 'bind' the Member States 'as to the result to be achieved but shall leave to the national authorities the choice of form and methods'.
>
> 34 The binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.
>
> 35 The fact that, by virtue of Article 35 EU, the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty, and the fact that there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI, does nothing to invalidate that conclusion.
>
> …
>
> 38 That jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States.
>
> …
>
> 42 It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion.
>
> 43 In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."

70. Perhaps more importantly for present purposes, however, at paragraphs 44-48 the Court then went on to observe that the principle of conforming interpretation is not without its limits:

> "44 It should be noted, however, that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity.
>
> 45 In particular, those principles prevent that obligation from

> leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law …
>
> …
>
> 47 The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem* . That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.
>
> 48 In this case, as the Advocate General has pointed out in paragraph 40 of her Opinion, it is not obvious that an interpretation of national law in conformity with the framework decision is impossible. It is for the national court to determine whether, in this case, a conforming interpretation of national law is possible." (Emphasis added)

Subsequent to this decision there are several other judgments of the court regarding this principle: none have deviated from it or expanded upon its terms: *Adeneler v. ELCG* (Case 212/04): *Criminal proceedings against Giovanni Dell'Orto* (Case C-467/05 & *Melloni v. Fiscal* (Case C-399/11).

71. At issue in this case, as in *Pupino,* is an EU framework decision, albeit one with a different subject matter. Such instruments, have been abolished for some time and the EU can now utilise its ordinary legislative procedure to enact laws in the field of criminal justice. Formerly however, framework decisions which were legislative acts of the Union were the way in which this was achieved. They were akin to directives (Art. 249(TEC): now 288 (TFEU)) in that they required Member States to achieve a particular result without dictating the means of achieving that. Unlike directives, however, framework decisions were expressly excluded by community law from having direct effect. Both of these propositions are inherent in Article 34(2)(b) of the Treaty on European Union.

72. To the forefront of any *Pupino* approach are the aims and the purpose of the underlying measure: in this case these can be ascertained from the recitals to the Framework Decision. The overarching objective of becoming an area of freedom, security and justice led to the abolishing of extradition between Member States and its replacement with a system of surrender between judicial authorities. This new simplified system is intended to remove the complexity and hence the delay inherent in traditional extradition procedures. It was determined that such a dramatic change could best be achieved at EU level rather than through the unilateral actions of individual Member States. Central to this regime was the fact that the execution process would be subject to sufficient controls, meaning that a judicial authority in the executing Member State would take the decision on surrender. The whole system is based on the high level of confidence between Member States, and critical to its operation is mutual respect for the fundamental rights of requested persons. It is against this broad general backdrop that the issues in the case fall to be considered.

Conforming Interpretation in Irish law

73. Dodd, in his work *Statutory Interpretation in Ireland* (Tottel Publishing, Dublin, 2008), raises at paragraph 14.76 the question of how far the Irish courts may deviate from the ordinary canons of statutory construction when interpreting instruments with this EU dimension. The author observes that:

> "It could be said that if the Irish courts have the power to depart from the literal reading by straining, reading in or severing words and expressions in order to avoid some unconstitutionality or absurdity, that such capacity equally applies in order to avoid some incompatibility with European law. Whether a court may, or is required, by European law to go further, remains unclear."

74. The *Pupino* case was referred to by Murray C.J. in *Minister for Justice v. Altaravicius* [2006] 3 IR 148. This case, too, concerned the interpretation of the 2003 Act and the 2002 Framework Decision, albeit that it related to different sections and Articles thereof. What is most relevant for present purposes is the Chief Justice's recognition of the limits of conforming interpretation:

> "When applying and interpreting national provisions giving effect to a framework decision the courts 'must do so as far as possible in [the] light of the wording and purpose of the Framework Decision in order to attain the result which it pursues' (see *Criminal proceedings against Pupino* (Case C-105/03) [2005] E.C.R. I-05285).The principle of conforming interpretation is limited, as the Court of Justice has pointed out in *Pupino* and other cases, to the extent that it is possible to give such an interpretation. It does not require a national court to interpret national legislation *contra legem* . If national legislation, having been interpreted as far as possible in conformity with community legislation to which it purports to give effect, but still falls short of what is required by the latter, a national court must, as a general principle, apply that legislation as interpreted although there may be other consequences for a member state which has failed to fully implement a directive or framework decision." (p. 156)

75. The relationship between this form of EU legislation and national law was also considered in, *inter alia, Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518. Again this case concerned the 2002 EAW Framework Decision, specifically Article 17 thereof and its effect on the true meaning of section 16(10) of the 2003 Act, as it then stood. That Article is also a time "provision", but unlike Article 23 it deals with the execution of the warrant as distinct from the surrender of the subject person (*Minister for Justice & Equality v. Lanigan* : Case C-237/15PPU). Subsection (10) is intended to reflect Article 17, indent 4 and 7, with subs (11) being the certification requirement for an appeal to this Court (now the Court of Appeal) from a s. 16(1) or (2) order, or from a refusal to make such order.

76. Denham J. (as she then was), applying *Pupino,* stated at p. 531 that a national court when applying domestic law should do so as far as possible, in light of the Council framework decision, in order to attain the result sought. She acknowledged that "this can not be done if it is contrary to the national law", but in so deciding held that the whole of that law should be looked at, to see if a result inconsistent with the framework decision can be avoided. Fennelly J., at p. 544, starting at first principles saw no reason why, in light of the then current Article 34(2)(b) of the Treaty on European Union, "the Act of 2003 as a whole and s.16(10) and (11), in particular, should [not] be interpreted

'as far as possible in the light of the wording of the purpose of the framework decision in order to attain the result which it pursues'".

77. The learned judge then continued, more specifically addressing the issues in that particular case:-

> "I see no reason why that principle cannot be applied in this case. It is true that the Court of Justice, in *Pupino* and earlier cases, recognised certain inherent limits to the principle of 'conforming interpretation'. In particular, it would not apply, when, as stated at para. 47, the 'national law … cannot receive an application which would lead to a result compatible with that envisaged by that framework decision.' It explained that 'the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem* .' I do not believe that it would be *contra legem* , as that expression is used in *Pupino* , to interpret the Act of 2003 in the light of the framework decision. That principle applies whichever of the alternative interpretations of article 17(3) of the framework decision is correct. On the one hand, if Geoghegan J. is correct, as I believe he is, in holding that it does not confer such a right, there is no problem of inconsistency. On the contrary hypothesis, that the framework decision, properly interpreted, does confer such a right, it would seem clear that the Act of 2003 could not be interpreted so as to deprive an arrested person of that right. The Court of Justice also stated in *Pupino,* at para. 47:
>
> > 'That principle [of conforming interpretation] does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result *contrary to that envisaged by the framework decision*' ". (Emphasis added by Fennelly J.)

Later, at p. 547 of the Report, Fennelly J. observed that:

> "These courts are bound to apply provisions of Acts of the Oireachtas. The framework decision does not have direct effect. Where a provision of an Act of the Oireachtas conflicts directly with a provision of a Framework Decision, this court must give preference to the former . To do otherwise would, to cite the language of the Court of Justice in *Pupino* , be *contra legem* ." (Emphasis added by me)

See also *Rimsa v. Governor of Cloverhill Prison* [2010] IESC 47:

78. Although this interpretative tool is well recognised and has featured in numerous cases, rather surprisingly it has received little analysis in the case law. So a further word might be useful.

A Further Word on Contra Legem

79. It is clear from the above that the principle of conforming interpretation cannot be used to lead to an interpretation of national law *contra legem* . This concept of " *contra legem* " is frequently used in EU law. The Latin phrase means "against the law". Often

the case law of the CJEU will simply refer to the prohibition on a *contra legem* interpretation without elaborating on what precisely this means. However, the meaning of the concept is somewhat intuitive although generally well understood at a surface level: it is that a court cannot adopt an interpretation which goes against the express wording of a provision. Put differently where it is not reasonably possible to construe a national measure in conformity with its EU counterpart, to do

so would be against the law. If a conflict of that scale exists, a court must give preference to its domestic provisions.

80. A good description of the rule was that as stated by AG Bobek in his Opinion in Case C 220/15 *European Commission v. Federal Republic of Germany* , where he said that "the clear wording of a provision is the outer limit of any interpretative endeavour". The same Advocate General also defined the principles thus in his Opinion in Case C 441/14 *Dansk Industri, acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* :

> "A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that *contra legem* interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority." (para. 68)

81. As alluded to in this passage, the interpretive limit provided by the *contra legem* principle is tied to the separation of powers, insofar as it ensures that a court will not assume the mantle of a legislature and interpret a provision contrary to the clear meaning of its express terms. To interpret *contra legem* is to surpass the limits of the judicial function, for the judge must be bound by statute. The concept is also connected to the principles of legality and legal certainty, in that it is important that the law should be certain and its application foreseeable, which understandably would not be the case if judges could freely adopt interpretations *contra legem,* as just defined.

The Construction of the Relevant Provisions of the Section 16 of the 2003 Act

82. Notwithstanding the sequence in which I have structured this judgment, it is important to understand that the front line approach to interpreting a domestic provision, even one derived from an EU measure, is to apply national rules in the first instance: in a great number of situations such approach would establish the compatibility of the provision with the measure. It is only when concern arises in this regard that resort to a *Pupino* like approach becomes necessary. Accordingly, one should see whether, without more, the view of the Court of Appeal in this case can be sustained on the first mentioned basis.

83. The general principles of statutory interpretation have been well rehearsed on many other occasions, and thus do not require any meaningful restatement here. It is well known that the objective of the task is to ascertain the will or intention of the legislature (see, for example, *Kelly v. Minister for the Environment* [2002] IESC 73 at p. 214 and *Macks Bakeries Ltd v. O'Connor* [2003] 2 IR 396 at p. 400). The exercise is a purely objective one: what matters is not what was subjectively in the minds of those who passed the legislation, but rather what intention can be gathered from the words used in the Act (*People (Attorney General) v. Dwyer* [1972] I.R. 416). It follows that the

express terms of the statute itself are the best indicator of this objective intention: thus the primary route by which such can be ascertained is by construing the words used in their ordinary and natural meaning. This is the "literal approach". If such words used are clear and unambiguous, they should be given their plain meaning: then the task is at its end.

84. That is not to say, however, that the words of the section in question can be read divorced from the context in which they appear: this context may include, *inter alia* , the rest of the sentence or sentences joined therewith, the other sub-sections of the provision, other sections within the relevant Part of the Act, the Act as a whole, and even, on occasion, the legislative history of the Act. Consideration of the context forms a part of the literal approach. In an overall sense the task for the judge is to construe the words used by reference to the entirety of the Act, rather than in isolation (see *C.K. v. Northern Area Health Authority* [2003] 2 IR 544 at p. 559 and *Crilly v. T. & J. Farrington Ltd.* [2001] 3 IR 251 at p. 295). The question therefore is what is the ordinary and natural meaning of the words used, in the context in which they appear.

85. If this first approach should result in ambiguity, it will be necessary to have regard to other interpretive tools, including but by no means limited to what has been described as the purposive approach. In such instances the Court will go beyond the pure text of the statute and consider any relevant and permitted circumstance including the intended objective of the Oireachtas and the reason for the statute's enactment. Occasionally it may be necessary to depart from the literal approach where to apply it would defeat the clear object and purpose of the legislation: see section 5 of the Interpretation Act 2005. In the present case, where it is accepted by all that the Oireachtas, in enacting the relevant sections of the 2003 Act, intended to transpose Article 23 F.D., any purposive interpretation of section 16 would have to have regard to the CJEU's interpretation of that Article as outlined in *Vilkas.*

86. The backdrop against which this question of how s. 16 should be interpreted, is fully set out above. It is clear that a conforming interpretation must be given to the provisions of the 2003 Act, but only insofar as it is possible to do so: if by this means the result falls short of what is required, that must remain the outcome. The CJEU's judgment in *Vilkas* is clear: Article 23 F.D. permits the making of a new surrender date on more than one occasion: quite how many is not clear and is not necessary to dwell on. Although the parties accept what end result s. 16 was intended to achieve, nonetheless, by virtue of the terms of subs. (5A), the learned High Court judge was not satisfied that the section, expressed as it is in simple binary terms, can be read in the manner suggested by the Minister, for to do so would render its provisions ineffective. The Court of Appeal, on the other hand, considered that the section was ambiguous, and therefore, relying on section 5(1)(a) of the 2005 Act and the principle of conformity, afforded the section an interpretation, which was consistent with the *Vilkas* opinion on Art. 23 F.D.: in its view this was the plain intention of the Oireachtas.

87. The gateway to the interpretive approach utilised by the Court of Appeal was its holding that the terms of section 16 are ambiguous. It was via this route that the intention of the Oireachtas in transposing the Framework Decision came to be considered. If this view of the section was otherwise, the result arrived at could not have been reached. For my part, however, I must respectfully disagree with this conclusion in respect of ambiguity. As I see it, the learned High Court judge was correct in the view which he took of the provisions in question. (para. 21 *supra* and para. 94 *infra*).

88. Like Keane J. in the High Court, I consider that the critical provision for present purposes is section 16(5A). By virtue of s. 16(5), where a person is brought before the High Court pursuant to subsection (4)(c) (which will only occur where the requested

person has not been or will not be surrendered within the s. (3A) time limit), the Court shall either (a) fix a new date and detain the person in prison until then: such an option is only available where the original surrender was prevented by *force majeure* : or (b) in any other case, order that the person be discharged. Two options: two choices: if *force majeure* applies, a new surrender date: if not, the court must discharge the person. Section 16(5A) applies only to a person in respect of whom a new surrender date has been made: the provision means that surrender, in an actual and physical s sense must take place not later than ten days after the order takes effect, or if that has not happened, the subject person shall be discharged.

89. One must, of course, be candid and acknowledge that another interpretation of this provision is, at the least, conceivable. After all, the construction urged by the respondent was ultimately accepted by the Court of Appeal. That interpretation, described in full at paragraph 46, *supra* , is that by virtue of the use of the phrase "the time for surrender under subsection (3A)", in subsections (4)(c) and (5)(a), the time for surrender does not mean ten days *simpliciter* , but rather ten days subject to extension in accordance with these subsections. Edwards J., although acknowledging that the appellant's interpretation appeared "somewhat more cogent" than that preferred by the respondent, was not satisfied however that it had sufficient force to resolve the construction issue: hence the finding of ambiguity. With respect, the question is not whether surrender must take place within ten days of the s. 16(1) or (2) order taking effect, but rather what is provided for if the subject person is not returned within ten days from the date of the order fixing a new surrender date? Subsection (3A) is not the only critical provision: subs (5) and in particular subs (5A) are arguably the key provisions. In any event let me assume that the respondent's argument cannot be entirely dismissed: its role on the construction issue must therefore be considered.

90. At this point therefore, we have the interpretation contended for by the appellant and the contrary construction urged by the respondent. That raises the question as to whether the mere fact that the respondent's interpretation is stateable is of itself sufficient to found an ambiguity as to the true meaning of the section, or whether such interpretation must reach some higher threshold before it can cast doubt on the face of the statute. In my view, the answer is that it must: there must be a level of credibility and reality to the contrary construction, beyond the bare fact of its stateability, in order to produce such uncertainty. Though I would be reluctant to define a threshold, such must at least plausibly be the correct one.

91. While accepting that the respondent's construction is not wholly untenable, insofar as it is not plainly nonsensical or manifestly incoherent, nonetheless in my view, the section, in accordance with the ordinary principles of statutory construction, has but one proper meaning. As such I do not consider that there is in fact the real ambiguity as identified by the Court of Appeal. Accordingly, having determined that the first-in-line approach to statutory construction permits of only one interpretation, one which is contrary to the meaning of the equivalent provisions of the Framework Decision, the question then becomes whether the principle of conforming interpretation can dislodge this conclusion so as to arrive at a construction in conformity with the EU instrument, or whether to so interpret section 16 would be to act *contra legem* ? Before analysing this issue however, there are some further matters addressed by the Court of Appeal which require observation.

92. Having held at paragraph 84 that the relevant subsections were ambiguous, Edwards J. went on to consider a number of issues which flowed from that conclusion. For example, at paragraphs 87-93 the learned judge discussed the proviso within section 5(1) of the 2005 Act (para. 13 *supra*) and the doubtful penalisation principle as described in *Mullins v. Harnett* [1998] 2 ILRM 304; in particular he commented on the present status of the latter principle given that it long pre-dates the creation of the EU

and the consequent requirement to adopt a conforming interpretation of legislation intended to transpose EU instruments. Again at paragraphs 105-107 he expressed a view on the proper interpretation of the 2003 Act, and in particular what he saw as the non-applicability of the doubtful penalisation principle thereto. The learned judge also considered the decision of this Court in *Kadri* which he distinguished from the instant case on a number of bases (see paras. 94-104). Finally, at paragraph 108 he stated his conclusion that "the provisions at issue in this case do not create penal or other sanctions within the meaning of that phrase as it is used in section 5 of the Act of 2005."

93. As I have reached the view that the learned High Court judgment was correct in his interpretation, it follows that it is not necessary for me to consider any of these further issues, which arose for discussion only in the context of the Court of Appeal's finding of ambiguity. As such I should not be taken as expressing any opinion on those matters, which should await a particular case in which the issues directly arise for determination.

94. In this case, an order was made under section 16(5)(a) setting a first new date, it having been determined that Mr Vilkas's refusal to board his original surrender flight was a circumstance beyond the control of the State. As and from the moment of the making of that order, the appellant, in the language of subs (5A), was "a person to whom an order for the time being in force under subsection (5)(a)" applied. That subsection then provides a single choice of response: either the requested person is surrendered within 10 days of the order taking effect, or else he or she is discharged. No provision is made for a further extension period. Indeed no provision is made for any other outcome: it is surrender within ten days, or discharge. As the surrender was not effected within that period, the plain, ordinary, natural and, in my view, unambiguous meaning of subsection (5A) was that the appellant had to be discharged.

95. In my view, this is the only meaning that the subsection permits of. Of course, when the learned High Court judge held as he did, he did not have the benefit of an interpretation of Article 23 F.D. by the CJEU. The Court of Appeal, having made the reference, did. It should be said that the interpretation of Article 23 F.D. arrived at by the Court of Justice was not the most immediately obvious one: even with an expansive approach to the provision such construction is certainly not strikingly apparent on the wording of the Article itself. One would have to have some sympathy with the statutory draftsman who appears to have faithfully transposed what the plain terms of that Article appeared to say: at the time he did so without foreknowledge of the *Vilkas* decision. Although the amendment history of the 2003 Act shows that it has been bedevilled by interpretive difficulties, the problems posed in the instant case may have their origin more in the EU instrument than in the transposing legislation.

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

97. This conclusion finds support from the High Court's power, on the making of a s.

16(1) or (2) order to direct the subject person again be brought before the court. That power is solely contained in subs 4(c). That provision applies when the surrender has not been effected within 10 days of the original order taking effect: further, it contemplates the "direction" order being made at the original s. 16 hearing. There is nothing to suggest that the High Court has statutory authority to give such a direction on more than one occasion or to make one, having open ended effect. In fact this understanding is reflected in the orders made in this case. Whilst s. 4(c) is used in the original order, there is no reference to it in the order of 1st August, 2015 (paras. 16 and 18 *supra*). Accordingly, it seems to me that if s. 16 bears the meaning as the Court of Appeal holds, it is altogether surprising that the power to make repeat direction orders, was not evident and clearly specified within the section itself.

98. Despite the conclusion which I have reached in respect of the provisions in question, it is necessary to take the opportunity to affirm the importance of the principle of conforming interpretation generally. I can only endorse the comments of Edwards J. at paragraph 93 of his judgment, where he said that "[a]rguably, it is highly desirable that the construer of transposing legislation should have an ability to have regard to the instrument intended to be transposed, and where necessary to be able to afford the domestic transposing legislation a purposive and teleological interpretation consistent with the instrument intended to be transposed." Absolutely correct where such interpretation is feasible: but as in this case there are occasions where such simply will not be open on the words of the domestic instrument.

99. As an illustration of when this may be or may not be possible, could I refer to two decisions: my judgment in *Skiba,* delivered today, and *Rimsa v. Governor of Cloverhill Prison* [2010] IESC 47. In Skiba I have held that it is appropriate to interpret the phrase "circumstances beyond the control of [the State]" in section 16(5)(a) of the 2003 Act in line with the interpretation accorded by the CJEU to the corresponding words of Article 23(3) F.D. in *Vilkas,* notwithstanding that that phrase would likely not be so construed , if it appeared in a purely domestic statute. Accordingly, I have concluded that the words must be interpreted as meaning *force majeure* as understood in EU law, which means that only abnormal and unforeseeable circumstances which were outside the control of the State, and the consequences of which could not have been avoided in spite of the exercise of all due care, will suffice on an application for a new surrender date under section 16(5).

100. A contrary conclusion was arrived at by the court in *Rimsa* , a case again pertaining to the 2002 Framework Decision and the 2003 Act. Here Murray C.J. held, on behalf of this Court, that there was a clear conflict between section 16(5)(b) of the 2003 Act, in the pre 2012 version of the section, and Article 23(3) F.D.: such a conflict could not be resolved on a *Pupino* basis. These cases show that the principle of conforming interpretation will doubtless continue to play an increasingly prominent role in statutory interpretation in this jurisdiction, but, as the case law at European and national level shows, it is not without its limits.

101. It follows from the above that, in my view, the Court of Appeal erred in its interpretation of the relevant subsections of section 16. The only permissible meaning of the section is as stated by the learned High Court judge. Accordingly, there is no question of remitting the proceedings to the High Court for a determination of whether Mr Vilkas's refusal to board the aeroplane on the second occasion was a "circumstance beyond the control" of the State, *i.e.* a *force majeure* as understood in EU law.

102. The next observation is purely an aside and incidental to the disposal of this appeal: nonetheless, I wish to venture some *obiter* views on what the likely outcome would have been, if the High Court had determined the application moved before it. The judgment of the CJEU in *Vilkas* strongly suggests that the second refusal to board the

plane would not have amounted to *force majeure* on the basis that the resistance of the requested person on such occasion could not be classified as unforeseeable (see paras. 59 and 60 of the judgment). The same was suggested by Advocate General Bobek in his Opinion:

> "84. In conclusion, if the narrow interpretation of force majeure as suggested in this Opinion is embraced, it is clear that any rerun of Article 23(3) of the Framework Decision will occur only in very exceptional situations. On this understanding, the aggressive behaviour of the requested person frustrating a first surrender attempt could be qualified as force majeure only if there was nothing in the file and the facts of the individual case which would have led the national judicial authorities to have reasonably foreseen such a course of events. *By contrast, a repetition of almost identical behaviour preventing a subsequent surrender attempt could not be reasonably qualified as force majeure, unless, on the facts of the case, the competent authority had reason to believe that such a scenario could not reoccur* ." (Emphasis added)

103. It is not apparent that there was anything on the facts of this case to suggest that Mr Vilkas's behaviour would not reoccur on the second occasion. Unlike the situation in *Skiba* , where I have determined that Mr Skiba's resistance on a first occasion was not reasonably foreseeable, it must surely be the case that where a requested person has successfully frustrated his surrender a first time, through his refusal to board an aeroplane, repeated resistance to the same effect on a second occasion will be foreseeable. Thus even had the judgment of the Court of Appeal been upheld and the matter remitted, or if Keane J. had determined that he had jurisdiction to determine the substance of the application when first before him, it is very difficult to see how the Minister could have established "circumstances beyond the control" of the State, as now understood: if that had occurred, it would therefore have followed, on the facts of the case, that Mr Vilkas would have had to be discharged in any event.

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What next: Section 16(5A)(b) of the 2003 Act:

104. In light of the conclusion reached above, it follows that as Mr. Vilkas was not surrendered within the ten day period provided for under s. 16(5A)(a), the trial judge was obliged to discharge him pursuant to s. 16(5A)(b). The same requirement, imposing the same obligation is also found in s. 16(5)(b). The former applies where a new surrender date has been obtained and the latter where on an application therefor, circumstances of *force majeure* could not be established and is therefore refused: in both situations the court "shall…order that the person be discharged".

105. At this point a further issue arises. The provisions last mentioned were undoubtedly intended to give effect in domestic law to Article 23(5)(F.D.), which, it will be recalled, states that:

> "[U]pon expiry of the time limits referred to in paras. 2 to 4, if the person is still being held in custody, he shall be released."

As set out in detail above, in its judgment in this case the CJEU discussed what should occur when surrender is not effected within these prescribed time limits (see paras. 32 - 37 *supra*). In short, it determined that the mere expiry of those periods cannot relieve the executing Member State of its obligation to carry on with and to finalise the execution process, by ultimately having the requested person surrendering: new dates

must be agreed for this purpose. The only consequence of non-compliance was that the subject person must be released if still being held in custody (Article 23(5)).

106. The CJEU did not specifically address what form or manner of release it had in mind. Whether for example such was intended as 'provisional', as Article 12 permits or in some other way being restrictive or curtailing of movement. Perhaps some form of bail, but how could that be administered and pursuant to what lawful authority? Might it instead require simply the immediate re-arrest of the person concerned? The answer is not obviously evident, though it was for Advocate General Bobek who had no doubt in this regard: such had to "amount to genuine and unconditional release as opposed to 'provisional' release under Article 12 of the F.D." (para. 35): no doubt having Article 6 of the CFR and Article 5 of the Convention in mind and being conscious that, if otherwise the time line could be disregarded with virtual impunity. If his view be correct, such may well pose considerable difficulties for the executing state not only at a practical level, but also in its faithful observance to other provisions of the Framework Decision.

107. It is undoubtedly true that Article 23 does not mandate or regulate custody issues: such is a matter for the Member State concerned. However, it is difficult to see how if release is to be truly unqualified, unrestricted and without any form of constraint, that State can comply with its obligations under the F.D. Despite such release, the executing Member State is under the same duty as if custodial incarceration was available, as an option right, namely that it must take all the measures it deems necessary "to prevent the person absconding" (Article 12). This seems to be a provision of overriding application, applying throughout the entire process. The essence of this general obligation is reinforced by the requirement, pending a final decision on extradition, of ensuring "that the material conditions necessary for effective surrender of the person remains fulfilled" (Article 17.5).

108. This continuing responsibility on the state concerned, has been summed up by the Advocate General as follows:-

> "The surrender is not contingent upon the requested person being held in custody. This is confirmed by Article 12 of the Framework Decision which establishing that when a person is arrested or on the basis of an EAW the executing judicial authority shall take a decision on whether the requested person should remain in custody. Moreover even if during the surrender procedure, the executing judicial authority has the obligation to take the necessary measures to ensure that the material conditions for effective surrender remain fulfilled, the Framework Decision does not impose custody or regulate its length or conditions which remain subject to national law." (para. 37)

This reads entirely acceptable at the document level but has inherent difficulties in its actual implementation.

109. If on the one hand the individual is free from detention and that freedom is not circumscribed - no reporting requirement - no surveillance - availability of travel documents -liberty secured - and yet on the other the executing state must ensure, that whenever the court at some future point in time might fix a further surrender date (if ever), effective surrender can take place with due despatch: many states will find it practically troublesome and legally fraught to appropriately balance these obligations, which at one level at least appear conflicted. This case is a primary example. Mr. Vilkas when discharged left the jurisdiction as he was perfectly entitled to do so. It may or may not have been fortuitous that he was detained in Northern Ireland on E.A.W's from Lithuania in respect of the same convictions. This I suggest will rarely be the case. Even though those difficulties are a matter for domestic law, it would have been helpful

indeed to have some guidance from the CJEU on this issue.

110. One further point, one mentioned with great respect: this issue does not seem to fit within the referred questions, even on the broadest view. It is probable therefore that the parties involved and those who intervened, of which there were a number, had no forewarning of this possible outcome and as a result did not of course, make any submissions on the general issue: even more significantly on the practical follow through which the F.W. Decision seems to now require to that end. Finally, it is worth noting that the Advocate General foresaw some of these difficulties when he pointed out at para. 89 of his opinion that "[He] takes no position on the legal status or validity of an E.A.W. once Article 23(5) of the Framework Decision is triggered, leading to the obligatory release of the requested person from custody". Be that as it may, the CJEU ordained as it has.

111. The views of the CJEU on this issue may have immediate consequences for the provisions referred to at para. 103 above. As noted, the Irish Act uses the term "discharge" rather than "release". The issue thus arises as to whether that word in both s. 16(5A)(b) and s. 16(5)(b) can be given a conforming interpretation which accords with the meaning intended by the CJEU?

112. As a matter of Irish law, certainly in the criminal and related spheres, the "discharge" of a person from custody means a full and unconditional discharge from the process that he has been subject to. Such marks the end of whatever proceedings are then in train. It is also my understanding that, prior to the decision of the CJEU in this case, as a matter of practice where a requested person was "discharged" pursuant to section 16(5)(b) or 16(5A)(b), that meant an unrestrictive and unequivocal discharge, as in fact occurred in this instance. No case was cited and I know of none where that consequence did not follow.

113. On the other hand the word "release" has a much more restricted meaning which is entirely different from what a discharge entails. A release generally though not always, is conditioned either by duration, terms or obligations. The phrase "release on bail" is a good illustration of what the term means. Even when unconditioned however, its meaning is generally regarded as being a considerable distance from that of the word discharge.

114. These matters are further complicated by the fact that Mr Vilkas was, as of the date of hearing, at least, in detention in Northern Ireland on foot of the same EAWs as are at issue in these proceedings. If he is surrendered to Lithuania from that jurisdiction, the underlying issue will be rendered moot in respect of Mr Vilkas, although the interpretive difficulties would have remained. If, however, he successfully resists his surrender there, and then returns to this State, what then are the relevant authorities to do in order to comply with the judgment of the CJEU in *Vilkas* ? These and some of the other issues arising would appear to call for a legislative reassessment of sections of the 2003 Act.

Conclusion

115. For the reasons stated above, I would allow the appeal and by reference to the questions upon which leave was granted would conclude as follows:-

> (i) that the cumulative effect of the relevant measures of the 2003 Act, namely s. 16(4)(c), (5)(a)(i) and (5A)(a), is that provision is made for the fixing of one new surrender date and no more,

(ii) that such follows from the natural and ordinary meaning of these sections, there being no ambiguity in that regard,

(iii) that the principle of conforming interpretation cannot be utilised to render such provisions consent with the opinion of the CJEU in *Vilkas* regarding Article 23 of the Framework Decision: to hold otherwise would be against the wording so used,

(iv) that if surrender has not taken place within the timeframe for the original s. 16(1) or (2) order, or if a new surrender date has been obtained within the time period therefore, then pursuant to s. 16(5)(b) and (5A)(b) of the Act, the person must be discharged and the surrender process on foot of the issued warrant, ; that particular process is at an end,

(v) that the subsections last mentioned cannot be read to accord with the *Vilkas* judgment on this point, and finally

(vi) that the other issues raised do not require determination.