Supreme Court of Ireland Decisions

Judgment

Title:	The Minister for Justice & Equality v Skiba
Neutral Citation:	[2018] IESC 68
Supreme Court Record Number:	33/17
Court of Appeal Record Number:	2016 594
High Court Record Number :	2016 96 EXT
Date of Delivery:	12/05/2018
Court:	Supreme Court
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 dismissed

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THE SUPREME COURT

[Supreme Court Appeal No. 2017/33]

[Court of Appeal Record No. 2016/594]

[High Court Record No. 2016/86 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-

PIOTR PAWEL SKIBA

Respondent/Appellant

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

Introduction

1. On the 1st December, 2016, the High Court ordered the surrender of Mr. Skiba (also referred to as "the appellant") to the Republic of Poland pursuant to section 16(1) of the European Arrest Warrant Act 2003, as amended. That State had requested his extradition so that he could serve two sentences of imprisonment for offences committed there. His surrender was set for the 22nd December, 2016. It was to be effected in the usual manner, that is, by commercial airline.

2. The reader will not be surprised to learn that the planned surrender was not as straightforward as anticipated. On the 12th December, the appellant's solicitors contacted the Garda Extradition Unit to inform it that Mr. Skiba had a fear of flying. This was the extent of the information conveyed. There followed a course of correspondence between the relevant Irish and Polish authorities, with the former seeking to make alternative travel arrangements for Mr. Skiba's surrender. Ultimately, however, it was decided to proceed with the plan as originally conceived. Having arrived at the departure gate at Dublin Airport, the appellant refused to embark the aircraft. It being apparent that it would require more than minimal force to get him aboard, the Captain of the airplane refused to allow him to board.

3. The next day the Minister for Justice and Equality ("the Minister") made an application in the High Court seeking to fix a new date for surrender. A prerequisite to the making of such order is that the original surrender must fail "because of circumstances beyond the control" of the States concerned. If such condition is not satisfied, the High Court must discharge the requested person. Humphreys J. decided not to follow the then recently delivered Opinion of Advocate General Bobek in Case C-640/15 *Tomas Vilkas* , which had stated that "circumstances beyond the control" must be understood as referring only to situations of *force majeure* as understood in EU law; thus such circumstances can be invoked only if, *inter alia* , they could not be foreseen by the States in question. Incidentally the preliminary reference in that case had been made by the Irish Court of Appeal. Humphreys J. preferred instead to apply the "normal" meaning of *force majeure* , which does not impart any element of foreseeability. The learned judge fixed the 5th January, 2017, as the new date for the surrender of Mr. Skiba.

4. The appellant appealed to the Court of Appeal. By judgment dated the 12th January, 2017, that Court found that the appellant's resistance to boarding the plane was not foreseeable in the circumstances of the case, and accordingly that it was a circumstance "beyond the control" of the State. Thus the High Court judge's assessment was correct,

and the appeal was dismissed. Mr. Skiba was surrendered to Poland on the 14th January, 2017.

5. Eleven days later the Court of Justice of the European Union ("the CJEU") delivered its judgment in C-640/15 *Tomas Vilkas ("Vilkas")* and adopted an interpretation of "circumstances beyond the control" of the Member States which was in line with the Advocate General's Opinion. The appellant was granted leave to seek a further appeal to this Court on a single net legal issue. The sole question posed asks whether the Court of Appeal was correct in its determination of the law applicable in this case in light of the subsequent decision of the Court of Justice in *Vilkas* . In essence the issue is whether Mr. Skiba's solicitor's phone call to the Irish authorities rendered it foreseeable that he would refuse to board the aircraft on the 22nd December; if so, what transpired on that date could not be said to have been "beyond the control" of the State and thus the High Court should have made an order discharging the appellant, rather than fixing a new date for surrender.

6. At the hearing of the appeal, another issue arose out of the discussion of the judgment of the CJEU in *Vilkas* . That Court held that the expiry of the time limits for surrender does not relieve the executing Member State of its obligation to carry on with the procedure for executing a European Arrest Warrant ("EAW") and to surrender the requested person, and that the relevant authorities must agree on a new surrender date. The issue that arose on the appeal related to the meaning of the word "discharged" in section 16(5)(b) of the European Arrest Warrant Act 2003, as amended, and in particular how that subsection should be interpreted in light of the decision of the CJEU. To that end the Court invited further written submissions from the parties on that point.

7. Furthermore, again subsequent to the hearing of this appeal, the Court of Appeal delivered judgment in *Minister for Justice and Equality v. Vilkas* [2018] IECA 33, the case having been referred back to that Court following the judgment of the CJEU. Mr. Vilkas was subsequently granted leave to appeal that judgment to this Court. As the two cases concern the interpretation of the same provisions of domestic and EU legislation, albeit different subsections thereof, it was decided that the parties to this appeal should be permitted to make oral submissions following the hearing in the *Vilkas* appeal. Unsurprisingly, as both cases in essence arise out of the judgment of the CJEU in *Vilkas,* there is substantial overlap in many respects, although the net legal issue in each case is distinct. Accordingly, regard should also be had to my judgment in *Vilkas,* delivered on the same date as the within judgment.

Legal Framework
Council Framework Decision on the European Arrest Warrant

8. Before setting out the background and procedural history of the case, it may be helpful at this juncture to cite the applicable law, which has both an EU and a domestic dimension to it. At EU level, the relevant enactment 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"). This is, of course, the framework decision which established the EAW system. Article 23 thereof provides for the time limits for the surrender of the person requested. It states that:

"Article 23

> Time limits for surrender of the person
>
> 1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.
>
> 2. He or she shall be surrendered no later than 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." (Emphasis added)

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

The European Arrest Warrant Act 2003

9. The Framework Decision on the European Arrest Warrant is given effect in domestic law by the European Arrest Warrant Act 2003, as amended ("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 section 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 sections 21A, 22, 23 or 24 (inserted by sections 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) …

(2A) …

(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) …

(b) order that that person be detained in a prison … for a period not exceeding 25 days pending the carrying out of the terms of the order, and

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

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

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

subparagraph (i), before that expiration."

10. It is apparent from the aforegoing provisions that the default position is that a surrender order made under section 16(1) comes into effect fifteen days after the date on which it is made (per section 16(3)) and that surrender must be effected within a further ten days from that date (per section 16(3A). There is, however, a provision allowing for a new surrender date to be fixed outside the default ten-day period, and it is this provision which is central to this appeal. Subsection 16(5) of the 2003 Act provides that:

> "(5) Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall—
>
> (a) if satisfied that, <u>because of circumstances beyond the control of the State or the issuing state concerned</u> , 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." (Emphasis added)

11. Regard should also be had to subsection 16(5A) of the 2003 Act, which states that:

> "(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."

The Court of Appeal held, in its preliminary reference to the CJEU in Vilkas, that sections 16(3) to 16(5A), inclusive, were intended to faithfully transpose Article 23 of the Framework Decision. Neither party to this appeal appears to dispute that proposition.

Background and Procedural History

The Surrender Order

12. Mr. Skiba is the subject of a European Arrest Warrant issued by the Republic of Poland and dated the 21st March, 2016. The EAW in question is a conviction warrant; the appellant's surrender is sought so that he may serve two sentences of imprisonment in that country following his conviction for certain offences before the Polish courts; one

such sentence is of one year and six months' duration, and the other is a sentence of nine months and twenty-eight days, the balance of a ten-month sentence.

13. In September, 2016 Mr. Skiba was arrested on foot of the EAW in question. He unsuccessfully contested his surrender at a hearing in the High Court for the purposes of section 16 of the 2003 Act. The hearing was held before Donnelly J. On the 1st December, 2016, the learned judge ordered the appellant's surrender pursuant to section 16(1) of the Act. She also ordered that he be remanded in custody in Cloverhill Prison for a period of not less than fifteen days from that date, and a further period not exceeding ten days until the date of his surrender. Accordingly, the surrender was to be effected not later than the 25th December, 2016.

14. The High Court also made two ancillary orders pursuant to section 16(4)(c) of the 2003 Act to the effect that "(a) if the Respondent is not surrendered before the expiration of the time for surrender under Section 16(3A) of the said Act he is to be brought before the High Court again as soon as practicable after that expiration" and "(b) 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 the Respondent will not be surrendered on the expiration referred to at (a) before that expiration he is to be brought before the High Court again before that expiration."

15. The Irish Central Authority, for the purposes of the 2003 Act ("the Minister"), made arrangements with the relevant Polish authorities for the surrender of the appellant to be effected on the 22nd December, 2016, which was within the permissible ten-day window for surrender under the Act. The envisaged mode of surrender was that Mr. Skiba would be placed on a commercial airline flight from Ireland to a destination in Poland; this is the usual method used for such matters. He was to be accompanied on this flight by members of the Polish police, who were to travel to Ireland for the purpose of chaperoning him back to Poland. It appears that to this end airline tickets were purchased on the 9th December, 2016. These arrangements were made in a timely and appropriate fashion and in accordance with the standard surrender procedures.

Correspondence between the Irish Central Authority and the Polish authorities

16. On Friday the 9th December, 2016, the appellant's solicitor phoned the Garda Extradition Unit to notify it that Mr. Skiba has a fear of flying. The solicitor was advised to ring again on Monday in order to speak to the Sergeant who was in charge of the surrender procedure. Thus on the 12th December the solicitor rang back and advised Sergeant James Kirwan of the Extradition Unit of the issue.

17. Following the receipt of this information, a course of correspondence was entered into between the Irish Central Authority and the relevant Polish authorities. This correspondence is relied upon by Mr. Skiba as indicating the foreseeability of his refusal to board the airplane at Dublin airport; it is thus necessary to set out the material passages of these letters, emails and faxes. The first such letter from the Central Authority to the issuing judicial authority, the Regional Court in Kielce, was dated the 12th December, 2016. It was marked "Urgent" and titled "Re:- European Arrest Warrant in respect of Piotr Pawel Skiba". That letter provided as follows:

> "I refer to previous correspondence.
>
> Solicitors acting for the respondent have advised that their client has expressed a fear of flying.
>
> Accordingly alternative arrangements for his surrender, <u>not</u>

> involving commercial aircraft, will be required.
>
> The respondent has expressed a fear of flying and there is a risk that he will resist boarding a commercial aircraft resulting in the pilot refusing to allow him on board, which has happened in the past.
>
> In the circumstances, please make alternative travel arrangements to collect the respondent between the 16th and 25th of December 2016 (dates inclusive). If due to circumstances beyond the control of the issuing state this is not possible then a date for the purpose of extending the time for his surrender should be proposed by the issuing judicial authority (Sad Okregowy w Kielce) for agreement in accordance with Art 23.3 of the Framework Decision and the respondent will have to be collected within ten days of that date.
>
> I would be obliged to receive a response to this query as a matter of urgency." (Emphasis in original)

18. On the 13th December, the Chief State Solicitor wrote to the appellant's solicitors informing them that the Central Authority had been notified of the appellant's fear of flying and that "the issuing state is being informed so that alternative arrangements may be made for his surrender not involving commercial aircraft." No replying documentation has been disclosed to the Court.

19. The response of the Polish authorities to the letter of the 12th December came by way of email from the Europol National Crime Bureau Unit at Warsaw to its Dublin counterpart on the 16th of that month. That agency, together with another operating under the acronym SIRENE Poland, performs extradition functions broadly analogous to those of An Garda Síochana in this country, including the running of a "convoy unit" for transporting extraditees. The Polish authority acknowledged that it had been informed that the appellant has a fear of flying. It inquired whether there was any appropriate medical documentation confirming Mr. Skiba's fear/phobia, or whether the only available information was that provided by his solicitors. A response was requested by noon on the 19th, in light of the short time before surrender. That email was followed up by a fax from the Kielce Regional Court on the 19th December, requesting "information whether there is some relevant medical documentation concerning the drugs (phobia related) for Piotr Pawel Skiba's … travelling by air." The same deadline for response was given.

20. The Irish Central Authority responded by letter dated the 19th December, 2016, again addressed to the issuing judicial authority and marked "Urgent". That letter stated that:

> "I refer to your correspondence dated 19/12/2016.
>
> This office is not in possession of any medical documentation concerning the respondent's expressed phobia .
>
> As previously informed, Solicitors acting for Mr. Skiba have advised that their client has expressed a fear of flying.
>
> In view of the respondent's expressed fear of flying, there is a risk that he may resist to board a commercial aircraft, resulting in the pilot refusing to allow him on board. Accordingly, arrangements for his surrender, not involving commercial aircraft , appear to be

warranted.

There is a concern now that he has expressed that he has a fear of flying, if he were to refuse to board a commercial flight it might then be difficult to persuade the High Court to extend the time for surrender on the basis of circumstances beyond the control of the member states.

That is because it could be argued on his behalf that it was reasonable to foresee that he would not voluntarily board an aircraft and therefore the reason he was not surrendered was not as a result of something beyond the control of the states in question as alternative arrangements should have been in put in place.

As matters stand, the respondent must be surrendered to the Polish police on or before 25/12/2016. If due to difficulty in arranging for an alternative means of surrender excluding commercial aircraft this is not possible, then a date for the purpose of extending the time for his surrender should be proposed by the issuing judicial authority (Sad Okregowy w Kielce) for agreement by the High Court in accordance with Art 23.3 of the Framework Decision. The respondent will have to be collected within ten days of that date." (Emphasis in original)

21. With the surrender deadline now looming, the Irish Central Authority again wrote to the Regional Court in Kielce on the 21st December. By now the letter was marked "Extremely Urgent". It read as follows:

"As previously advised the respondent must be surrendered to the Polish authorities on or before 25/12/2016.

Please note that if there are no arrangements in place to effect the hand-over of Mr. Skiba before the 25/12/2016 and there has been no proposal for an extension of time for reasons beyond the control of the Member States, which possibly could be due to having to make arrangements for surrender not involving commercial aircraft, the respondent will be brought back before the High Court on Friday, 23/12/2016 in accordance with section 16(4)(c) of the EAW Act 2003 (as amended).

In circumstances where there has been no order for an extension of time the respondent will be discharged from proceedings."

22. The response from NCB Warsaw was received later that evening. The short message provided that "[w]e confirm that the subject will be collected by our officers tomorrow [*i.e.* 22nd December] at 10:00 hrs at Dublin airport as originally planned."

The unsuccessful attempt at surrender

23. All did not go according to plan. On the morning of the 22nd December the appellant was brought from Cloverhill Prison by members of the Garda Síochana extradition unit to Dublin Airport, where the Gardaí met two Polish police officers who had flown to Ireland the previous day for the purposes of escorting the appellant on his flight. The appellant and the Polish officers checked in for their flight. The appellant, the Gardaí and

their Polish counterparts then went to the assigned departure gate. It was intended that from there the group would cross the tarmac to the aircraft together, following which the Gardaí would stay behind while the appellant and the Polish officers boarded the plane. At this point, Mr. Skiba indicated that he was not prepared to proceed beyond the departure gate. When it became clear that he would not board the plane other than through the use of more than minimal force by the police officers present, the captain of the plane decided that he did not want Mr. Skiba on his flight and refused him permission to board. The surrender attempt thus had to be abandoned, and the appellant was returned to Cloverhill Prison overnight.

The Judgment of the High Court fixing a new surrender date

24. It now being apparent that the appellant would not be surrendered before the 25th December, the Chief State Solicitor wrote to the appellant's solicitors later on the 22nd December indicating the Minister's intention to make an application under 16(5) of the 2003 Act the next day. The Central Authority also wrote to the Polish authorities explaining what had happened at the airport and seeking a proposal as to a new surrender date; the response by fax the following day requested that the new date be set for the 5th January, 2017. Thus on the 23rd December the Minister brought Mr. Skiba back before the High Court, as envisaged by the ancillary order made by Donnelly J. pursuant to section 16(4)(c)(ii) of the Act.

25. The hearing was held before Humphreys J. From the Minister's perspective the purpose of this hearing was to fix a new date for the appellant's surrender pursuant to section 16(5)(a)(i). A consequential order detaining the appellant pending the rearranged surrender was also sought under section 16(5)(a)(ii). This application was opposed by counsel for Mr. Skiba, who contended that the preconditions to the making of the said orders under section 16(5)(a) were not satisfied. Accordingly, he submitted that his client should be discharged pursuant to section 16(5)(b).

26. Evidence as to what had transpired at the airport the previous day was given by Sergeant Kirwan. As explained by the witness:

> "[W]e … went as far as the gate, Judge, we were then at the point where we had to leave the terminal building and cross the tarmac to the plane and at that point, Judge, he refused to go and it became apparent that he wasn't going to go except by using more than minimal force, Judge, and the Captain of the plane … decided at that point that he didn't want him on his plane."

27. Sergeant Kirwan gave evidence that the flight tickets had been purchased on the 9th December, prior to the appellant's fear of flying being brought to his attention on the 12th. He accepted on cross examination that the solicitor may have phoned the Garda Station the previous Friday, but stated that he was not aware whether this had in fact happened. Having received this phone call, which he felt should have been directed to the Chief State Solicitor's Office rather than the Garda Extradition Unit, he advised the solicitor to notify the CSSO but also took it upon himself to inform the relevant authorities of the appellant's fear. As regards the first notification of this fear coming after the appellant had been in custody for twelve days, Sergeant Kirwan stated that:

> "I would have been sceptical of this, Judge. The fact that we had been through the whole court procedure … and had a full hearing and when his extradition was ordered that no indication was given to the Court of this expressed fear, Judge."

28. The Sergeant confirmed that no medical evidence of this fear had been forthcoming.

The following exchange is also of some relevance:

> "Q. … I know you deal with a lot of cases of surrender and have occasions transpired in the past, Sergeant, where people have been nervous of flying or matters of that nature and how have they been dealt with?
>
> A. Yes, Judge, many occasions. I've dealt with hundreds of surrenders by air, Judge, 99.9% of them going according to plan and I have met many people, when I've met them at the airport they have said they have never been on a plane before and they would have been quite anxious and it is normal enough but they didn't have any problem boarding them on the plane."

29. Sergeant Kirwan confirmed that a new surrender date had been set for the 5th January, 2017, and that this surrender was to be effected over land, rather than by airplane. This, according to the Sergeant, is a far more complicated and time-consuming procedure. Under cross-examination, he could not comment on how Mr. Skiba had first come to Ireland, or the suggestion that the appellant has never flown before. He was further cross-examined in relation to the correspondence between the authorities in the two States, and also in relation to Mr. Skiba's English language proficiency and his demeanour on the morning that he was to be surrendered. Nothing of continuing relevance emerged from this cross-examination.

30. It is at this point that the *Vilkas* case at the Court of Justice of the European Union becomes relevant. That case is described in some detail at paras. 39-48, infra. Although the CJEU had not yet pronounced its judgment in *Vilkas* at the time of section 16(5) hearing, Advocate General Bobek had delivered his Opinion on the 27th October, 2016. Counsel for the appellant relied on that Opinion before the High Court and the Court of Appeal, contending that it contained guidance of general application to all cases in which Article 23 of the Framework Decision (and therefore section 16 of the 2003 Act) is engaged. There, the Advocate General had stated that the phrase "circumstances beyond the control of the Member States" should be understood as meaning *force majeure* as that concept is defined in EU law, which refers to "unusual and unforeseeable circumstances that are beyond the control of the party by whom it is pleaded and the consequences of which could not have been avoided even if due care had been exercised" (para. 60). A little later in the Opinion it is said that there are two essential elements in the notion of " *force majeure* ": the first is an objective one and relates to the circumstances, being abnormal, unforeseeable and extraneous to the person so asserting, and the second, a subjective one, meaning that due care must be taken to guard against such an abnormal event occurring (para. 65).

31. Of particular relevance however was paragraph 68 of the Opinion, where the Advocate General had stated as follows:

> "68. Concerning the first element of *force majeure* , the behaviour of the requested person can be considered as a 'circumstance beyond the control …' in the sense of Article 23(3) if it cannot be foreseen and is external to the control of the Member State alleging them. Aggressive behaviour at the time of surrender may therefore be considered as an unforeseen and extraneous event only if the factual elements at the disposal of the authorities in no way hinted at such a scenario occurring. When assessing the likelihood of such a scenario, due consideration must be given by the national authorities to the specific factual background of each individual case, including considerations such as: the crimes for

> which the person is requested or has been convicted; behaviour during detention; previous records; and any other elements related to his background that may emerge from the national file."

32. This paragraph formed the crux of the appellant's argument. He submitted that his solicitor's phone call to Sergeant Kirwan had put the State on notice of a potential problem. Thus it could not be said that his refusal to board the aircraft was unforeseen and therefore it could not amount to a "circumstance beyond the control" of the States concerned, had they exercised due diligence in relation to the matter. This was borne out by the course of correspondence between the Central Authority and the Polish authorities, admitted in evidence by agreement and said by the appellant to be an express acknowledgment by the Irish Central Authority that it had foreseen the risk that he would resist boarding the plane. This, it must be said, remains the central tenet of Mr. Skiba's submissions to this Court, albeit now bolstered by reliance on the judgment of the Court of Justice rather than the Opinion of the Advocate General, which obviously could not be binding.

33. This submission did not persuade Humphreys J. He took the view that what had happened was "beyond the control" of the State and he was therefore prepared to fix a new surrender date in line with that agreed in advance with the issuing judicial authority. The learned judge stated in his *ex tempore* judgment that:

> "Well, I'm not going to apply paragraph 68 of the Advocate General's opinion because in my view that is a departure from the normal understanding of force majeure. So I'm going to give it its normal meaning . The respondent refused to get on the plane; that's a circumstance outside the control of the Minister. So, because I'm satisfied that the failure to effect the surrender was because of circumstances beyond the control of the state, I'll fix the date of the 5th January [2017] for the surrender of the Respondent and order him to be detained [in Mountjoy pending the surrender]." (Emphasis added).

Thus on the learned judge's reading of section 16(5)(a) Mr. Skiba's refusal to board the aircraft was beyond the control of the State, and this was sufficient to fix the new date; the issue of foreseeability did not arise. The order of the Court clarified that Mr. Skiba was to be detained in Mountjoy for a period not exceeding ten days after the 5th January, 2017.

The Judgment of the Court of Appeal

34. Mr. Skiba appealed the said judgment and order of Humphreys J. to the Court of Appeal. He said that the learned judge had erred in not following the Advocate General's Opinion, and that this had led him into the further error of finding that the surrender could not be effected within the default statutory time period due to "circumstances beyond the control" of the States concerned, when the evidence was in fact to the contrary. He submitted that his phobia had been notified to the State but had been ignored. Alternative arrangements could and should have been made and thus what happened was not outside the control of the relevant authorities. There was ample time to make alternative arrangements, but nonetheless a decision was made to proceed with the original plan. Thus the problem that arose was entirely avoidable.

35. The Minister responded that the Irish Central Authority's perception of a risk that Mr. Skiba might not board the plane was not material; it is the High Court, not the Central Authority, which must assess whether the circumstances were "beyond the control" of the State. Although the Minister accepted that this assessment must be approached with due diligence, he argued that no "heightened" due diligence as

envisaged at paras. 80 and 84 of Advocate General Bobek's Opinion was required (see, para. 62 *infra*), as, unlike that case, this was not a second or subsequent application for a new surrender date. The only evidence before the High Court was Sergeant Kirwan's testimony. He had not been informed of the extent or degree of the appellant's fear, nor told that Mr. Skiba would be unable to fly or might refuse to board the aircraft, nor given any indication that his fear had ever previously prevented him from flying. No supporting medical evidence had been adduced, the authorities were not told that the appellant had a phobia in a pathological sense, and the Sergeant had expressed his scepticism of the appellant's fear. There was also his evidence that many people express a fear of flying but nonetheless board the airplane: cases where the phobia prevents the person from embarking are rare. Knowledge of the extent and history of the appellant's fear were peculiarly within his own knowledge and the authorities were not given sufficient details thereof; all that the authorities had was his bald statement of having a fear of flying, and Sergeant Kirwan was not challenged on the lack of detail conveyed to him. Moreover the appellant himself had not given evidence. The High Court judge had been entitled to take all of this into account. Thus the Minister submitted that the learned judge had exercised the requisite degree of due diligence and his decision was amply justified on the evidence before him.

36. The judgment of the Court was delivered by Edwards J. (Ryan P. and Mahon J. concurring) on the 12th January, 2017 ([2017] IECA 9). The Court agreed with the Minister's arguments. Edwards J. was of the view that there was no reason to believe that the High Court judge had not exercised the requisite due diligence in assessing the claim of *force majeure* or "circumstances beyond the control" of the relevant authorities. Moreover, there were no grounds for the learned judge to apply an approach of heightened due diligence. Edwards J. did not accept the proposition that once Sergeant Kirwan had been informed that the appellant had a fear of flying it was reasonably foreseeable that he would resist boarding the airplane or create such disruption as to cause the pilot to refuse to allow him aboard. The learned judge reasoned as follows:

> "A matter such as fear of flying is very easily asserted, but before action on foot of it could reasonably be justified there would have to be some assessment of the level of the theoretical risk involved. Very many people have a fear of flying and would prefer to travel by sea or overland despite the additional time involved in doing so. However, in most cases the fear does not operate to such a degree as to prevent them from taking flights. By the same token, a small percentage of people do have a fear so profound as to represent a phobia that operates to inhibit them from taking flights. In assessing the possible implications of an asserted 'fear of flying' an assessor would naturally look to see if the assertion was particularised and supported in any way, *e.g.,* by the provision of details by the person himself concerning how he had been affected historically, by third party accounts of how he had been affected, and optimally by relevant expert or professional testimony if any such material was available. However, absent any such support, a bald assertion could, it seems to me, do no more than flag a remote and theoretical possibility, rather than a reasonably foreseeable risk to be actively responded to." (para. 33)

37. In respect of the Irish Central Authority's reaction to the appellant's solicitor's phone call and the subsequent correspondence between the relevant Irish and Polish authorities, Edwards J. took the view that the letters reflected at paras. 17, 20 and 21, *supra* , had to be considered together. So read, they did not indicate an acceptance by the Irish Central Authority that it was reasonable to foresee that the appellant would not voluntarily board an aircraft. Rather, they indicated acceptance "that such a proposition

` *could be argued on his behalf*' " (emphasis in original, para. 34). Edwards J. observed that this position may have been adopted out of a concern to be seen to have ostensibly taken on board certain of the Advocate General's remarks not long after his Opinion had been promulgated. Indeed Edwards J. went on to say that the Central Authority "could be said to have over-reacted to the information received", given the absence of details or a description of the prior history in respect of Mr. Skiba's claimed fear.

38. Finally, Edwards J. agreed with another of the Minister's submissions and remarked *obiter* that "how the Central Authority may have viewed the risk is not determinative of anything." The person required to assess whether the circumstances advanced constituted *force majeure* or "circumstances beyond the control" of the relevant authorities was not the Central Authority, but the High Court. The Court of Appeal concluded that the High Court judge's assessment was conducted with due diligence and was consistent with the relevant evidence actually before him. Accordingly, it dismissed the appeal.

39. The appellant was surrendered to Poland on the 14th January, 2017.

The Judgment of the Court of Justice of the European Union in Case C 640/15 Vilkas

40. The Court of Justice delivered its judgment in Case C-640/15 *Tomas Vilkas* on the 25th January, 2017, just under two weeks after the Court of Appeal had delivered its judgment in this case. As noted above, the *Vilkas* case came before the CJEU by way of an Article 267 preliminary reference from the Irish Court of Appeal in *Minister for Justice and Equality v. Tomas Vilkas* (the neutral citation given to this case, when the Court of Appeal rendered judgment following the judgment of the CJEU, was [2018[IECA 33).

41. Mr. Vilkas was the subject of two European Arrest Warrants issued by a Lithuanian court. He resisted embarking the flight on the date set for his surrender, causing the pilot to refuse to have him on board the flight. A fresh surrender date was set by the High Court. Again, however, this surrender attempt failed as a result of Mr. Vilkas's behaviour. The Minister applied to the High Court for a third attempt to surrender Mr. Vilkas to the Lithuanian authorities, this time by sea and over land, but the Court held that it lacked jurisdiction to make such an order on a second occasion and thus ordered Mr. Vilkas's release. The Minister appealed to the Court of Appeal, which entered a stay in order to refer two questions to the CJEU for a preliminary ruling.

42. By the first of these questions the Court of Appeal asked whether Article 23 of the Framework Decision contemplates and/or allows for the agreement of a new surrender date on more than one occasion. Evidently this same point did not arise in Mr. Skiba's case. In short, the CJEU held that Article 23(3) permits the making of a new surrender date on more than one occasion, provided that the requisite circumstances exist on each such occasion. This aspect of the judgment is of continued relevance only insofar as it could be said to have informed the Court's subsequent treatment of the foreseeability of Mr. Vilkas's refusal to board the aircraft in the circumstances of the case. Following receipt of this opinion, the Irish Court of Appeal subsequently held that sections 16(3) to 16(5A) of the 2003 Act must be read to conform with the interpretation of Article 23(3) adopted by the CJEU, and thus that section 16 allows for the fixing of a new surrender date on multiple occasions. Mr Vilkas was granted leave to appeal that decision to this Court; its judgment on that appeal is delivered today alongside the judgment in this case.

43. More relevant for present purposes was the second question referred by the Court of Appeal. The wording is not entirely germane; what is important is that it required the Court of Justice to consider 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)

of the Framework Decision. Given that the sole issue before this Court arises directly out of the CJEU's treatment of this issue, it is necessary to address the pertinent sections of its judgment in some detail.

44. The Court first noted a divergence between the various language versions of that provision, with some languages, including English, using the phrase just quoted but others referring instead to the surrender not being possible by reason of a case of " *force majeure* in one the Member States concerned." Noting the need for a uniform construction of the provision, the Court resorted to an interpretation based on the intention of the legislature and the objective being pursued. By reference to the origins of Article 23(3) as found in Article 11(3) of the earlier Convention on Simplified Extradition Procedure, as well as the various language versions of the explanatory reports to that Convention and the Commission's proposal which led to the adoption of the Framework Decision, the Court took the view that "the contracting parties to the Convention ultimately had the intention of referring to the concept of force majeure as usually understood, a fact which is confirmed by the list of examples that are set out in the explanatory report." Thus the Court concluded that:

> "52 These various factors contribute to demonstrating that the use in various language versions of [the concept of circumstances beyond the control of the Member States concerned] does not indicate that the EU legislature intended to make the rule set out in the first sentence of Article 23(3) of the Framework Decision applicable to situations other than those where the surrender of the requested person proves impossible by reason of a case of *force majeure* in one or other of the Member States."

45. The Court then in effect confirmed the view expressed in Advocate General Bobek's Opinion, disregarded by Humphreys J., that the foreseeability of the event is relevant for the purposes of Article 23(3). It explained that it is apparent from settled case law, across various sphere of EU law, that "the concept of *force majeure* must be understood as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care" (para. 53). As can be seen, four distinct aspects of *force majeure* are immediately apparent from this definition. These are, that the circumstances relied on must have been:

> i. Abnormal;
>
> ii. Unforeseeable; and
>
> iii. Extraneous to the party by whom they are pleaded;

And, furthermore:

> iv. It must not have been possible to avoid the consequences of the *force majeure* in spite of the exercise of all due care.

46. The Court next recalled that the concept of *force majeure* does not have the same scope in all spheres of EU law, and therefore its meaning must be determined by reference to the legal context in which it is to operate (para. 54). Thus it was necessary to take account of the general scheme and purpose of the Framework Decision in order to interpret and apply the constituent elements of *force majeure* , as derived from the Court's case-law, in the context of Article 23(3) (para. 55). This view of the Court seems indistinguishable from that of the Attorney General.

47. Approached in this manner, the Court had the following to say:

- As Article 23(3) lays down an exception to the general rule contained in Article 23(2), the concept of *force majeure* in Article 23(3) must be interpreted strictly (para. 56);

- It is clear from the wording of Article 23(3) that *force majeure* can justify extending the period for surrender only where it *prevents* that surrender - merely rendering surrender more difficult is not sufficient (para. 57);

- The fact that resistance is put up by a requested person may properly be considered as an abnormal circumstance outside the control of the authorities concerned (para. 58);

- However, the fact that *certain requested persons* put up resistance cannot, in principle, be classified as an unforeseeable circumstance (para. 59);

- Where the requested person has already resisted a first surrender attempt, the fact that he resists a second surrender attempt cannot normally be regarded as unforeseeable. The same is true of the refusal of a commercial airplane pilot to allow a violent passenger to board (para. 60);

- In respect of the requirement that the consequences could not have been avoided in spite of the exercise of all due care , the authorities concerned will have means enabling them more often than not to overcome resistance put up by the requested person. The Court gave two examples:

  o It cannot be ruled out that authorities may have recourse to certain *coercive measures* , as provided for in national law and in compliance with the requested person's fundamental rights, in order to cope with resistance (para. 62);

  o It is also possible to envisage recourse to *means of transport* whose use cannot be effectively prevented by the requested person's resistance (para. 63).

48. In spite of the foregoing, however, the Court did not rule out the possibility that, on account of exceptional circumstances, it might be objectively apparent that the requested person's resistance to surrender could not be foreseen by the authorities concerned and that the consequences of said resistance could not be avoided through the exercise of all due care by the authorities. In such circumstances, the rule set out in the first sentence of Article 23(3) would apply (para. 64).

49. The Court then went on to make some further observations on the consequences of the expiry of the time limits prescribed in Article 23 of the Framework Directive and how the executing Member State must still process the surrender request at that point (paras. 66-73). The impact of these remarks was touched upon but not fully debated at the hearing of this appeal: accordingly, the parties were then invited to make further written submissions on the subject (para. 6 *supra*). This issue is addressed separately

later in this judgment; for present purposes the focus will remain on the point concerning the meaning and application in this case of the phrase "circumstances beyond the control" of the Member States.

Issue

50. The appellant sought leave to appeal the judgment and order of the Court of Appeal. By determination dated the 23rd June, 2017 ([2017] IESC DET. 69), this Court granted Mr. Skiba leave on a single issue, namely, whether the Court of Appeal was correct in its determination of the law applicable in this case in light of the subsequent decision of the CJEU in Case C 640/15 *Vilkas,* delivered on the 25th January, 2017.

Submissions

Submissions of the Appellant

51. The appellant submits that it is clear that the Irish and Polish authorities were on notice that he had a fear of flying such that he might not board his intended flight on 22nd December, 2016. The purpose of his solicitor's phone call on the 9th December was to convey that fact. It must have been implied that there was a risk he would not board the airplane, otherwise there would have been no point in making the call. Having voluntarily informed the authorities of his problem, they had almost two weeks' notice of the issue, which was ample time to make alternative arrangements for his surrender. He says that the objective of giving the authorities notice was not to evade his return to Poland; had that been his intention, he would not have made the communication which he did.

52. Mr. Skiba submits that he does not understand why Sergeant Kirwan was sceptical of his fear, nor does he understand what would have been added, by him obtaining medical evidence. Indeed he questions what that evidence may have been, beyond a general practitioner confirming that the appellant had told him or her that he has a fear of flying. Immediately after he refused to board the aircraft, arrangements were made to transport him to Poland over land. This appears to have been done within the 24 hour period between the refusal to board on the 22nd December and the hearing in the High Court on the 23rd December. It therefore follows that this could easily have been arranged between the 9th and 22nd of December. Moreover he submits that the Irish Central Authority's letter to the Polish authorities on the 12th December suggests that it immediately recognised the risk that he might not board the plane.

53. Therefore, the appellant submits that, applying *Vilkas* , what occurred in Dublin airport was entirely foreseeable. Both national authorities had been on notice of it for ten days. Accordingly, it cannot have been a *force majeure* for the purpose of Article 23(3), and the High Court and Court of Appeal erred in their judgments in this respect. Mr. Skiba's fear of flying did not *prevent* his surrender; it merely required the making of alternative transport arrangements rather than a flight.

54. Whilst under section 16(5) of the 2003 Act it is for the Court to determine whether a failure to surrender occurred "because of circumstances beyond the control" of the executing or issuing State, that necessarily requires analysis of the actions adopted by those States. As the Central Authority had informed the Polish authorities of the necessity to make alternative arrangements, what transpired manifestly cannot have been a situation beyond the control of those States. The Polish authority was invited on the 12th December to make such arrangements or, alternatively, to indicate whether this would not be possible "due to circumstances beyond the control" of that State.

Despite this, no alternative arrangements were made.

55. It is submitted that judgment of the Court of Justice in Case C-237/15 PPU *Minister for Justice v. Lanigan* highlights the importance of diligence on the part of both Member States where the requested person is in custody pending surrender. Moreover, in Case C-396/11 *Ministerul Public - Parchetul de pe lÃ¢ngÃ£ Curtea de Apel ConstanÃ¾a v. C iprian Vasile Radu* the CJEU stressed that the length of detention on foot of an EAW should not exceed that which is reasonably required as otherwise it becomes arbitrary and therefore offends Article 5 ECHR.

56. Article 23 of the Framework Decision and section 16(5) of the 2003 Act place an obligation on the State to guard against the consequences of an abnormal event by taking appropriate steps without making unreasonable sacrifices. Here, Ireland and Poland were on ample notice of Mr. Skiba's fear of flying. It was well within their power to organise overland transport before the 22nd December, 2016. Due diligence required same, rather than persisting with an abortive attempt to remove him by air and the consequential imposition of an additional period of time in prison here.

Submissions of the Respondent

57. The Minister submits that *Vilkas* must be read in light of the questions posed to the Court and the factual background of that case. He does not dispute that the principle of conforming interpretation applies in this case (Case C-105/03 *Criminal Proceedings against Pupino* [2005] ECR I-05285). This principle provides that a national court has an obligation to refer to the content of the Framework Decision when interpreting the relevant rules of its national law and in so far as possible to render it in conformity with the principles of EU law. The Minister accepts that the meaning ascribed to "circumstances beyond the control" by the CJEU in *Vilkas* should equally apply in our domestic law.

58. The respondent submits that while the judgment of the Court of Appeal did not specifically endorse what the CJEU eventually decided, its decision is in total conformity with the *Vilkas* judgment. The Court of Appeal carefully considered whether or not a statement that a person had a fear of flying, in itself, made it foreseeable that the requested person would resist boarding, causing the surrender not to be effected. That Court fairly summarised the appellant's argument as being that once Sergeant Kirwan had been informed that he had a fear of flying, it was reasonably foreseeable that he would resist boarding the aircraft or create such a disruption as to cause a pilot to refuse him permission to board. Notably, no argument was advanced that resistance to surrender by the requested person was something which was properly to be regarded as an abnormal circumstance outside the control of the authorities.

59. The Court of Appeal carefully analysed (at para. 33) whether or not informing Sergeant Kirwan of the appellant's fear of flying made it foreseeable that the surrender attempt would have to be abandoned. The Court came to the view that this "bald assertion", absent supporting material, could "do no more than flag a remote and theoretical possibility, rather than a reasonably foreseeable risk to be actively responded to." This, the Minister submits, was a perfectly logical conclusion to reach. In this regard he highlights the following evidence: (i) the only information conveyed to the Irish authorities regarding Mr. Skiba's fear was the phone call from his solicitor; (ii) this notification was first made nine or twelve days after the High Court had ordered his surrender; (iii) Sergeant Kirwan told the High Court that he had been involved in hundreds of surrenders which had gone according to plan, notwithstanding that persons involved were apprehensive about flying; (iv) Mr. Skiba's behaviour on the 22nd December, 2016, would not support the proposition that it was foreseeable that his surrender attempt would have to be abandoned, given that no resistance or anxiety was

obvious until the very last stage of pre-flight procedure when he refused to board the plane; and (v) no evidence of the appellant's past behaviour was presented that would make it foreseeable that he would resist boarding.

60. The Minister submits that the correspondence between the Central Authority and the Polish authorities is largely irrelevant. It is the executing judicial authority, not the Central Authority, who is tasked with deciding whether or not the circumstances are "beyond the control of the state or the issuing state". Although the appellant argues that the fact that the Central Authority advised the Polish authorities of the need for alternative arrangements proves that it was foreseeable that he might not board the plane, it is more accurate to categorise this argument as the Court of Appeal did, namely, that the correspondence indicates acceptance by the Central Authority that such a proposition could be argued on the appellant's behalf.

Discussion/Decision

61. Humphreys J. in the High Court declined to follow the Opinion of Advocate General Bobek insofar as the interpretation of the words "circumstances beyond the control" in section 16(5)(a) was concerned. Even accepting that such phrase was to be equated to the concept of *force majeure* , he was of the view that the ordinary meaning of that term would not include elements such as foreseeability: accordingly, he refused to follow the approach adopted by the Advocate General. As we know, that approach was subsequently endorsed by the Court of Justice in its judgment dated the 25th January, 2017. It therefore obviously follows, that the judgment of the High Court is inconsistent with the meaning attributed to the corresponding terms of Article 23 F.D. by the CJEU.

62. The sole question for the Court, however, is whether the Court of Appeal was correct in its determination of the law in light of the subsequent decision of the CJEU in *Vilkas* . Both judgments have been explained in detail above. In this regard it should be said, first, that the Court of Appeal concluded by expressing itself satisfied that "the High Court judge's assessment was in fact conducted with due diligence" and was otherwise consistent with the relevant evidence as given. At no point did Edwards J. demur from or criticise the approach of Humphreys J.

63. The reference to "due diligence" requires comment. It was stated in rejecting a submission that the judge's assessment had to be from a "heightened due diligence" perspective, said to have been demanded by the Advocate General at paragraph 68 of his Opinion. In fact, in that paragraph the phrase used was "due consideration". At para. 80, addressing the context of where the circumstances relied upon as justifying *force majeure* had previously occurred, he suggested that such circumstances would raise "the threshold" of the due diligence requirement. The CJEU made no mention of the phrase in any form. To avoid any confusion, it should be stated that the task of the court on a section 16(5) application is to conduct a careful analysis of the presenting circumstances and reach a conclusion based on what is probable. No level of enhanced consideration, whether called "due diligence" or "heightened due diligence" or, in another context, "anxious scrutiny", is called for.

64. In any event, as has been pointed out by the Minister, the Court of Appeal appears to have followed the Opinion of the Advocate General, at least implicitly so. Unlike Humphreys J., who discarded foreseeability as an element to be considered, the Court of Appeal approached the issue by putting the foreseeability of Mr Skiba's refusal to board the plane to the forefront of its analysis. In that general sense it applied at least that crucial aspect of *force majeure* as laid down by the subsequent CJEU judgment: it adopted foreseeability of the circumstances as a requirement of the test under section 16(5)(a). As noted, it did not expressly state that it was following the Opinion of the

Advocate General or refer to the EU law definition of *force majeure* , nor did it say that Humphreys J. had applied the wrong test, but its approach to the issue was clearly very different from his. Ultimately, it reached the conclusion that it was not reasonably foreseeable that the appellant would refuse to board the plane and so affirmed the judgment of the High Court, but its pathway to this point differed significantly from that which led the learned trial judge to the same outcome.

65. In that respect, at least, it must be said that there is no question of the Court of Appeal having applied the wrong test at a general level, nor is there any great inconsistency in principle with the decision of CJEU in *Vilkas* , insofar as the requirement of unforeseeability is concerned. The question really is whether the Court of Appeal's conclusion is sustainable in light of the further specific principles articulated in *Vilkas* : in particular paragraphs 53-64, which contain a number of more detailed points concerning *force majeure* and the foreseeability of a person's refusal to board an airplane in the context of Article 23(3) F.D.; indeed, with all due respect to the Court of Justice, these same points had previously been articulated in the erudite Opinion of the Advocate General. Although the Court of Appeal undoubtedly assessed foreseeability, it will also be necessary for this Court to analyse that element by reference to the more detailed principles contained in the CJEU judgment.

The Proper Construction of Section 16(5)(a)

66. Before moving on to conduct such an assessment, I should say a few words about the interpretation of the phrase "circumstances beyond the control" as it appears in section 16(5)(a) of the 2003 Act and the impact of the CJEU's *Vilkas* judgment on the proper meaning of that term. The issue essentially is whether the relevant text of section 16 can be read to conform with the interpretation adopted by the CJEU of the corresponding portions of the Framework Decision. The undoubted purpose of, *inter alia* , section 16(5)(a) of the 2003 Act was to transpose Article 23(3) of the Framework Decision. The principle of conforming interpretation and its application to section 16 is discussed at some length in the judgment of the Court delivered today in *Minister for Justice and Equality v. Vilkas.* That principle dictates that when applying national law enacted to implement an EU measure, as in this case, the domestic 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 relevant Framework Decision in order to attain the result which it pursues. This rule, however, as we shall see in a moment, has its limits both in EU law and in national law; the *Vilkas* judgment is in large respect concerned with those limits.

67. Nonetheless, it is true that, insofar as the actual language used in enabling legislation permits, it remains highly desirable that the construer of that legislation should be capable of having regard to the instrument sought to be transposed. The judgment of the CJEU is undoubtedly binding as regards the proper construction of Article 23 of the Framework Decision. As explored in *Vilkas,* however, that fact is not necessarily determinative of the proper interpretation of the relevant provisions of the 2003 Act. That Act must in the first place be interpreted in accordance with the normal rules of statutory interpretation, meaning that the terms of its provisions will first be accorded their ordinary and natural meaning in the context in which they appear. As this Court's judgment in *Vilkas* demonstrates, there is a limit to how much the plain meaning of the text of the 2003 Act can be displaced in order to conform with the interpretation given to Article 23(3) by the CJEU. If there is an irreconcilable inconsistency between the words of the domestic statute and those of the EU instrument, such that the national legislation cannot be read otherwise than *contra legem* , even taking account of the principle of conforming interpretation, it is the former which must prevail: (see - on the domestic side, *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518 and *Rimsa v. Governor of Cloverhill Prison* [2010] IESC 47, both of which concerned the meaning of subsections of section 16 of the 2003 Act, and also *Minister for Justice v. Altaravicius*

[2006] 3 IR 148, - on the EU side, see Case C-105/03 *Criminal Proceedings against Pupino* [2005] ECR 1-5285, paragraphs 44 and 47, and Case C-212/04 *Adeneler & others v. Ellinikos Organismos Galaktos* , paragraph 110).

68. In *Vilkas* , I have reached the conclusion that despite the clear intention of the Oireachtas to transpose Article 23 F.D. by way of section 16 of the 2003 Act, the text of that section cannot be read in line with the purposive construction given to Article 23 by the CJEU in *Vilkas* , where it was held that the provision in question permits of the setting of multiple new dates for surrender (para. 41 *supra*). It would simply be too much of a reach for the domestic legislation to have that same outcome in respect of the relevant subsections of section 16.

69. However, no such difficulties arise in this case as I am satisfied that the key phrase in section 16(5)(a), "circumstances beyond the control of the State or the issuing state concerned", can and must be given the same meaning as its direct EU equivalent, being that in the first sentence of Article 23(3) F.D., "circumstances beyond the control of any of the Member States".

70. The CJEU interpreted the latter phrase to refer to the concept of *force majeure* as understood in EU law, the elements of which are described above (para. 44). It is true, as Humphreys J. stated in the High Court, that this is a departure from the normal meaning that would be attributed to these terms in the domestic context. If the phrase "circumstances beyond the control" were to be interpreted in a purely common law manner, it is highly doubtful, for example, that any element of foreseeability would feature in that analysis. On such a reading, as the learned High Court judge found, what occurred at the departure gate in Mr Skiba's case could certainly be considered as being a circumstance beyond the control of the State, as but for the actions of Mr. Skiba over which the Minister had no control, the surrender would have been effected successfully.

71. Clearly, however, the relevant provisions cannot be approached in a manner, entirely isolated from the Framework Decision. Thus, in line with the principle of conforming interpretation, I am satisfied that the phrase "circumstances beyond the control" in section 16(5)(a) must be read as meaning *force majeure* as defined by the CJEU in the judgment discussed above. There are, in my view, three reasons why such a construction is possible here whereas it was not possible to reach a similar conclusion in the *Vilkas* decision, delivered today. First, and most importantly, the words of the statute sought to be construed here are, in essence, exactly the same as those found in the Framework Decision. In both instruments what is at issue is a single phrase of a single clause of a sentence - "circumstances beyond the control". This was, as such, a direct transposition of the words of the Framework Decision. This is unlike the provisions at issue in *Vilkas,* where, as the submissions of the parties and the judgment of this Court will show, what was involved was a complex construction of a number of different subsections and their interplay with one another. In that case s. 16(5) and (5A) of the 2003 Act,, although certainly intended to transpose the EU legislation, did not do so verbatim, and it was there that the difficulties of interpretation arose. In this case, on the other hand, we have a judgment of the CJEU on the meaning of precisely the same words in the supranational instrument as appear in the domestic legislation. Thus this is precisely the kind of situation in which the principle of conforming interpretation must be in play.

72. Second, it should be noted that the Minister agrees that the meaning ascribed to "circumstances beyond the control" by the CJEU in *Vilkas* should equally apply in our domestic law. He thus accepts the case as binding in that respect. This is unlike the situation which presented before this Court in *Vilkas* itself, where Mr Vilkas strenuously and persuasively argued that although the CJEU judgment was obviously binding as regards the interpretation of Article 23 F.D., the same interpretation could not carry

over to the relevant provisions of the domestic statute because the clear and literal meaning of section 16 produced the opposite result: it would therefore be to stretch the meaning of the text too far to hold otherwise.

73. Finally, I would also observe that the interpretation adopted by the CJEU is one that favours the liberty of the requested person. It is more difficult for the executing Member State to demonstrate the existence of *force majeure* as understood in EU law than it would be to establish mere circumstances beyond its control, which of course is but one element of the definition of *force majeure* : if the latter was the only requirement it would be inherently easier for the State to successfully extend time and by definition, continue further detention. Thus adopting a conforming interpretation in this respect in fact favours the subject person by making it less likely that circumstances warranting an extension of time will be found to exist. There could accordingly be no question of any undue intrusion on the liberty of such person by virtue of applying the CJEU's judgment to s. 16(5)(a) of the 2003 Act. In making the latter point I am not suggesting the conforming interpretation applies in one direction only: clearly it does not. Rather I make the point in the context of detention and of Article 5 of the ECHR.

74. It therefore follows that the phrase "circumstances beyond the control of the State or the issuing state concerned" in section 16(5)(a) of the 2003 Act must be given the definition of *force majeure* as described by the CJEU in *Vilkas* (see para. 44, *supra*).

The Elements of Force Majeure Applied to this Case

75. Turning, then, to the issue of whether Mr Skiba's refusal to board the plane can be considered as a *force majeure* within the meaning of EU law, as described above. It will be recalled that there are four elements to the relevant definition of *force majeure* (para. 45, *supra*). The circumstances must have been (i) abnormal; (ii) unforeseeable; and (iii) outside the control of the asserting party; and, furthermore, (iv) it must not have been possible to avoid the consequences of the *force majeure* in spite of the exercise of all due care. Guidance on the application of each of these factors in circumstances where a requested person refuses to board an airplane is contained in both the Opinion of Advocate General Bobek and the judgment of the CJEU in *Vilkas* . It will be necessary to examine each such element in turn, taking account of the specific principles articulated at paragraph 45, *supra* .

a. Abnormal circumstances beyond the control of the authorities concerned

76. These two elements can be dealt with together and in brief. As noted by the CJEU at paragraph 58 of its judgment, resistance to surrender put up by a requested person may properly be regarded as an abnormal circumstance outside the control of the authorities concerned. Such conclusion seems self-evident and is not in any event challenged by the appellant, who instead contests the decision of the Court of Appeal on the foreseeability issue. No more specific guidance on the application of either such term is contained in the Opinion of Advocate General Bobek.

77. In the circumstances, and in the absence of there being any plausible suggestion to the contrary, I would consider it uncontroversial that these two elements are satisfied in the circumstances of Mr Skiba's case. His resistance to surrender was abnormal in the sense of being unusual or atypical, even if not totally unprecedented: the evidence of Sergeant Kirwan was that the vast majority of surrenders by commercial airliner are effected smoothly. It was, moreover, clearly beyond the control of the authorities concerned. I would therefore consider that these constituent requirements of *force majeure* have been established.

b. Whether the appellant's resistance to surrender was foreseeable

78. The principal dispute between the parties concerns whether or not it was foreseeable that Mr Skiba would refuse to board the plane at Dublin airport. In the ordinary course one would presume that such was a finding of fact to be made by the trial judge, but no such assessment was made in this case. Given the manner in which the appeal was argued, the fact that this is the most contentious issue between the parties and further, the fact that the appellant has been surrendered, it seems that the only choice for this Court is to adopt the same course as the Court of Appeal did, and for itself to assess the foreseeability of Mr. Skiba's resistance to surrender (see however para. 90 *infra*).

79. I would observe at the outset that one cannot but agree with both the Advocate General (at paragraphs 70 and 71 of his Opinion) and the Court of Justice (at paragraph 60 of its judgment) that it is foreseeable that a commercial airline pilot will refuse to allow a violent and aggressive passenger to board his plane. The real point, however, is whether it was foreseeable that the requested person would be violent, aggressive, or otherwise conduct himself with similar effect in the first place

80. It will be recalled that the CJEU stated, at para. 59 of its judgment, that the fact that certain requested persons put up resistance to surrender cannot, in principle, be classified as an unforeseeable circumstance. The reference to "certain" requested persons begs closer analysis. An obvious corollary is that there are certain requested persons in respect of whom resistance can be classified as unforeseeable. This is put beyond doubt by paragraph 64 of the judgment, where the Court stated as follows:

> "[I]t cannot be entirely ruled out that, on account of exceptional circumstances, it is objectively apparent that the resistance put up by the requested person to his surrender could not be foreseen by the authorities concerned and that the consequences of the resistance for the surrender could not be avoided in spite of the exercise of all due care by those authorities."

81. However, this passage certainly seems to envisage that it will only be in very rare circumstances that resistance to surrender could be classified as unforeseeable. Mr Skiba's case is obviously unlike Mr Vilkas's in that he resisted boarding an airplane only once. What was at issue in *Vilkas* was resistance to surrender by airplane on a second occasion, in circumstances where a first surrender by air had already failed due to Mr Vilkas's refusal to board. The passage just quoted may perhaps best be read in that light; so viewed, it seems unremarkable to state that it would only be in exceptional circumstances that refusal to board an airplane on a second occasion, when surrender on the first occasion had failed for that very reason, could be regarded as unforeseeable. This very issue was addressed by the CJEU at paragraph 60, where it noted that "in a situation such as that at issue in the main proceedings, where the requested person has already resisted a first surrender attempt, the fact that he also resists a second surrender attempt cannot normally be regarded as unforeseeable."

82. On the other hand, if the above quote from paragraph 64 were to be read as being generally applicable on all surrender attempts, even first attempts at surrender, then the default setting would seem to be that resistance to surrender, to the point of an airline pilot refusing to allow the person to board, is generally foreseeable, and thus could not amount to *force majeure* absent truly exceptional circumstances. Such a reading would appear to be out of keeping with the reality of surrenders by air, which generally are effected without such disruption. It would, moreover, render it exceedingly straightforward for a requested person to prevent both surrender and the fixing of a new

date for surrender, simply by refusing to board the plane.

83. I would therefore take the view that the "exceptional circumstances" referred to, apply only on a second or subsequent surrender attempt. That is not to say that resistance on a first occasion will therefore always be considered unforeseeable. Rather we must return to the point made above: resistance by *certain* requested persons may be foreseeable, but by others it may not. The question then is in respect of what class or classes of requested person resistance might be foreseeable.

84. The judgment of the CJEU contains little additional guidance in that regard. Some further insight into matters that may be relevant is however contained in the Opinion of Advocate General Bobek. At paragraph 68 of that Opinion, quoted at para. 30, supra, he stated that aggressive behaviour at the time of surrender may be considered as an unforeseen and extraneous event "only if the factual elements at the disposal of the authorities in no way hinted at such a scenario occurring." He identified a number of factors as being relevant to the authorities' assessment of the likelihood of such a scenario, which must be the specific factual background of the individual case. Such considerations will include (i) the crimes for which the person is requested or has been convicted; (ii) his or her behaviour during detention; (iii) his or her previous records; and (iv) any other elements related to his or her background that may emerge from the national file. Also relevant in this regard is the following extract from 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. …"

85. There is no suggestion that he considered the above factors to be exhaustive, nor are they binding on the Court in any event. They are however, helpfully illustrative of the kind of considerations which a court must take into account when conducting the analysis required by section 16(5)(a). That exercise, naturally will be heavily dependent on the particular facts of a given case.

86. Looking at each such factor in turn, the first thing to be said is that the crimes for which Mr Skiba was convicted were (i) a drugs offence and (ii) four burglaries. It is not entirely clear from the certified translation of the EAW precisely what offence the drug charge would equate to in this jurisdiction, though it seems to be for possession of marijuana and is therefore relatively minor. The total amount of property taken during the burglaries is stated as having a value of 4950 Polish zÂ³o ty, which at the time of this judgment equates to roughly €1,150. The burglaries were effected by damaging locks and/or breaking windows. As above noted (para. 12), the longer of the two sentences facing the applicant was one-year and six months, a relatively short period of imprisonment. For present purposes what is most significant is the nature of the offences. Although drugs and property offences can be very serious crimes in their own right, those for which Mr Skiba was convicted do not appear to have involved any violence or aggression towards any other person. Certainly there can be no strong link between his having committed these offences and his subsequent refusal to board the airplane.

87. Neither is there any suggestion in the EAW of a prior history of violent or physical offences, although there is a reference to the four burglaries having been committed "within the period of five years after serving more than six months' imprisonment for an

intentional similar offence", so evidently the appellant had some previous convictions. As regards his behaviour during detention, no untoward or aggressive behaviour has been mentioned. Indeed, as addressed in more detail below, the most striking aspect of the appellant's behaviour was the fact that, other than his solicitor's phone calls, he made no protest whatsoever against his surrender by airplane until he had reached the departure gate at Dublin Airport. Nothing else on the disclosed file speaks directly to this point one way or the other. In my view, therefore, there was nothing in his prior history or behaviour to suggest that Mr Skiba would refuse to board the plane, and in that sense the factors identified by the Advocate General tend to lean in favour of the unforeseeability of such refusal.

88. Of course, regard must also be had to the various submissions made by the respective parties for or against the foreseeability of the appellant's refusal to board the aircraft. The Minister has highlighted a number of factors that tend to undermine Mr Skiba's own personal fear of flying. In this regard he points out that the only information conveyed to the authorities was a single phone call stating that the appellant has a fear of flying; his solicitor did not even expressly say that (there was a chance that) he would not board the plane due to his fear. The appellant did not mention said fear at the original surrender hearing before the High Court; in fact there was no mention of this fear until nine (or twelve) days after the surrender order was made. The Minister also points to the appellant's behaviour on the morning of surrender, noting that Mr Skiba made it all the way to the departure gate at the airport before raising any further objection to his surrender by plane. As noted above, there was a total absence of any medical or other supporting evidence to bolster the appellant's claimed fear of flying. Indeed, no reference was made by his solicitor to the extent, degree or history of his fear of flying. Other relevant matters at a general level were Sergeant Kirwan's evidence to the effect that he has been involved in hundreds of surrenders and that many people express a fear of flying, but very few in fact refuse to board the aeroplane. It was argued that while many people would prefer to travel by other means if possible, actual phobia of flying (aviophobia) is very rare. Or, as counsel put it at the hearing, for every Dennis Bergkamp, there are a hundred people who will get on the plane notwithstanding their fear.

89. As against this, the primary argument on the appellant's behalf was the phone call made by his solicitor to Sergeant Kirwan. It was asked why, as a matter of common sense, would the solicitor have informed the authorities of Mr Skiba's fear of flying other than to put them on notice of the risk or possibility that he would not board the plane. Despite having two weeks' notice of this fact, no alternative travel arrangements were put in place.

90. Taking all of the foregoing factors into account, it may fairly be said that the issue of the foreseeability of Mr Skiba's refusal to board the flight could be decided either way. It is, ultimately, a fine call, and one on which reasonable people could very well differ. In such circumstances an appellate court would typically be required to defer to the decision of the trial judge provided that there was some credible evidence to support the conclusion reached. In this case, however, the learned judge adopted a narrower definition of *force majeure* than did the CJEU in its subsequent judgment; he therefore did not assess the foreseeability of Mr Skiba's refusal to embark the plane. There can thus be no question of simply standing over the conclusion of the High Court. Moreover, although the Court of Appeal found that Mr Skiba's refusal to board was unforeseeable, that court does not have the same advantages as the High Court does in terms of seeing live witness testimony etc. which explain the particular deference shown to findings made at trial level. The Court of Appeal was no better placed to review the transcript and the evidence than this Court is, and so it follows that this Court is free to reach its own conclusion on the matter.

91. Of course, as noted above, in the normal course the way forward would be to remit the matter to the High Court in order for it to make a finding applying the test as articulated in this judgment. For the reasons previously articulated (paras. 35 and 39 *supra*) this is not feasible: and so it has been suggested that this Court ought itself to make such finding. In any event, it is not clear that any further or additional evidence would be led on a re-hearing which would materially alter the relevant considerations. Moreover the appellant's surrender on the 14th January, 2017, would strongly militate against such a course. Accordingly, I have assessed each of the above factors in order to arrive at my own view on the issue. Before stating my conclusion, however, I will venture to first say a few words about the standard of foreseeability required.

92. The judgment of the Court of Justice in *Vilkas* is silent as to the degree of foreseeability at issue. The Court of Appeal referred to the fact that the appellant's "bald assertion" raised only a "remote and theoretical possibility" of failure to board, rather than a "reasonably foreseeable risk to be actively responded to". This standard of "reasonable foreseeability" seems to me to be appropriate given the nature of the inquiry. Almost any scenario can be foreseen at the theoretical level. A great many eventualities may be foreseen without there being any realistic prospect of their coming to pass. A standard of reasonable foreseeability, however, ensures that the State will not be able to rely on circumstances that it ought to have foreseen, whilst preventing the requested person from denying the existence of a *force majeure* on the basis of some remote or fanciful foreseeability of an intervening event.

93. Having weighed the relevant considerations against this standard, I am of the view that it was not reasonably foreseeable that Mr Skiba would refuse to board the plane. As rightly pointed out by the Court of Appeal, a claim to have a fear of flying is easily asserted yet difficult to disprove. Something more than a mere assertion must be required before it meets the requirements threshold. The preponderance of the evidence did not suggest any kind of a reasonable prospect that Mr Skiba would not board the aeroplane. No mention of a fear of flying was made at the initial surrender hearing, nor indeed for nine (or twelve) days after that. It will be recalled that even when such fear was communicated to the Extradition Unit, Mr Skiba's solicitor did not go so far as to expressly say that there was a chance that his client would not board the plane, although it must be said that the Irish authorities understood the call to mean as much (on which see para. 97, *infra*). No reference was made to any previous history of a fear of flying; no examples were given of any prior occasions on which Mr Skiba had been unable to travel by air due to this fear, or on which he had opted to travel by alternative means instead. There was a total lack of supporting evidence of any kind. Moreover, his behaviour on the day in question, right up until the boarding gate, was not suggestive of a man who would refuse to embark the airplane. Despite obviously knowing his destination, he made no protest all the way to the airport, nor did he attempt to explain that he would not be able to fly; if a person truly did have a crippling phobia of flying, you would perhaps expect them to make earnest and repeated exhortations of same, at least to the authorities while en route to the airport.

94. It is not my intention to be prescriptive regarding the kind of evidence that might suffice to put the authorities on notice of a genuine fear of flying such as might prevent surrender by air. What is clear is that some form of cogent supporting evidence is necessary to make the case in that respect. Ireland is an island and the overwhelming number of non-nationals who arrive here will do so by airplane. Commercial flight has long been a feature of modern life. In most cases it should not be unduly burdensome to produce an email receipt of a ferry ticket to back up a fear, if such existed. Medical or expert evidence would surely be sufficient in this regard, though what form that might take is not clear. Third party evidence from a relative or friend may also suffice. At the very least, an explanation of the history of the asserted fear and its previous implications for the person's travel arrangements, quite possibly with supporting

documentation if necessary, would surely be required. I am by no means saying that all of the above will be necessary in every case, but some form of particularisation of the claimed phobia will be required. Without such supporting evidence, it seems to me that it simply cannot be said that it was reasonably foreseeable that Mr Skiba would not board the flight, notwithstanding the fact that his fear had been flagged with the authorities and that there will always be some level of theoretical risk of a requested person refusing to fly.

95. Moreover, if a mere assertion of the fear, without more, was enough in itself to render foreseeable any failure to board, then the same could have significant logistical implications for the manner in which surrenders on EAWs are effected by the executing authorities in this State. It hardly needs stating that as an island nation, the default option for surrender from Ireland will almost always be a commercial flight. Any other option is necessarily and inherently going to be more time-consuming, expensive and difficult to organise, if routinely required. Such is likely to pose even greater difficulty if and when Britain leaves the European Union. It would not be conducive to the objects of the EAW system if surrender by air could be frustrated simply by asserting fear, over the phone without further information or explanation.

96. In future cases, whether the totality of the information at the authorities' disposal was sufficient to render the refusal to board foreseeable will be a matter for the High Court judge hearing the application for an extension of time.

97. That leads directly on to a final point which merits consideration in relation to foreseeability: it is the relevance of the correspondence between the Irish and Polish authorities and whether the reaction of the Irish Central Authority has any bearing on whether Mr Skiba's refusal to board was foreseeable. The appellant says that the Central Authority immediately recognised the risk that he might not fly. It had two weeks' notice of the difficulty with surrender by air. He argues that had his intention been to evade surrender, he would not have given the authorities any notice of his fear of flying. The Minister, on the other hand, says that the correspondence is largely irrelevant, as it is the executing judicial authority, not the Central Authority, which is tasked with deciding whether or not the circumstances amounted to *force majeure.*

98. Edwards J., at paras. 34 and 35 of the judgment of the Court of Appeal, seems to have taken the view that the correspondence does no more than indicate that the Irish authorities accepted that the appellant could conceivably argue that it was foreseeable that he would not board the aircraft, but that it does not establish that the authorities in fact thought this eventuality was reasonable to foresee. This view is open on a reading of the documents in question. However, and respectfully, it may be that the better view of the original documents is that the authorities certainly did believe that there was a chance that Mr Skiba would not board the plane. Such to me seems to the proper interpretation based on the wording used and the tone of and emphasis in the letters and emails. The Court of Appeal may therefore have undersold the extent of the Irish Central Authority's concern. I might also note as an aside that the Irish authorities appear to have been far more concerned about the risk of Mr Skiba refusing to board than the Polish authorities were.

99. However, notwithstanding these observations, the Minister is correct ins his submission that it is the High Court, rather than the Irish Central Authority, to assess whether the presenting facts constitute "circumstances beyond the control" of the State. This argument was also accepted by the Court of Appeal (para. 35). As such, there is limited relevance to be accorded to the correspondence between the relevant authorities in Ireland and Poland. Of course, it may be asked how something can be determined not to have been reasonably foreseeable when it *actually* was foreseen. I suspect the answer was identified by Edwards J. when he stated that the Central Authority was

presumably reacting with an overabundance of caution to the Opinion of Advocate General Bobek. Overall, however, notwithstanding the reaction of the authorities, the Court is satisfied that more is needed to establish reasonable foreseeability of a failure to board an airplane than a single phone call from a solicitor to the gardaí, unsupported by any evidence, documentation or even detail. Generally the determination will be for the High Court. In the circumstances of this appeal it is for this Court to decide. I am satisfied that it was not reasonably foreseeable that Mr Skiba would refuse to board the plane. This element of *force majeure* is therefore made out.

c. Whether it was possible to avoid the consequences of the force majeure

100. The final element of *force majeure* states that the circumstances must have been such that it was not possible to avoid their consequences despite the exercise of all due care. The CJEU identified two material considerations in this regard, namely, the possibility of recourse to coercive measures and the option of utilising an alternative means of transport whose use cannot be effectively prevented by the requested person's resistance. It may be that further matters still would require to be considered under this heading, depending on the circumstances.

101. As to the use of coercive measures, the type, nature and scale of which were not elaborated upon by the Court, it is clear that such was not a viable option under the circumstances. Whilst some degree of reasonable force may be permissible to effect a surrender on some occasions, in this case Mr Skiba's resistance was such that the airline pilot understandably refused to have him aboard. There could obviously be no question of subduing the requested person to such an extent as to prevent them from continuing their resistance after being put on the airplane. Given that the captain simply would not have permitted Mr Skiba on board in light of the level of resistance he was offering, it does not seem that there were any permissible coercive measures that the authorities could have used in order to effect the surrender.

102. Then there is the issue of alternate means of transport. Evidently, given that Mr Skiba's surrender was ultimately effected by sea and over land, there was a viable alternative to flight available. It would, moreover, have been possible to arrange for transport by such means when the surrender order was first made, or even after the solicitor's phone calls on the 9th and 12th December. However, in my view such issue cannot be assessed in isolation from the requirement of foreseeability. Simply because it would have been possible to arrange for an alternative surrender method does not mean it was incumbent upon the State to do so unless there was a reasonably foreseeable prospect of the surrender by air being prevented. For the reasons stated above, I am of the view that the same was not reasonably foreseeable.

103. Accordingly, the fact that there was a mode of transport available which could not have been frustrated by the appellant's resistance does not in itself mean that consequences of said resistance ought to have been avoided if due care had been exercised, as there was no reasonable basis to suggest that recourse to an alternate method of surrender would in fact be necessary. The position might have been entirely different had Mr Skiba's solicitor provided the authorities with compelling evidence of his client's phobia; in such circumstances his refusal to board would not only have been foreseeable, but it could also be said that it could have been avoided had the alternative transport method been arranged instead. In the absence of any reasonably foreseeable risk that Mr Skiba would not board the plane, however, I am of the view that it cannot be said that the State failed to exercise due care in not organising an alternative means of surrender instead.

104. A similar point may be made in respect of the holding of the CJEU that *force majeure* will justify extending the surrender period only where it means that surrender

is prevented, rather than merely rendering it more difficult. Such assessment must surely be carried out at the time of the force majeure itself; it cannot be the case that one can determine with hindsight that an alternative method of surrender would not have been frustrated, and that the surrender was not therefore prevented. I am satisfied that at the time when he refused to board the plane, given the timeframe involved, Mr Skiba's actions prevented his surrender to Lithuania.

Conclusion on force majeure/circumstances beyond the control of the State

105. For the above reasons, I am satisfied that Mr Skiba's refusal to board the plane constituted a "circumstance beyond the control" of the State within the meaning of section 16(5)(a) of the 2003 Act, which is to be interpreted in line with the definition of *force majeure* laid down in the judgment of the CJEU in *Vilkas* . It was an abnormal circumstance beyond the control of the State. Although I accept that an argument can be made both ways as to whether Mr Skiba's resistance was foreseeable, on balance I am of the view that it was not reasonably foreseeable. Based on the information available to the State authorities and the timeframe involved, it was also not possible to avoid the consequences of his resistance in spite of the exercise of all due care. His resistance in the circumstances was such as to prevent his surrender within the time period laid down, rather than merely to render more it difficult.

106. As a consequence I am satisfied that the preconditions to the fixing of a new date for surrender pursuant to section 16(5)(a) of the 2003 Act existed, and that the learned High Court was entitled in the circumstances to so do. In so doing, however, he adopted an interpretation of *force majeure* which is not in keeping what that subsequently laid down by the Court of Justice in *Vilkas* . As implicitly recognised by the Court of Appeal, this requires an analysis of the foreseeability of the circumstances said to constitute the *force majeure* , as it also does an assessment of the other elements of force majeure as described in *Vilkas* and as applied in this judgment.

Further Issue: Proper Construction of Section 16(5)(b) of the 2003 Act

107. As noted above, a further issue arose in the course of the oral hearing of the appeal. It concerned the interpretation of the word "discharged" as appears in section 16(5)(b) of the 2003 Act; if the High Court is not satisfied that a *force majeure* has been made out and it therefore declines to order the new date for surrender sought by the authorities, then the Court shall, pursuant to section 16(5)(b), order that the requested person be discharged. The corresponding provision of the Framework Decision is Article 23(5), which states that "[u]pon 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."

108. As noted by Advocate General Bobek at paragraph 89 of his Opinion in *Vilkas* , the questions referred to the CJEU by the Irish Court of Appeal in that case did not strictly speaking raise the issue of the interpretation of Article 23 F.D. Nonetheless, the CJEU at paragraphs 66-73 of its judgment described what should happen in the event that the circumstances cited as warranting an extension of time are deemed not to constitute a *force majeure* . The Court observed that, pursuant to Article 1(2) F.D., Member States are in principle obliged to give effect to a European arrest warrant. It went on to hold that the rule set out in Article 15(1) F.D., which provides that the executing judicial authority is to decide within the time limits defined in the Framework Decision whether the person is to be surrendered, cannot be interpreted as meaning that once the time limits prescribed in Article 23 F.D. have expired, the states concerned are no longer able to agree on a new surrender date or that the executing Member State is no longer required to carry on with the procedure for execution of the EAW. It therefore followed that the mere expiry of the time limits in Article 23 F.D. cannot relieve the executing

Member State of its obligation to carry on with the procedure for executing an EAW and to surrender the requested person, and that the authorities concerned must agree on a new surrender date for that purpose. The Court went on to hold, however, 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.

109. The issue which was canvassed at the hearing was how the word "discharged" in section 16(5)(b) should be read in light of the last-mentioned portion of the CJEU judgment. It was argued on behalf of Mr Vilkas that the word "discharged" in Irish law must mean a full and unconditional discharge, and that the same is incompatible with the meaning attributed to the word "released" in the European judgment. The Court invited further written submissions from the parties on this issue, and also afforded them to make further oral submissions following the hearing of the Vilkas appeal if they so wished. This same issue was raised in that appeal also.

110. While I am grateful to the parties for their submissions, it is not necessary to address that issue in this judgment in light of my above conclusion in respect of the interpretation of section 16(5)(a) and its application on the facts of this case. As I have stated above, here there were "circumstances beyond the control" of the State and thus the fixing of a new surrender date was appropriate. Accordingly, section 16(5)(b) does not arise in this case. However, this point is directly in issue in *Vilkas* , and regard should be had to the judgment of the Court delivered therein for an analysis of and conclusion on the topic.

Conclusion

111. For the reasons set out above, I would dismiss the appeal.