Neutral Citation Number: [2022] EWHC 2737 (Admin)

Case No: CO/2134/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Tuesday 1st November 2022

Before:
MR JUSTICE FORDHAM
- -

Between:
REHAN MALIK **Applicant**

- and -

Respondent

GOVERNOR OF HM PRISON HINDLEY (No.3)

- -
- -

The **Applicant** in person
Will Hays (instructed by Government Legal Department) for the **Respondent**

- -
Hearing 27.10.22
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a claim for habeas corpus. There is an issue of substance: whether the Applicant's detention is lawful or unlawful. There is an issue of procedure: whether the issue of substance should be raised by a claim for judicial review impugning the warrant (dated 26.1.22) pursuant to which he is detained (the Operative Warrant). The background and circumstances can be seen from two earlier judgments [2022] EWHC 2599 (Admin) (the First Judgment) and [2022] EWHC 2684 (Admin) (the Second Judgment). The Applicant appeared in person without an advocate. Mr Hays has, with conspicuous care, properly drawn my attention to points which could be made in the Applicant's favour. The Applicant's position is to ask this Court to deal substantively, and promptly, with the issue of substance and, if the detention is unlawful, grant habeas corpus. There is an application for bail, but this is pursued only if the Court transfers this case to continue as a claim for judicial review. I decided to grasp the nettle and produce a reasoned judgment as soon as reasonably possible.

2. The hearing was a remote hearing by CVP, as it was on 14 October 2022 (see the First Judgment). It was known that the Applicant was going to be appearing by video link from prison. GLD made a reasoned request for a remote hearing. The Applicant's concern was to ensure that his brother and sister in law, and Mr Mirza (who features in the First and Second Judgment) could observe if they wished to do so. The arrangements allowed this to happen. The hearing worked well. Two documents were circulated during the hearing, at my request, and the prison ensured that this worked smoothly. Open justice was secured through the publication of the hearing, its start time and mode of hearing in the cause list, with an email address usable by any member of the press or public who wished to attend. I was able to take as the framework for the hearing three principal documents: the Applicant's Amended Grounds for Habeas Corpus (2.9.22); the Respondent's Response (23.9.22); and the Applicant's Submissions Document (25.10.22). There was a hearing bundle and an authorities bundle, available to everyone. The Applicant adopted the Submissions Document as his submissions for this hearing. He also read out a statement. At the hearing, I raised the points – mentioned below – regarding the Official Journal (8.10.18) and the Schmidt case.

3. The background is this. The Applicant was extradited (18.4.19) to Germany. That was on an accusation European Arrest Warrant (EAW) issued in September 2016 by the Public Prosecutors Office (PPO) in Augsberg. Extradition was ordered by DJ Snow in Westminster Magistrates Court (WMC) on 12 April 2017. The Applicant and his co-accused challenged that order by an extradition appeal to the High Court, which McGowan J heard on 10 May 2018 and rejected by a judgment dated 19 December 2018: see Malik & Others v Germany [2018] EWHC 3479 (Admin). Six Counsel, including one Queen's Counsel, represented the Appellants. The Respondent was the Requesting State Authority (PPO), for whom the Crown Prosecution Service acted as always in extradition cases. On 5 April 2019 McGowan J declined to certify a point of law of general public importance for the purposes of a putative appeal to the Supreme Court. On 31 March 2019 the Applicant made an application to vary bail and quash the EAW, which DJ Arbuthnot refused on 5 April 2019. On 8 April 2019 the Applicant sought permission for judicial review of that refusal, which Sir Ross Cranston refused on 11 April 2019 (certifying the claim as totally without merit (TWM)), in which

proceedings the Court of Appeal later declined jurisdiction. Also on 11 April 2019 the Applicant brought a claim for habeas corpus, which Andrews J dismissed (with a TWM certificate) on 16 April 2019. Grounds of appeal and supporting documents were prepared on 17 April 2019 in an attempt to progress those proceedings in the Supreme Court. That attempt failed. The CPS declined to agree to stay the extradition and said an injunction would be needed. No injunction was obtained. The extradition proceeded on 18 April 2019. In Germany, the Applicant was then tried, convicted and sentenced. In his Amended Grounds for Habeas Corpus the Applicant "accepts for the purposes of these proceedings that the [German] court had jurisdiction to try him under German law". In the Submissions Document the Applicant raises as a possibility that the German Court may have acted in breach of EU law.

4. Having been sentenced in Germany, arrangements were then made pursuant to the Repatriation of Prisoners Act 1984 (the 1984 Act) for the Applicant to be brought back to this country to serve his (German) prison sentence. That required his consent. A first warrant (under the 1984 Act s.1) was issued on 28.9.21, his return to the UK took place on 28.10.21 and the Operative Warrant (under s.6 of the 1984 Act) was issued on 26 January 2022. The Applicant's sentence expiry date is 12 April 2025, and his half-time conditional release date is 21 July 2023.

The issue of substance

5. I gave a summary of the substantive claim for habeas corpus in the First Judgment. The essence is this. The application for habeas corpus made by the Applicant in June 2022 is on the grounds that the Applicant is unlawfully detained. Two prominent legal arguments feature in that application.

6. One argument (Exit Day) is this. The Exit Date for leaving the EU at 23:00 on 29 March 2019 was never lawfully extended. In law, the UK left the EU on that date. This has a legally vitiating consequence and a 'domino' effect. It means the EAW system collapsed on 29 March 2019 and was never subsequently saved. In turn, that means the Applicant's current detention is vitiated in law, because it all flowed from an EAW purportedly enforced after the collapse of the EAW system. As is accepted, this is the same argument which was advanced in a judicial review claim brought on 1 April 2019 by the English Democrats CO/1322/2019. It was rejected by Spencer J (18.6.19) and Hickinbottom LJ (19.8.19). The same argument was raised on behalf of the Applicant before DJ Arbuthnot (5.4.19), Sir Ross Cranston (11.4.19) and Andrews J (16.4.19). The argument has never before had an oral hearing and the absence of one means those earlier decisions are not binding. They are wrong.

7. The other argument (PPO) is that aspects of the extradition process involving the German PPO as purported issuing authority, an issue on which the Luxembourg Court ruled on 27 May 2019 (see Minister for Justice and Equality v OG & PI C-508/18 & C-82/19 PPU), have a legally vitiating consequence for the extradition, whose domino effect renders unlawful the Applicant's subsequent and current incarceration. The OG case decided that the concept of an "issuing judicial authority" for the purposes of Article 6 of the EU instrument governing extradition in EAW cases (EU Framework Decision 2002/584/JHA) did not include those PPOs which are "exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister of Justice, in connection with the adoption of a decision to issue [an EAW]". The OG case arose of a reference made by the Supreme

Court of Ireland on 31 July 2018. The CPS and the German PPO in the Applicant's extradition proceedings knew (or must have known) that there was an "arguable defence" based on the issue raised in the OG pipeline case. The UK Government must have known from the date of the reference on 31 July 2018. The arguable defence in fact can be traced back to before 20 March 2017, given the issue then being ventilated in the Irish courts. The PPO and CPS failed to disclose it to the Applicant's representatives or to McGowan J. That was a deliberate, material non-disclosure, and in that sense there was bad faith, which "unravels everything". The PPO and (in particular) the CPS were duty-bound to disclose it, as "ministers of justice". In the event, the arguable defence would have succeeded. The PPO had no authority to issue the EAW. The EAW was, in law, a worthless piece of paper. The entire extradition process was illegal 'ab initio'. As the Applicant put it at the hearing: it was an "illegal process". The closest analogy is the extradition abuse case of R v Horseferry Road Magistrates Court, ex p Bennett [1994] 1 AC 42, from which a principled extension is justified, in the application of English law. This is "no great extension". Each case should turn on its own legal merits. As in Bennett, there is an illegality and impropriety which 'shocks the conscience of the Court'. The legal consequence is that the Applicant's current detention is vitiated in law, because it all flowed from a defective EAW. The consequence is that the Operative Warrant is bad and defective in law and cannot be an answer to habeas corpus. Any other conclusion would be a contradiction.

8. Other points are made and can be made in support of the PPO argument. The Applicant emphasises what he says is the contradiction between the idea that the German proceedings and UK detention are lawful, if the actions of the CPS in 2019 were fundamentally unlawful and the EAW was fundamentally invalid. The 1984 Act must be interpreted and applied by reference to the "principle of legality". The fact that the Irish reference in OG, and the questions raised, were published in the Official Journal on 8 October 2018 reinforces the fact that it was or should have been known to the CPS and should have been brought to the attention of the English courts dealing with the Applicant's extradition. Although Bennett is a case about abuse of process in an English criminal court where the prosecutor has colluded in an unlawful extradition, and the fact that extradition proceedings have their own safeguards (see eg. In re Schmidt [1995] 1 AC 339 at 377H-378A), provides no answer. The safeguards cannot apply to a non-disclosure in proceedings, of which the extradited person was unaware. Another helpful reference point is O v Governor of HMP Holloway and Secretary of State for Justice [2010] EWHC 58 (Admin). That case recognises, in the context of the 1984 Act, that a prior abuse can have a vitiating effect on the UK imprisonment, notwithstanding an operative warrant. There, the test was whether there had been a "flagrant denial of justice": O at §140. By analogy with Bennett, and with O, there is here a non-disclosure abuse by the CPS which secured an extradition on an invalid EAW purporting to emanate from a PPO, and the consequence is that the detention here is unlawful.

9. Those, in essence, are the arguments.

Discussion

10. Both the Exit Day argument and the PPO argument involve two stages. The first stage argues that the extradition process was vitiated in law, in some important fundamental respect. That is either because (the Exit Day argument) the UK left the EU on 29 March 2019 at 23:00, the purported extension being contrary to law and legally invalid, so that the EAW regime ceased to be applicable, and the EAW could not be relied on. Or it is

because (the PPO argument) there was an arguable defence arising from the fact of the reference to the CJEU in OG – that the accusation EAW issued in September 2016 was not issued by an "issuing judicial authority" under Article 6 of the Framework Decision – which the CPS acted wrongfully and abused its power or position in failing to disclose to the Applicant's representatives and the Courts. Either way, the first stage arrives at a vitiating unlawfulness relating to the extradition proceedings. That is the solid platform – or legal premise – for the second stage. Standing on that platform, the second stage argues that, because there was a serious vitiating unlawfulness in the extradition proceedings, a legal consequence flows. That consequence is that the Applicant's current detention, in serving his German prison sentence in the United Kingdom pursuant to the 1984 Act and the Operative Warrant, lacks lawful authority. So, there are two arguments and each has two stages. For the Applicant to succeed, it is enough that one of the two arguments is correct in law. But it must be correct at both stages.

11. In my judgment, each of the two arguments fails on its substantive legal merits. What is more, each argument fails at each of the two stages (either one of which would be fatal). It follows that the clear answer to the issue of substance is that the detention is lawful, and the application for habeas corpus must fail. I will explain the reasons that lead me to these conclusions.

12. I will start with the Exit Day argument. I will take the first stage. In my judgment, it is incorrect in law to say that the UK left the EU on 29 March 2019 at 23:00. The argument is not new. It has been considered, and rejected, in emphatic terms. It was the legal challenge put forward in the English Democrats judicial review CO/1322/2019. In that case, Spencer J refused permission for judicial review on the papers on 18 June 2019. He certified the claim as TWM. There was then a permission-stage appeal to the Court of Appeal which failed on the papers before Higginbottom LJ on 19 August 2019. He also certified the claim as TWM. In his order – available from the court files – Higginbottom LJ encapsulated the argument and the answer to it as follows.

> ***In this claim, the Claimant … seeks to challenge "the date upon which the United Kingdom leaves the European Union", claiming that the Government had no power to extend the time for the UK leaving the European Union beyond 29 March 2017. Notification of withdrawal having been given on 29 March 2017, article 50(3) of the Treaty on European Union provided that the European Treaties should cease to apply to the relevant Member State from entry into force of a withdrawal agreement or, failing that, two years after the date of notification. It is submitted that, although that period could be extended by the European Council in agreement with the Member State unanimously agreeing to extend it, the Government had no power to agree an extension on behalf of the UK. The European Union (Notification of Withdrawal) Act 2017 granted the Prime Minister a statutory power only to give notification, not to extend the period referred to in article 50. The European Union (Withdrawal) Act 2018 provided that, for domestic purposes, the Treaties were to cease to apply on "exit day", which was initially was 29 March 2019 but could be and has since been extended by statutory instruments), the power to amend that date could only be exercised where the date the Treaties are to cease to apply is different from 29 March 2019. It does not give the Government any statutory powers in relation to its conduct of relations with the EU on the international plane. The power to amend "exit day" has therefore not been triggered. The Claimant thus contends that the UK left the EU on 29 March 2019.***
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> ***… [T]his claim is bound to fail, and is totally without merit, for the reasons set out in paragraphs 16-22 of the Summary Grounds of Resistance which I gratefully adopt as correct. In short, international agreements (including agreements as to extensions of time under article 50(3)) are matters for the Government in the exercise of prerogative powers; and, although such powers can be displaced by Parliament, this case is distinguishable from R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, because***

> ***Parliament, in its various interventions into the withdrawal process or otherwise, has not arguably displaced those prerogative powers in respect of an extension of time under article 50(3). Indeed, Parliament has consistently made clear in the 2017 and 2018 Acts, and especially clearly in the European Union (Withdrawal) Act 2019, that timing of withdrawal (including agreeing extensions to the withdrawal date under article 50) was and is a matter for the Government.***

13. Higginbottom LJ referred to and adopted §§16-22 of the summary grounds of resistance which had been filed in that judicial review claim. The Respondent relies on them in this case. I will set them out:

> ***16. The Government negotiates and enters into international agreements in the exercise of prerogative powers: i.e. the treaty and foreign relations prerogatives: see eg R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [2018] AC 61 at §§54-55.***
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> ***17. The Claimant's case is dependent upon the assertion that the statutory scheme set out above has displaced the Government's prerogative powers to negotiate and agree extensions of time to the withdrawal period under Article 50(3) TEU. The short answer to that contention is that the statutory scheme says no such thing; on the contrary, each of the relevant pieces of primary legislation is fundamentally inconsistent with it.***
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> ***18. The 2017 Act authorised the Government to notify the EU of the UK's intention to withdraw. It did not purport to address when the UK would leave, or to control any power to agree extensions of time. By the express inclusion within s.1(1) of a reference to Article 50, Parliament was recognising and acknowledging that it was, necessarily, for the Government to exercise its powers in relation to the withdrawal process in accordance with Article 50, including extensions of time under Article 50(3).***
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> ***19. So far as concerns the 2018 Act: (a) Section 20 as a whole presupposes that the prerogative power to seek and agree extensions exists. Thus, s.20(3) expressly recognises that an extension might be agreed between the UK and the EU under Article 50(3) TEU, and s.20(4) makes provision for the Government to amend the definition of "exit day" by regulations. Parliament did not purport to control or limit the prerogative power to agree such extensions under Article 50(3). Rather, Section 20(4) restricts the power to make regulations amending the definition of "exit day" to circumstances where an agreement under Article 50(3) has already been reached, in order that the definition be aligned with the date of withdrawal under the Treaties. It is therefore evidently premised upon Governmental exercise of the prerogative already having occurred. (b) Moreover, where Parliament did intend in the 2018 Act to control or limit the Government's prerogative powers in relation to the Article 50 process it did so expressly. Section 13 has the effect of preventing the Government ratifying any withdrawal agreement with the EU before it has been approved by the House of Commons and primary legislation has been passed to implement the agreement. That operates as a direct fetter on the Government's ordinary treaty prerogative to negotiate and agree a withdrawal agreement, under Article 50, departing from the ordinary preservation of that prerogative in s.20(4) and (8) of the Constitutional Reform and Governance Act 2010. The absence of any similar control on the power to agree an extension under Article 50(3) in the 2018 Act is conspicuous.***
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> ***20. So far as concerns the 2019 Act: (a) Section 1(6) recognises and preserves, in terms, the Government's power to 'seek and agree' extensions of time under Article 50(3). That is the sole purpose of that provision. (b) To the limited extent that Parliament intended to control or limit that prerogative power in the 2019 Act, it did so in express terms (eg in ss.1(4)-(5)); and then went out of its way to make clear (in s.1(6)) that otherwise the prerogative powers are preserved.***
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> ***21. There is no parallel or analogue with the situation in Miller. Unlike sending the notification of intention to withdraw under Article 50(2) – and on the assumption of irrevocability the Supreme Court proceeded upon – an extension of the UK's period of membership of the EU preserves the existing legal position, including the rights and***

> ***obligations of citizens, the sources and content of domestic law, and the constitutional arrangements of the UK for the period of the extension. It does not involve any constitutional or legal change, let alone one of the "major" or "fundamental" type which concerned the Supreme Court in Miller: at §§82-83. Where, as in this case, the exercise of the treaty prerogative does "not in any significant way alter domestic law", including in relation to EU treaties and agreements, the Supreme Court accepted that the prerogative power existed: at §89, approving R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg [1994] QB 552 in this respect.***
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> ***22. It is equally plain that an extension of the UK's period of membership does not frustrate the purpose of any statutory provision: (a) An extension of time under Article 50(3) does not frustrate Parliament's expressed intention in s.1(1) of the 2017 Act that the UK should withdraw from the EU. Parliament set no date by which that intention was to be effected: it provided only a power to notify under Article 50(2), which could be exercised at any time. (b) Section 20(1) of the 2018 Act, as enacted, gave a specific definition of "exit day" as 11.00pm on the 29 March 2019. However, that was evidently to reflect the fact that under the terms of Article 50 – given the date of the notification – the ordinary two year period would expire on 29 March 2019. In any event, and dispositively so far as this point is concerned, s.20 also made direct provision to enable and to regulate – in ss.20(3)-(4) and §14 of Schedule 7 – extensions of time which would alter the definition of "exit day". It is therefore the Claimant's position, that there is no power to agree an extension, which would frustrate the evident purposes of ss.20(3)-(4). The extension regulation powers would be denuded of any purpose or function. Parliament would have legislated in vain to permit regulations to be made to reflect an agreed extension of time under Article 50(3) if, as the Claimant asserts, only primary legislation could authorise such a step. (c) No assistance can be drawn from the anticipated repeal of the 1972 Act in section 1 of the 2018 Act. Section 1 is not in force, and the commencement of it was both tied in terms to the definition of "exit day" (as to which, see above) and left by Parliament to be dealt with in regulations: s.25(4). The 1972 Act remains fully in force as an expression of Parliament's continued intent. Any extension of time of the UK's membership of the EU is wholly consistent with the intention of Parliament as expressed in the 1972 Act. Again, it is the Claimant's position which would frustrate the continued intention of Parliament by seeking to render the 1972 Act empty of effect without it having been repealed.***

14. The Exit Day argument asks me to accept as legally correct the very arguments emphatically rejected as unsustainable in those 2019 proceedings. There is no basis for my doing so. The argument was and is hopeless for the reasons given, 3½ years ago when the point had current legal significance, by Higginbottom LJ. I adopt those reasons. True, there was no hearing on the issue. Nor was there any hearing, on the same issue, when it was relied on in the extradition context by the Applicant in 2019: Sir Ross Cranston's TWM order (11.4.19); and Andrews J's TWM order (16.4.19). There was no hearing precisely because the point was hopeless. The Exit Day argument does not therefore get out of the starting blocks even for the purposes of the first stage. I add one further point by way of footnote. As is obvious, the Courts in extradition cases since March 2019 have had to deal with the legal implications of Brexit and the effect of Brexit on the application of the EU Framework Decision and for reliance on EAWs. The idea that "the EAW regime collapsed" at 23:00 on 29 March 2019, so that extradition could not lawfully take place on an EAW after that time on that date, is inconsistent with an entire body of extradition case-law. I mention just one case. In Polakowski v Poland [2021] EWHC 53 (Admin) [2021] 1 WLR 2521 the Divisional Court explained that the Brexit arrangements had the consequence in law that the EU Framework decision continued to govern until 31 December 2020, and moreover that EAWs could be relied on after that date.

15. I turn to the PPO argument. Again, I focus on the first stage. In my judgment, it is incorrect in law to say that the CPS acted wrongfully or abused its power or position in

failing to disclose to the Applicant's representatives and the Courts an arguable defence arising from the fact of the reference to the CJEU in OG. I do not accept that the fact of a reference to the CJEU, on a legal point of general applicability, of itself equates to an arguable defence to extradition. Even assuming that they were aware (or should have been aware) of the OG reference, I do not accept that the CPS, or the German PPO as requesting state authority, acted wrongly or abused its power, in not informing the Applicant's representatives or the Court. The position was this. The Applicant's extradition was ordered by DJ Snow on 12 April 2017. The Applicant, like all of his co-accused, was represented by solicitors and barristers. No ground was raised (as the Irish lawyers had done in the Irish proceedings) on incompatibility of the PPO with Article 6 of the Framework Decision. The OG case was a pipeline case before the Luxembourg Court (CJEU) from 31 July 2018 when the Supreme Court of Ireland had made a reference. The Advocate General reported on 30 April 2019 and the CJEU's judgment came on 27 May 2019. I would accept that there could be situations where knowledge of a pipeline case could give rise to a responsibility to inform the Court. An example may be where the English Court has granted permission to appeal, recognising a "reasonably arguable" general point of law. It is often the case that the Court will grant a stay of other cases in such a situation. I cannot accept that the existence of a pipeline reference to the CJEU is an equivalent situation. I cannot accept that there was a legal duty, nor that failure constituted an abuse, still less that it was "bad faith". It follows that the PPO argument does not get out of the starting blocks and fails at the first stage. I add three points by way of footnote. The first is that the fact of the OG reference – and the questions referred – were in the public domain, published in the EU Official Journal on 8 October 2018. The second is that the argument is not that extradition is vitiated in law because, after the extradition, a Court upholds an argument which would have succeeded. The argument is that there was a material non-disclosure, in breach of duty and by way of an abuse. The third is that the OG point, when it was recognised, was not the end of the road for extradition. The principle identified by the CJEU is a nuanced one, not a binary on-off switch. In any event, what OG meant was that if an EAW from a German PPO could not stand, it could nevertheless be replaced with a fresh EAW and extradition could proceed (for a post-OG example of this outcome, see Shirnakhy v Germany [2020] EWHC 1103 (Admin) at §§9-10).

16. I cannot, in any event, accept that the arguments are right at their second stage. The 'domino effect' argument is unsustainable. The reasons are the same for both arguments. The first point is this. So far as English law is concerned, the Applicant's extradition was pursuant to court orders. Those are judicial acts. There was a court order for extradition by District Judge Snow on 12 April 2017. There was a further court order by McGowan J upholding that order for extradition, on 19 December 2018. I cannot see how, as a matter of English law, the extradition falls to be characterised as 'fundamentally vitiated in law' so as to be of 'no legal effect' – with the knock-on effect which is said to follow – unless the Applicant can show that the court orders by which extradition was effected are vitiated and invalidated. I cannot see how they are. That problem, in my judgment, cuts off the suggested 'domino effect' at its source. The extradition was lawful because it was pursuant to court orders. Be that as it may, the second point is that the Applicant's current detention is – as a matter of English law – governed by distinct primary legislation, pursuant to which there is the Operative Warrant. The Applicant was tried convicted and sentenced in a German criminal court. The custodial sentence imposed by the German court and the location of that sentence being served fall within the 1984 Act as the governing primary legislation. The

applicant is a "prisoner" for the purposes of section 1 of the 1984 Act. The Applicant has given the statutory consent to the international arrangements in accordance with which he is transferred as a prisoner: section 1(5). It is not disputed that the 1984 Act applies. Reference is made to the "principle of legality" but there is no fundamental human right or constitutional value being abrogated when the Applicant serves a custodial sentence passed by a criminal court. The third point is that the suggested analogy with, or extension of, the case of Bennett (or the case of O) is unsound. What is conspicuous about those cases is how high the threshold is. Bennett was a case where a criminal prosecution in this country was an abuse of process because the prosecutor was bringing the case before the court after the flagrant abuse of being involved in abducting the accused and circumventing all extradition safeguards. Any equivalent principle would have been a matter for the German criminal court. The Bennett threshold is deliberately a very high one: "executive action … that threatens either basic human rights or the rule of law", as "a serious abuse of power" (62A-C); "acts which offend the court's conscience as being contrary to the rule of law" (76C). The case of O is in fact the closer analogy. It accepted – through the medium of primary legislation in the form of the Human Rights Act 1998 – that detention under the 1984 Act, pursuant to an operative warrant, could be unlawful and habeas corpus warranted, but the test (by reference to Article 5 and 6 ECHR) was whether there had been in the foreign court a "a flagrant denial of justice", a test "rightly set very high" (O at §140). If there were room for a principled extension, at common law, of Bennett (criminal abuse of process) or O (statutorily protected human rights), it would in my judgment necessarily involve a very high threshold, one which this case comes nowhere near.

Conclusion

17. For these reasons, in my judgment, the current detention of the Applicant is plainly lawful. The 1984 Act applies. The Operative Warrant governs. There is nothing which begins to impugn or dislodge these. There is no line of falling 'dominoes' of vitiating effect which can arise from either of the arguments advanced.

The issue of procedure

18. The Respondent maintains that this case involves an inapt procedure. This should not be habeas corpus proceedings against the custodian. It should be judicial review of the Secretary of State, who made the Operative Warrant. Reliance is placed on Jane v Westminster Magistrates Court [2019] EWHC 394 (Admin) [2019] 1 WLR 95 where it was said that where an operative warrant is conclusive, subject to the decision to make it being challenged on public law grounds, judicial review of the body issuing the warrant is in principle the favoured course. I described this in the First Judgment as "a preliminary issue which has been ventilated by the Respondent as to whether the wrong procedural route has been taken in this case and it ought to be (or be transferred to be) judicial review proceedings". Having registered the Respondent's concerns, which I understand, Mr Hays sensibly recognised that the Court might – as a sound case-management course – leave to one side the procedural issue and see whether there was anything in the substantive issue. That is what I have done. I am not going to rule on the issue of procedure. It is academic. In the circumstances of the present case, I would not convert the claim from habeas corpus to judicial review only to dismiss it. The Applicant's answer, in essence as I see it, is: that he is not challenging on public law grounds the Secretary of State's decision to make the Operative Warrant; that a claim for habeas corpus directed at the custodian will often necessarily have a 'collateral

challenge' content; that it has been good law since R v Halliday, ex p Zadig [1917] AC 260 at 272 that habeas corpus is a detained person's "right … to have tested and determined in a Court of law … the legality of the order or warrant by virtue of which he is given into or kept in that custody"; and that O was a habeas corpus case (combined with judicial review). In the circumstances, I do not need to resolve the dispute on the issue of procedure. Although the claim for habeas corpus fails, that is not on the basis that it should have been brought – should continue – by judicial review. Since I have been able to resolve the issue of substance, and provide this judgment speedily, the question of bail does not arise. For the reasons given, the application for habeas corpus will be dismissed. There will be no order as to costs.

1.11.22