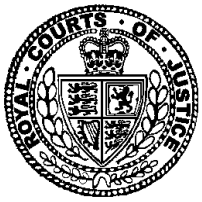

Neutral Citation Number: [2021] EWHC Civ 53 (Admin)

Case Nos: CO/2/21, CO/3/21,
CO/5/2021, CO/6/21, CO/7/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE CHAMBERLAIN

- -

Between :

MAREK POLAKOWSKI, VIJAY SANKAR, CARLOS MENDES, MARIS ZELENKO AND THOMAS OVSIANIKOVAS **Applicants**

- and -

(1) WESTMINSTER MAGISTRATES' COURT
(2) WARSAW REGIONAL COURT, POLAND
(3) OFFICE OF PUBLIC PROSECUTION, COLOGNE, GERMANY
(4) JUDICIAL DISTRICT OF LISBOA NORTE, PORTUGAL
(5) PROSECUTOR GENERAL'S OFFICE, LATVIA
(6) DEPUTY PROSECTOR GENERAL LITHUANIA
(7) GOVERNOR OF HMP WANDSWORTH (IN POLAKOWSKI AND OVSIANIKOVAS) **Respondents**

- -

David Josse QC, Ben Keith, David Williams and John Crawford for Polakowski and Mendes (instructed by **McMillan Williams**)**,** Sankar **(**instructed by **Rahman Ravelli**), Zelenko (instructed by **Tuckers**) and Ovsianikovas (instructed by **Birds**)
Helen Malcolm QC and Alexander dos Santos (instructed by the Crown Prosecution Service) for the judicial authorities

Hearing dates: 15 January 2021

- -

Approved Judgment

Dame Victoria Sharp, P:

Introduction

1 This is the judgment of the Court to which all members have contributed.

2 There are before us five applications for writs of habeas corpus. The five applicants were all arrested pursuant to European Arrest Warrants ("EAWs") before 31 December 2020. Two of them are detained; the other three are on conditional bail. The applications are made on a single common ground: that, since 11p.m. on 31 December 2020, the end of the transition period defined by the *Agreement on the withdrawal of the United Kingdom from the EU and Euratom* ("the Withdrawal Agreement"), there is no longer any legal basis in international law for their surrender; and that in consequence there is no basis in domestic law for continued detention or for the maintenance of bail conditions.

The applicants

3 The circumstances of the applicants are as follows:

(a) Marek Polakowski is sought pursuant to a conviction EAW issued on 4 October 2019 by the Warsaw Regional Court in Poland and certified by the National Crime Agency ("NCA") on 13 February 2020. He was arrested on 10 July 2020 and brought before Westminster Magistrates' Court, where he was remanded in custody. A full extradition hearing has yet to take place. The latest hearing at Westminster Magistrates' Court took place on 14 January 2021, at which Mr Polakowski was remanded in custody for a further 28 days. He is currently detained at HMP Wandsworth.

(b) Vijay Sankar is sought pursuant to an accusation EAW issued on 22 April 2020 by the Office of Public Prosecution in Cologne, Germany, and certified by the NCA on 2 June 2020. He was arrested on 30 June 2020 and appeared at Westminster Magistrates' Court on the same day. He was granted conditional bail. He remains on bail. A full extradition hearing is listed on 25 January 2021.

(c) Carlos Mendes is sought pursuant to an accusation EAW issued on 28 February 2019 by the Judicial District of Lisboa Norte in Portugal and certified by the NCA on 6 January 2020. He was arrested on the same day. His extradition was ordered following a hearing at Westminster Magistrates' Court by District Judge Snow. He has appealed. Permission to appeal was initially refused but was then granted following a hearing on 21 October 2020. The appeal is listed for hearing on 16 February 2021. He has been on bail throughout.

(d) Maris Zelenko is sought pursuant an accusation EAW issued on 4 January 2018 by the Prosecutor General's Office in Latvia and certified by the NCA on 9 January 2018. He was arrested on 2 October 2018. His extradition was ordered by Deputy Senior District Judge Ikram on 17 January 2019. His appeal was dismissed by the Divisional Court on 13 July 2020, but he has applied to re-open that appeal. He has been on bail throughout.

(e) Tomas Ovsianikovas is sought pursuant to an accusation EAW issued on 16 October 2014 by the Deputy Prosecutor General in Lithuania and certified by the NCA on 24 October 2014. He was arrested on 20 May 2015 whilst in custody in relation to an offence of rape committed in this jurisdiction, for which he was convicted and sentenced. He remained in custody on the basis of the EAW after serving his custodial sentence. He is currently detained at HMP Wandsworth.

4 These cases have been selected to illustrate three categories: first, those in which an EAW has been issued and certified and the subject arrested but no extradition order has been made (Polakowski, Sankar and Ovsianikovas); second, those where extradition has been ordered and an appeal is pending (Mendes); and third, those where the extradition appeal is concluded but there is an application to re-open it (Zelenko). As will become clear, the argument advanced – and the answer to it – applies equally to each of these categories of case.

Procedure: the appropriateness of applications for habeas corpus

5 On behalf of the judicial authorities, Ms Helen Malcolm QC submitted that it was not clear that this challenge has been properly brought by applications for habeas corpus. She directed our attention to authorities which suggest that the appropriate procedure for such a challenge is, rather, judicial review. Mr Josse QC, for the applicants, submits that habeas corpus is the appropriate remedy in the exceptional circumstances of this case, but in the alternative invites us to exercise the power under CPR r. 87.5(d) to direct that the applications continue as applications for permission to apply for judicial review.

6 In *Jane v Westminster Magistrates' Court* [2019] EWHC 394 (Admin), [2019] 4 WLR 95, the Divisional Court (Singh LJ and Dingemans J) considered the circumstances in which habeas corpus is appropriate in extradition cases. At [45]-[46] of his judgment, Singh LJ noted that it was unclear whether an application for habeas corpus could be brought on behalf of an applicant who was not detained but subject to conditional bail. He did not consider it necessary to resolve that point because:

> "47… there is a more fundamental difficulty in the way of the applicant's use of habeas corpus in a case like this. Even if the applicant were in detention, it is that a complete answer to the writ of habeas corpus would be provided by the fact that there is lawful authority for his detention. That authority is provided by the order of a court. The gaoler (for example a prison governor) would be able to cite the order of the court as providing the lawful authority for the detention.
>
> 48. What the applicant in truth needs to attack, and indeed does attack, is the order of the court by which the district judge refused his application for discharge. The applicant submits that the decision of the district judge is flawed on various public law grounds…; and irrationality. Those are grounds of judicial review.
>
> 49. The appropriate procedure for setting aside the order of the court which on its face authorises the applicant's detention is an application for judicial review to have that order quashed."

7 Singh LJ then went on to consider an argument that habeas corpus was nonetheless appropriate in extradition cases. He cited and endorsed *Gronostajski v Government of Poland* [2007] EWHC 3314 (Admin) at [8]-[9]. There, Richards LJ said that, where detention was authorised by the order of a district judge which on its face was valid, the proper target of challenge was the order and the proper procedure judicial review. This, Singh LJ held, was also consistent with the decisions of the Court of Appeal in *R v Secretary State for the Home Department ex p. Cheblak* [1991] 1 WLR 890 and *R v Secretary of State for the Home Department ex p. Muboyayi* [1992] QB 244 and the judgment of the Divisional Court in *R v Oldham Justices ex p. Cawley* [1997] QB 1. Those cases were to be followed.

8 As in *Jane*, it is not necessary for us to address the question whether an applicant who is not detained but is subject to conditional bail is entitled to apply for habeas corpus; and we therefore say nothing about that question. This is because, even if the answer to that question is "Yes", we do not consider that applications for habeas corpus are the correct procedural route for this challenge.

9 We start with the case of Polakowski. He is now detained pursuant to an order made by a district judge on 14 January 2020. The habeas corpus application in his case is directed at the Governor of HMP Wandsworth. It would be a sufficient return to an application for a writ of habeas corpus for the Governor to point to the district judge's order remanding him in custody. That order not only authorises but compels the Governor to detain Mr Polakowski. If the argument advanced by Mr Josse is correct, it follows that the district judge erred in law. On the reasoning in *Jane*, with which we agree, the proper means of challenging such an order is a claim for judicial review. Since the application is now before us, we shall exercise our power under CPR r. 87.5(d) to direct that the application continue as an application for permission to apply for judicial review.

10 In the other case where the applicant is currently detained (Ovsianikovas), the detention is also pursuant to orders of the court. To the extent that it is argued that the orders were lawful when made, but the legal basis for detention has fallen away since, the proper course would be to apply back to the district judge to discharge the order. If that were refused, the decision could then be challenged by judicial review. The same is true, *a fortiori*, of the decisions of the Westminster Magistrates' Court to impose conditional bail in the other cases. The proper forum for an argument that legal developments since the orders were made render the bail conditions unlawful, is an application to the district judge to discharge the applicant from bail. If discharge were refused, the proper route of challenge would be by judicial review of the refusal.

11 The writ of habeas corpus remains an important remedy in cases where there is a proper basis for arguing that there is no authority for detention – as distinct from cases where there is a court order authorising detention but it is said to be flawed by public law error. Applications for habeas corpus, unlike claims for judicial review, may be brought without the permission of the court. They take priority over other court business. Different provisions as to appeal apply. These procedural differences make it important that professional representatives consider carefully whether their cases fall into the limited category in which an application for habeas corpus is appropriate. For the reasons we have given, the present cases do not.

12 In this case, given that we are considering the challenge in Polakowski's case, it would be wasteful of time and resources if we were to decline to determine these cases until applications were first made to the Westminster Magistrates Court. Instead, in these exceptional circumstances, we shall direct that the four remaining applications should all continue as applications for permission to apply for judicial review

The applicants' argument

13 Mr Josse QC accepts that, in each of these cases, the EAW, taken with the district judge's order, provided a proper legal basis for the detention of the applicant or the grant of conditional bail until 11p.m. on 31 December 2020. He contends, however, that from that point onwards, the legal basis for detention or conditional bail fell away. His argument proceeds in these stages (re-ordered for ease of logical exposition):

(a) The legal basis for the EAW system is Framework Decision 2002/584 JHA ("the Framework Decision"). That provides for the issue of EAWs by a judicial authority in the requesting Member State to the sending Member State and for the surrender of persons by the latter to the former.

(b) Until 11 p.m. on 31 January 2020, the Framework Decision itself – which applied to all Member States including the UK as part of the corpus of EU law – provided a proper legal basis for the issue of EAWs and for the surrender of individuals pursuant to them.

(c) From 11 p.m. on 31 January 2020, however, the UK ceased to be an EU Member State; and EU law was no longer an independent source of obligations on the UK. The UK's rights and obligations vis-à-vis the EU were exhaustively defined by the Withdrawal Agreement, which entered into force at that time.

(d) Article 62 of the Withdrawal Agreement provided that the Framework Decision was to continue to apply in respect of EAWs where the requested person was arrested before the end of the "transition period" (defined in Article 126 as the period from 11 p.m. on 31 January 2020 to 11 p.m. on 31 December 2020).

(e) But in order for the Framework Decision to be capable of sensibly applying, it was necessary for there to be an express agreement that the UK would be treated as if it were a Member State for the purposes of the Framework Decision. There is such an agreement in Article 127, but that applies only during the transition period. Its para. (1) provides that, subject to immaterial exceptions, EU law is to be applicable to and in the UK, but only "during the transition period". Para. (3) provides that the law made applicable by para. (1) "shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union". But this too applies only "[d]uring the transition period". Para. (6) provides: "Unless otherwise provided in this agreement, *during the transition period*, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom" (emphasis added).

(f) Article 7 of the Withdrawal Agreement, provides, subject to exceptions, that "[f]or the purposes of this Agreement, all references to Member States and competent authorities of Member States in provisions of Union law made applicable by this Agreement shall be understood as including the United Kingdom and its competent authorities". But Article 128(1) shows that this applies only during the transition period.

(g) This means that, after the end of the transition period, there is no agreement that the term "Member State" includes the UK. Since the Framework Decision in its Article 1(1) defines an EAW as "a judicial decision issued by a Member State with a view to the arrest and surrender *by another Member State* of a requested person" (emphasis added), this has the consequence that the Framework Decision does not provide a proper legal basis for the surrender of the applicants by the UK to any EU Member State.

(h) The 2003 Act, insofar as it implements the Framework Decision, must be read conformably with it: see the decision of the Grand Chamber of the European Court of Justice ("ECJ") in Case C-105/03 *Pupino* [2006] QB 83 and other cases to similar effect. Accordingly, since the Framework Decision supplies no basis for the surrender of the applicants, neither can the 2003 Act.

(i) Since, from 1 January 2021, the UK is no longer a Member State and no longer to be treated as if it were, a number of key protective features of the Framework Decision regime have ceased to apply. In particular:

  (i) specialty protection (provided for by Article 27 of the Framework Decision), the importance of which is vouched by s. 17 of the 2003 Act, which requires discharge where there are no specialty arrangements with the requesting territory;

  (ii) assurance that time spent in custody or remand will count toward sentence (provided for by Article 26 of the Framework Decision), without which it is said that there may be a breach of Article 7 ECHR;

  (iii) protection from onward extradition (provided for by Article 28 of the Framework Decision); and

  (iv) provisions governing surrender and transit (provided for by Article 25 of the Framework Decision).

(j) The EAW regime can no longer operate properly as intended, because the UK's departure from the EU has removed the jurisdiction of the Court of Justice of the EU ("CJEU"), which is essential to ensure uniform application of the Framework Decision.

(k) Finally, since 1 January 2021, the UK no longer has access to the Schengen information System II ("SIS") for the purpose of surrender and removal arrangements. This is a further matter which renders the operation of the EAW system impossible.

Analysis

14 In our view, this argument is misconceived for five reasons.

15 **First**, as a matter of constitutional principle, the correct starting point for the legal analysis is the Act of Parliament which governs extradition – the 2003 Act – and the domestic law which modifies it, not the Framework Decision or any other piece of EU law, nor any unincorporated international agreement.

16 Even before the UK ceased to be an EU Member State, most EU law was implemented by domestic legislation of one sort or another. Where that was so, the starting point for any legal analysis was the domestic implementing legislation. In the vast majority of cases, that would provide the answer. Only exceptionally, in cases where the domestic law was unclear or failed properly to implement the underlying EU instrument, was it necessary to look to the latter.

17 After the UK ceased to be an EU Member State on 31 January 2020, EU law continued to have effect in the UK, subject to certain modifications, by virtue of s. 1A of the European Union (Withdrawal) Act 2018 ("the 2018 Act"), as inserted following the conclusion of the Withdrawal Agreement by the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act"). Since 11 p.m. on 31 December 2020, EU law has effect in the UK only insofar as incorporated into domestic law by the 2018 Act (as amended) or other domestic legislation. The ongoing relationship between the UK and the EU is the subject of international agreements, the most significant being the Trade and Co-operation Agreement ("TCA"), which is not part of UK domestic law save to the limited extent that it is specifically incorporated by statute.

18 These developments make it even more important that any legal question involving rights or obligations said to be derived from EU law should now be approached in the first instance through the lens of domestic law.

19 **Second**, there is no dispute that these five applicants were all properly arrested pursuant to "Part 1 warrants" under the 2003 Act. Nor is there any dispute that the decisions to remand two of them in custody and impose bail conditions on the others were all properly made under the 2003 Act. The first place to look when deciding what is to happen next is the 2003 Act. There is nothing in that Act, or any other provision of domestic law, which suggests that they must all be discharged unless surrendered prior to 11 p.m. on 31 December 2020. Nor is there anything to suggest that the powers conferred by the 2003 Act depend on the continued applicability to the UK of any EU law instrument or international agreement.

20 On the contrary, as Ms Malcolm QC for the judicial authorities said in her helpful written and oral submissions, domestic law provides for what is to happen to those arrested pursuant to EAWs prior to 11 p.m. on 31 December 2020 but not surrendered before that date. The law in question is contained in the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 (SI 2019/742). Regulations 53, 55 and 56 amend, respectively, the 2003 Act, the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (SI 2003/3333) and the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (SI 2003/3334). It is not necessary to consider the detail

of these amendments because reg. 57 provides that they do not apply in a case where, before 11 p.m. on 31 December 2020, "a person has been arrested under a Part 1 warrant". As the Explanatory Note makes clear, this provision was inserted to show "how cases 'live' on exit day should be dealt with". (The use of "exit day" here is capable of misleading. The amendments made by s. 1 of the 2020 Act continued the effect of EU law in the UK, subject to modifications, after exit day until 11 p.m. on 31 December 2020.)

21 In case there were any doubt about the intention here, by a further amendment made to reg. 57 by SI 2020/1408, a second paragraph was inserted, referring the reader to Article 62(1)(b) of the Withdrawal Agreement (which provides for the continued applicability of the Framework Decision in EAW cases where the arrest takes place before 11 p.m. on 31 December 2020) and to ss. 7A to 7C of the 2018 Act (which give effect in domestic law to the directly effective provisions of the Withdrawal Agreement).

22 Further amendments to the 2003 Act were made by s. 12 of the European Union (Future Relationship) Act 2020 ("EUFRA"), which received the Royal Assent on 30 December 2020. Again, it is not necessary to consider the detail of these, because paragraph 10 of Part 2 of Schedule 6 provides as follows:

> "The amendments made by section 12 do not apply for the purpose of deciding whether the offence specified in a Part 1 warrant is an extradition offence if the person in respect of whom the warrant is issued is arrested under the warrant or under section 5 of the Extradition Act 2003 on the basis of a belief related to the warrant before [11 p.m. on 31 December 2020]."

23 These provisions make clear that the intention was that the 2003 Act should continue to apply – in its unamended form – to extradition cases coming before the courts after 11 p.m. on 31 December 2020 where the arrest took place before that time. The EUFRA in particular envisages that in such cases a court will have to decide whether the offence specified in the EAW is an extradition offence. That is flatly inconsistent with the applicants' submission that they are entitled to be discharged because the UK courts now lack jurisdiction to deal with EAW cases.

24 This would be enough on its own to dispose of the applicants' case. But since we have heard argument on the position in international law, we should address that too.

25 **Third**, the central plank of the applicants' argument is that the Framework Decision cannot apply to or in the UK after 11 p.m. on 31 December 2020 because, from that time onwards, the UK is neither an EU Member State, nor to be treated as if it were. This is wrong. Article 7(1) of the Withdrawal Agreement provides as follows:

> "For the purposes of this Agreement, all references to Member States and competent authorities of Member States in provisions of Union law made applicable by this Agreement shall be understood as including the United Kingdom and its competent authorities, except as regards:

> (a) the nomination, appointment or election of members of the institutions, bodies, offices and agencies of the Union, as well as the participation in the decision-making and the attendance in the meetings of the institutions;
>
> (b) the participation in the decision-making and governance of the bodies, offices and agencies of the Union;
>
> (c) the attendance in the meetings of the committees referred to in Article 3(2) of Regulation (EU) No 182/2011 of the European Parliament and of the Council (4), of Commission expert groups or of other similar entities, or in the meetings of expert groups or similar entities of bodies, offices and agencies of the Union, unless otherwise provided in this Agreement."

26 It is common ground that none of the exceptions in (a) to (c) applies. Article 7, unlike the provision to similar effect in Article 127(6), is not time-limited by reference to the transition period. It is open-ended. It applies to all "provisions of Union law made applicable by this Agreement". That includes the Framework Decision, which Article 62(1)(b) makes applicable in any case "where the requested person was arrested before the end of the transition period for the purposes of the execution of the European arrest warrant". Article 62 is also not time-limited by reference to the transition period: it lacks the limiting words "during the transition period", which are found in Article 127(1), (3) and (6).

27 Mr Josse relied on Article 128(1), which provides that "[n]otwithstanding Article 127, during the transition period Article 7 shall apply". He submitted that the effect of this was to confine the operation of Article 7 to the transition period. But Article 128(1) does not say that Article 7 applies *only* during the transition period. Its purpose is to make clear that, during the transition period, Article 7 applies *alongside* Article 127. Article 128(1) appears in Part Four of the Withdrawal Agreement, which deals with the transition period. It does not purport to cut down the scope of the other parts of the Withdrawal Agreement, which apply without limit of time.

28 Mr Josse accepted that, if his construction of Article 7 were accepted, the consequence would be that *none* of the instruments given effect by Article 62 would apply at all after the end of the transition period. The matters covered by those instruments include (among others) mutual legal assistance, freezing orders and confiscation orders. But if that were correct, there would be no need for Article 62 at all, because Article 127(1) gives effect to the whole of EU law (subject to immaterial exceptions) during the transition period. The only plausible interpretation of Article 62 is that it was intended to impose on the UK and the Member States of the EU mutual and indefinite obligations to apply existing EU instruments to cases where matters were "live" as at 11 p.m. on 31 December 2020. In the case of the EAW system, what makes a case "live" is that the arrest has taken place prior to that time. But the obligation to apply the relevant instrument – in this case, the Framework Decision – applies indefinitely to such cases.

29 The combined effect of these provisions is that the Withdrawal Agreement provides a clear basis in international law for the application of the Framework Decision after 11 p.m. on 31 December 2020 to EAW cases where the arrest took place before that time.

30 This is fatal to the applicants' contention that the Framework Decision cannot sensibly be operated in respect of the UK after 11 p.m. on 31 December 2020. It can be so operated, because the parties agreed in the Withdrawal Agreement that it should; and they agreed expressly that the term "Member State" as it appeared in the Framework Decision should be read *as if* it included the UK.

31 This also removes the foundation for the applicants' argument that key arrangements and protections provided in the Framework Directive are missing at the level of international law. The protections relating to specialty (Article 27), time spent in custody or on remand (Article 26), protection from onward extradition (Article 28) and surrender and transit (Article 25) all continue to apply. These provisions continue to impose obligations on requesting states. These obligations arise under international law by virtue of the Withdrawal Agreement, which is also part of the EU legal order law in EU Member States.

32 **Fourth**, this means that the principle that the 2003 Act must be read conformably with the Framework Directive, far from supporting the applicants' case, tells against it. As noted above, domestic legislation expressly provides that the amendments to the 2003 Act made in consequence of the TCA do not apply in EAW cases where the arrest occurred before 11 p.m. on 31 December 2020. In those cases, it is the (unmodified) 2003 Act that applies. When construing the parts of that Act which implemented EU law, domestic courts will continue to be guided by decisions of the CJEU to the extent provided for by ss. 6, 7 and 7A-7C of the 2018 Act, although they will no longer be able to refer cases to the ECJ: see s. 6(1)(b). This means that CJEU case law will be available to elucidate the principles applicable in the cases of those arrested pursuant to EAWs prior to 11 p.m. on 31 December 2020. In cases referred by UK courts prior to the end of the transition period, but not yet decided, the CJEU retains jurisdiction pursuant to Article 86 of the Withdrawal Agreement and the judgment and order, when given, will be binding on the UK pursuant to Article 89. These provisions are given effect in domestic law by s. 7A of the 2018 Act. The submission that the applicants have been deprived of substantial protections conferred by EU law is therefore not made out.

33 **Fifth**, although the UK will no longer have access to the Schengen Information System II, there is nothing to support the submission that this will in practice render impossible arrangements for transit and surrender of requested persons. It may also be noted that, while the UK will no longer be a member of Eurojust or Europol, the TCA provides for co-operation with both bodies: see Part 3, Titles 5 and 6.

Postscript

34 On the evening after the conclusion of the hearing, Ms Malcolm drew to our attention Article 185 of the Withdrawal Agreement, which had been overlooked at the hearing. It is headed "Entry into force and application". It provides, insofar as material, as follows:

> "Parts Two and Three, with the exception of Article 19, Article 34(1), Article 44, and Article 96(1), as well as Title I of Part Six and Articles 169 to 181, shall apply as from the end of the transition period."

35 Article 62 is in Part Three (which is headed "Separation Provisions"). This means that, on the applicant's construction, Article 62 would have no effect at all because, from the moment it began to apply (11 p.m. on 31 December 2020), the EU instruments to which it purports to give effect would be incapable of application to the UK. That would make Article 62 (and other parts of the Withdrawal Agreement) a dead letter. It would involve reading large parts of the Withdrawal Agreement in a way which makes them self-defeating and incoherent. Accordingly, Article 185 shows conclusively that the applicants' construction of the Withdrawal Agreement is wrong and the judicial authorities' construction is correct.

36 In written submissions filed at our directions on 18 January 2021, Mr Josse accepted in the light of Article 185 that he could no longer properly argue that Article 127(6) placed a temporal limit on the operation of Article 62. He therefore abandoned the first of his two principal points. He nonetheless maintained his second point, that Article 7 applied only for the purposes of the Withdrawal Agreement, whereas the term Member State as used in the instruments given effect by Article 62 had to be read as it would be understood in EU law and for *those* purposes, the UK was no longer a Member State. We regret to say that this point also is so hopeless that it is not properly arguable.

37 Once it is conceded (as it must be in the light of Article 185) that Article 62 was intended to have effect from the end of the transition period and without limit of time, Mr Josse's construction of Article 7 would have the effect of rendering nugatory the plain, intended effect of Article 62, which was – in cases "live" as at 11 p.m. on 31 December 2020 – to give effect to the EU instruments identified in that Article. Even on its own terms, Mr Josse's argument makes no sense. In the remaining EU Member States, from the moment of the UK's withdrawal from the EU, the only "purposes" for which the Framework Decision had effect in situations involving the UK are those specified in the Withdrawal Agreement. So, the words "[f]or the purposes of this agreement" in Article 7 covers all the purposes for which the Framework Decision could possibly apply in situations involving the UK. From the perspective of the remaining Member States, the Withdrawal Agreement – as an international treaty to which the EU is party – is part of, and not distinct from, the EU legal order.

Conclusion

38 For these reasons we consider that the challenge in these cases is not arguable. Accordingly, we refuse permission to apply for judicial review in each case. As this judgment deals with a point that is likely to be of significance in a number of cases, however, we give permission for it to be cited.