Trinity Term
[2012] UKSC 25
On appeal from: [2011] EWHC 1145; [2012] EWHC 25 (Admin)

JUDGMENT

HH (Appellant) *v* Deputy Prosecutor of the Italian Republic, Genoa (Respondent)

PH (Appellant) *v* Deputy Prosecutor of the Italian Republic, Genoa (Respondent)

F-K (FC) (Appellant) *v* Polish Judicial Authority (Respondent)

before

Lord Hope, Deputy President
Lady Hale
Lord Mance
Lord Judge
Lord Kerr
Lord Wilson
Lord Brown

JUDGMENT GIVEN ON

20 June 2012

Heard on 5, 6, 7 and 8 March 2012

Appellant (HH)
Alun Jones QC
John Jones
(Instructed by Wainwright & Cummins LLP)

Respondent
David Perry QC
Ben Lloyd
(Instructed by Crown Prosecution Service, Special Crime Division Extradition Unit)

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Intervener (X, Y and Z, by the Official Solicitor, their litigation friend)
Hugo Keith QC
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Intervener (JUSTICE)

Alex Bailin QC
Mark Summers
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Intervener (Coram Children's Legal Centre)
Manjit Gill QC
James Dixon
(Instructed by Coram Children's Legal Centre)

LADY HALE

1. We have before us two cases under the Extradition Act 2003 involving the parents of young children. In one, an Italian court has issued a European Arrest Warrant (EAW) in respect of both parents of three children now aged 11, 8 and 3, the parents having been convicted of a series of drug trafficking offences. The parents are both British nationals. In the other, a Polish court has issued EAWs in respect of the mother of five children aged 21, 17, 13, 8 and 3, who is accused of offences of dishonesty. The parents are both Polish nationals who have been living here since 2002, after the alleged offences were committed. No-one seriously disputes that the impact upon the younger children of the removal of their primary carers and attachment figures will be devastating. The issue is the relevance of their interests in the extradition proceedings.

2. The question certified by the Administrative Court in each of the two cases before us is as follows:

> "Where, in proceedings under the Extradition Act 2003, the article 8 rights of children of the defendant or defendants are arguably engaged, how should their interests be safeguarded, and to what extent, if at all, is it necessary to modify the approach of the Supreme Court in *Norris v Government of the United States of America (No 2)* in light of *ZH (Tanzania)*?"

It is necessary, therefore, to consider what each of those cases decided.

3. In *Norris v Government of the United Sates of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487, the issue was the compatibility with the article 8 rights of both Mr and Mrs Norris of extraditing Mr Norris to the USA to face charges of conspiracy to obstruct justice. The couple were both in their mid-sixties and had a long and close marriage which made them highly dependent on one another. The husband had a variety of health problems, including a history of prostate cancer and other ailments. The wife was suffering from either a "major depression of moderate severity" or a "moderate depressive episode". The proceedings had caused her "severe psychological suffering and mental deterioration" which would be greatly worsened were her husband to be extradited.

4. Lord Phillips gave the leading judgment, with which all other members of the court agreed, including those who added short judgments of their own. He

agreed that there could be "no absolute rule that any interference with article 8 rights as a consequence of extradition will be proportionate". On the other hand, it was "certainly not right to equate extradition with expulsion or deportation in this context" (para 51). It was "instructive to consider the approach of the Convention to dealing with criminals or suspected criminals in the domestic context. . . . Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate" (para 52). He rejected counsel's submission that it was wrong to apply a "categorical assumption" about the importance of extradition in general. Such an assumption was an essential element in the task of weighing the public interest against the rights of the individual. It did not mean that the latter could never prevail, but "the interference with human rights will have to be extremely serious if the public interest is to be outweighed" (para 55). Thus:

> "The reality is that it is only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves. . . . Instead of saying that interference with article 8 rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition." (para 56)

5. However, he also rejected the submission that the gravity of the offence could never be relevant. Usually it would not be. "If, however, the particular offence is at the bottom of the scale of gravity, this is capable of being one of a combination of features that may render extradition … disproportionate . . . " (para 63). Furthermore, the impact upon family life was not to be considered only from the point of view of the person facing expulsion. In *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115, the House of Lords "concluded that, when considering interference with article 8, the family unit had to be considered as a whole, and each family member had to be treated as a victim". This also applied to extradition (para 64). Finally,

> "Indeed, in trying to envisage a situation in which interference with article 8 might prevent extradition, I have concluded that the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration. If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee . . ." (para 65).

6. Agreeing with Lord Phillips, Lord Hope also stressed that "exceptionality is not a legal test" and that extradition was "not a special category which diminishes the need to examine carefully the way the process will interfere with the individual's right to respect for his family life" (para 89). The public interest in extradition is a "constant factor" and will always be a "powerful consideration to which great weight must be attached". Against this, "those aspects of the article 8 right which must necessarily be interfered with in every case where criminal proceedings will be brought will carry very little, if any, weight". "What is the extra compelling element that marks the given case out from the generality?" (para 91). The only feature of this case which was not inherent in every extradition case was the delay (para 93).

7. Lord Mance cautioned against formulations such as a "high threshold", "striking and unusual facts" or "exceptional circumstances". They could be read as suggesting that the public interest in extradition is the same in every case, when it is not, and also that the extraditee has some sort of legal onus to overcome the threshold, when in fact the competing public and private interests have to be weighed against each other (para 108). Further, such formulations "may tend to divert attention from consideration of the potential impact of extradition on the particular persons involved . . . towards a search for factors (particularly *external* factors) which can be regarded as out of the run of the mill". Some circumstances which might influence a court to find that the interference was unjustified could hardly be described as "exceptional" or "striking and unusual":

> "Take a case of an offence of relatively low seriousness where the effect of an extradition order would be to sever a genuine and subsisting relationship between parent and baby, or between one elderly spouse and another who was entirely dependent upon the care performed by the former" (para 109).

He too favoured balancing the "general public interest in extradition to face trial for a serious offence" against the "exceptional seriousness of the consequences which would have to flow from the anticipated interference with private and family life in the particular case" (para 114).

8. We can, therefore, draw the following conclusions from *Norris*:

(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.

(2) There is no test of exceptionality in either context.

(3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.

(4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.

(5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.

(6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.

(7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe.

9. I turn, therefore, to *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166. This was an expulsion case. The mother had been in the United Kingdom since 1995. She formed a relationship with a British citizen and had two children with him, born in 1998 and 2001, both of whom were British citizens and had lived here all their lives. They had a good relationship with their father, although the parents were now separated. Because of his health and other matters, their father would not be able to look after them if their mother were removed to Tanzania, so they would have to go with her. Their mother had an "appalling" immigration history. She had made three unsuccessful applications for asylum, one in her own name and two in false identities. Because of this she had twice been refused leave to remain under different policy concessions. An earlier human rights application had also been refused, as was the current claim, by the Secretary of State, the immigration appellate authorities, and the Court of Appeal. Before the case reached the Supreme Court, however, the Secretary of State had conceded that on the particular facts of the case removing the mother would be a disproportionate interference with the article 8 rights of the children.

10. I gave the leading judgment, and all the other members of the court, including those who added short judgments of their own, agreed with it. The Strasbourg jurisprudence had adopted rather different approaches to the assessment of article 8 rights when considering the expulsion of, on the one hand, long-settled foreigners who had committed criminal offences and, on the other hand, foreigners who had no right to be or remain in the country. In the former type of case, the "best interests and well-being of the children" had been explicitly recognised as a factor by the Grand Chamber in *Üner v The Netherlands* (2006) 45 EHRR 421, at para 58. In the latter type of case, this was not explicitly listed as a factor in, for example, *Rodrigues da Silva*, *Hoogkamer v The Netherlands* (2006) 44 EHRR 729, at para 39. Nevertheless, the court had in fact taken into account that it was clearly in the best interests of the child that her mother remain in the Netherlands. Significantly, the child's interests prevailed, "despite the fact that the [mother] was residing illegally in the Netherlands at the time of [the child's] birth" (para 44). In *Neulinger v Switzerland* (2010) 28 BHRC 706, the Grand Chamber had held that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law" (para 131). These of course included article 3.1 of the United Nations Convention on the Rights of the Child:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

11. I pointed out that "despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'" (para 25). Where the decision directly affects the child's upbringing, such as the decision to separate a child from her parents, then the child's best interests are the paramount, or determinative, consideration. Where the decision affects the child more indirectly, such as the decision to separate one of the parents from the child, for example by detention or deportation, then the child's interests are a primary, but not the paramount, consideration (para 25). As the Federal Court of Australia had explained in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, at para 32:

> "[The tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative weight of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."

12. Although nationality was not a "trump card" it was of particular importance in assessing the best interests of any child (para 30). As citizens the children had rights which they would not be able to exercise if they moved to another country (para 32). We now had a much greater understanding of the importance of such issues in assessing the overall well-being of the child:

> "In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations".

The countervailing considerations were the need to maintain firm and fair immigrations control, the mother's immigration history and the precariousness of her position when family life was created. But the children were not to be blamed for that (para 33).

13. Lord Hope also stressed the importance of the children's citizenship as "a very significant and weighty factor" in the overall assessment of what was in the children's best interests (para 41) and, more fundamentally, that "it would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held responsible", such as the suspicion that they might have been conceived as a way of strengthening the mother's case for being allowed to remain here (para 44).

14. Lord Kerr put it even more strongly. It is "a universal theme" of both international and domestic instruments:

> "that, in reaching decisions that will affect a child, primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them" (para 46).

15. However the matter is put, therefore, *ZH (Tanzania)* made it clear that in considering article 8 in any case in which the rights of a child are involved, the best interests of the child must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance. The

importance of the child's best interests is not to be devalued by something for which she is in no way responsible, such as the suspicion that she may have been deliberately conceived in order to strengthen the parents' case.

Should Norris be modified?

16. Mr David Perry QC, who appears for the respondent in each case, argues that nothing in *ZH (Tanzania)* was intended to depart from the approach to the assessment of proportionality in *Norris*. The extraditing judge may properly proceed on the basis that the best interests of the child are a primary consideration, but they are not the primary or the only consideration. The compelling public interest in extradition will ordinarily outweigh the best interests of the child, especially where the offence is serious. Indeed, there is no known Strasbourg case in which article 8 interests have prevailed against the legitimate aims of extradition, recognised by the court in *Launder v United Kingdom* (1997) 25 EHRR CD67 and *Aronica v Germany*, (Application No 72032/01) (unreported) given 18 April 2002. The court has recently stated that only in exceptional circumstances will an applicant's private or family life outweigh the legitimate aim pursued by extradition: see *King v United Kingdom*, (Application No 9742/07) (unreported) given 26 January 2010, para 29; *Babar Ahmad v United Kingdom* (2010) 51 EHRR SE97, para 172.

17. The appellants all argue that some modification, either of the approach in *Norris* or of its application, is required in the light of *ZH (Tanzania)*. Mr Alun Jones QC, on behalf of the mother in the Italian case, argues that no distinction should be drawn between extradition and immigration cases. In *Harkins and Edwards v United Kingdom* (Application Nos 9146/07 and 32650/07) (unreported) given 17 January 2012, the Strasbourg Court drew no such distinction when considering whether a person would face a real risk of treatment contrary to article 3 if sent abroad (thus disagreeing with the majority in *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] AC 335). The same should apply in the context of article 8. It was wrong to treat the public interest in extradition as a constant factor or to conclude that the best interests of children could not generally override it.

18. Mr Matthew Ryder QC, on behalf of the father in the Italian case, does not consider that it is necessary to modify the general principles in *Norris*, provided that primacy of importance is given to the children's rights. But this may involve some changes in practice. Any infringement of the children's rights which causes significant and serious damage to their development should be considered sufficiently "exceptional" to warrant the court considering carefully whether the infringement is justified. The court will need to examine carefully the extent of the

public interest in extradition in the particular case and also whether there is any course of action which might reduce the damage to the children's well-being.

19. Mr Edward Fitzgerald QC, on behalf of the mother in the Polish case, also argues that it is wrong to say that the public interest in extradition is always greater than the public interest in sound immigration control. It will vary. He also points out that the effects upon family relationships are far more extreme and immediate in extradition than are the effects of domestic prosecution and imprisonment. The extraditee may be sent a very long way away with little or no opportunity to maintain contact with the family left behind. The mitigating effects of wise prosecutorial or judicial discretion are less predictable when extradition is to a totally different judicial system. In the domestic context it is clearly established that a sentencing judge should have at the forefront of his mind the consequences for the children if their sole carer is sent to prison and consider whether on balance the seriousness of the offence(s) justifies their separation: see *R (P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002, per Lord Phillips MR at para 79; *R v Mills* [2002] EWCA Crim 26, [2002] 2 Cr App R(S) 229; *R v Bishop* [2011] EWCA Crim 1446 and see also the South African case of *M v The State* [2007] ZACC 18. The Court in *Norris* did not have to consider the special rights of children when the extradition of their sole or primary carer will have a devastating impact upon their wellbeing.

20. Mr Hugo Keith QC appears for the Official Solicitor as litigation friend of the children in the Italian case. He argues that the best interests of the children of extraditees should be considered first and foremost, and separately, and in a fact sensitive and meaningful way which pays regard to their individual circumstances. A conclusion that the undoubted public interest in extradition (which may not be of a wholly different order from that which arises in deportation and immigration cases) outweighs the best interests of the children should never be reached automatically or mechanically. Consideration should be given, where necessary, to any alternatives to extradition: for example, delaying the extradition of the primary carer parent; arranging for a mother to be placed in a mother and baby unit in the requesting state; seeking an assurance that speedy repatriation will be considered by both the requesting and the sending state; when available in a conviction case, arranging for the sentence to be served here; and, where possible in an accusation case, prosecuting the case here rather than in the requesting state. The court should also consider the alternative care arrangements for the child and satisfy itself that steps have been taken to protect the child's welfare if a sole or primary care-giver is extradited.

21. We have also had the benefit of valuable interventions by JUSTICE and the Coram Children's Legal Centre. Mr Alex Bailin QC, for JUSTICE, emphasises that the requirement to interpret article 8 in the light of the Convention on the Rights of the Child (CRC) is of general application and is not limited to

immigration cases. The CRC has also been enshrined in article 24 of the European Union Charter of Fundamental Rights. Article 24.2 requires that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration." Article 24.3 requires that "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests". He points to recital 12 of the Framework Decision on the European arrest warrant and article 1.3, which provides that the Decision "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, as enshrined in article 6 of the Treaty on European Union". Full and proper adherence to article 8 is thus entirely compatible with the EAW system. The executing state cannot rely upon the issuing state to have considered the children's rights before issuing the warrant or to protect those rights after the warrant is executed. A bright line distinction between the public interest in extradition and the public interest in deportation could not be drawn (he too makes reference to *Harkins and Edwards*). As for domestic criminal proceedings, the interests of children were "not infrequently" a material consideration in sentencing and there were more options available to mitigate the consequences of separating parent and child. As to alternatives to extradition, articles 4.6 and 5.3 of the Framework Decision, which permit refusal to execute a conviction EAW if the sentence is to be served in the UK, or the conditional execution of an accusation EAW, have not been transposed into UK law. But it would be possible to refuse to execute an EAW, indicating that the children's article 8 rights currently prevent this, but would be unlikely to do so in the future.

22. Most helpfully, he points out that further guidance on the application of *Norris* in cases involving dependent children is necessary, because later cases show that *Norris* has been wrongly interpreted so as to impose an exceptionality test and applied so as to set a threshold which is unattainable in practice. They reveal a reluctance to make a detailed assessment of the effect of extradition on each child and a failure to consider the child's best interests first. The examples he gives are (in chronological order): *R (Stojkova) v District Court in Okresny, Slovakia* [2010] EWHC 3532 (Admin), para 31; *R (Antonovic) v Prosecutor General's Office (A Lithuanian Judicial Authority)* [2010] EWHC 2967 (Admin), paras 18 and 20; *Budaj v District Court of Presnov, Slovak Republic* [2011] EWHC 193 (Admin), para 14; *R (Bartosiewicz) v District Court Warszawa Praga, Warsaw* [2011] EWHC 439 (Admin), paras 7 and 9; *B v District Court in Trutnov and District Court in Liberec* [2011] EWHC 963 (Admin), paras 63 and 68; *Irwinski v Regional Court in Bydgoswcz, Poland* [2011] EWHC 1594 (Admin), para 8; *Rzeczkowski v Provincial Court in Warsaw, Poland* [2011] EWHC 1698 (Admin), paras 13, 15 and 16; *Semen v Legnica District Court, Poland* [2011] EWHC 1960 (Admin), para 7; *Smuda v District Court of Poznan, Poland* [2011] EWHC 2734 Admin), para 7. A similar approach can be detected in *Kudzevica v Riga Circuit Court Latvia* [2010] EWHC 3505 (Admin), paras 11 and 12, and *R*

(Gorczowska) v District Court in Torun, Poland [2012] EWHC 378 (Admin), paras 11 and 12.

23. After the oral hearing, the court was informed that the Strasbourg Court has granted interim relief under rule 39 of the Rules of Court (2009) in the *Gorczowska* case, as it had already done in the case of *R (B) v Regional Court of Elbag* [2010] EWHC 2958 (Admin): see *EB v United Kingdom* (Application No 63019/10) (unreported) given 28 February 2011. This indicates that the Court is at least prepared to consider that there may be circumstances in which extradition (in that case of a breast-feeding mother) would be in breach of the article 8 rights of the family.

24. JUSTICE does not argue that any of these cases was necessarily wrongly decided, rather that they are indicative of an approach which prevents the court from taking account of the welfare of children as it is required to do. In fact, Mr Bailin suggests that there are very few cases in which the right approach would have produced a different result. He has produced a list of 75 cases decided after *Norris* involving article 8 and dependent children. In only five of these was the prospective extraditee the sole carer and in only one was the extradition of both parents sought. But in only one (*R (Cepkauskas) v District Court of Marijampole, Lithuania* [2011] EWHC 757 (Admin)) was extradition refused, and then on grounds of delay and oppression rather than because of the rights of the children.

25. In his written submissions on behalf of the Coram Children's Legal Centre, Mr Manjit Gill QC argues that international human rights instruments, including the Universal Declaration of Human Rights and the UNCRC, have recognised the special and unique status of children. This involves not only a negative duty to avoid doing them harm but also positive obligations to promote their development into adulthood. In this they are different from adults, even vulnerable adults, because adults have passed the growing-up stage while children need special attention in order to grow up. It is not just a matter of balancing the private rights of children against the public interest in extradition, because there is also a wider public interest and benefit to society in promoting the best interests of its children. Children are (as Latey J put it in *In re X (A Minor)(Wardship: Jurisdiction)* [1975] Fam 47, at 52) "a country's most valuable asset for the future". More than that, promoting their proper development is in the public interest in order to prevent their becoming the criminals of the future. In addition to article 3.1 of UNCRC, he draws attention to article 3.2:

> "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other

> individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

26. *Norris* concerned an adult couple and so the court did not, and did not have to, consider the special position of children. It could, and did, treat the interests to be balanced as the public interest in extradition and the individuals' interest in their private and family life. There is, however, a strong public interest in the protection of children which makes their case different from that of adult family members, even adults who need support on health grounds.

Discussion

27. It will be apparent from the above that, for the most part, the parties do not criticise the principles laid down in *Norris.* But they make two points. First, they criticise the way in which those principles have been summarised and applied in subsequent cases. Some of those criticisms might apply whether or not there were any children involved. And second, they point out that *Norris* did not, and did not have to, consider the special position of children. These cases give the court the opportunity to fill that gap.

28. Two main criticisms are levelled against the approach of the Administrative Court in these and other cases after *Norris*. The first is the "bright line" distinction between the public interest in extradition and the public interest in immigration control, exemplified by the observations of Laws LJ in the Italian case at [2011] EWHC 1145 (Admin): "Expulsion and deportation are matters only of domestic policy" (para 62), in which "the striking of reasonable balances is an inherent feature of the policy itself" (para 63); whereas "extradition promotes a universal public benefit" (para 62), which is "*systematically* served by the extradition's being carried into effect" (para 63). An even stronger view was taken by Silber J in *B v District Court in Trutnov and District Court in Liberec* [2011] EWHC 963 (Admin), at para 55, when he stated that "It is clear that the approach of the courts to article 8 rights has to be *radically different* in extradition cases . . . because of the very important obligation of the state to ensure that those who are to be investigated, prosecuted or imprisoned for criminal offences are returned to those countries" (emphasis supplied).

29. It is not correct that the approach of the court to article 8 rights has to be "radically different" as between extradition and expulsion cases. The Extradition Act 2003 imposes a structured approach upon the court, so that it will already have considered the validity of the warrant (section 2), the identity of the person arrested (section 7), whether the offences are extradition offences (section 10), whether the various bars listed in section 11 apply, and conviction in absentia

(section 20), before it gets to section 21. Section 21 requires the judge to decide whether the person's extradition would be compatible with the Convention rights and to discharge the person if it would not.

30. In answering that question, the court would be well advised to adopt the same structured approach to an article 8 case as would be applied by the Strasbourg court. First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate aims within those listed in article 8.2. Third, it asks whether the interference is "necessary in a democratic society" in the sense of being a proportionate response to that legitimate aim. In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale.

31. There are differences between extradition and other reasons for expulsion. Thus, as Lord Judge points out (para 122), an extradition order may be appropriate where deportation or removal would not. In particular, extradition is an obligation owed by the requested state to the requesting state in return for a similar obligation owed the other way round. There is no comparable obligation to return failed asylum seekers and other would-be immigrants or undesirable aliens to their home countries (which would sometimes be only too pleased never to see them again). But there is no obligation to return anyone in breach of fundamental rights. Furthermore, although domestic immigration policy does try to strike a balance between competing interests, article 8 typically comes into play when it has not done so. That is why an "exceptionality" test was disapproved in immigration cases in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, just as it was later disapproved in extradition cases in *Norris.* Hence, as Lord Hope observed, "there are [no] grounds for treating extradition cases as falling into a special category which diminishes the need to examine carefully the way the process will interfere with the individual's right to respect for his family life" (para 89).

32. The second main criticism of the approach in later cases is that the courts have *not* been examining carefully the nature and extent of the interference in family life. In focussing on "some quite exceptionally compelling feature" (para 56 in *Norris*), they have fallen into the trap identified by Lord Mance, tending "to divert attention from consideration of the potential impact of extradition on the particular persons involved . . . towards a search for factors (particularly *external* factors) which can be regarded as out of the run of the mill" (para 109). Some particularly grave consequences are not out of the run of the mill at all. Once again, the test is always whether the gravity of the interference with family life is justified by the gravity of the public interest pursued (see also Lord Wilson, at para

152). Exceptionality is a prediction, just as it was in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, and not a test. We are all agreed upon that.

33. These two points clarified, what more needs to be said about the interests of children? There appears to be some disagreement between us about the order in which the judge should approach the task. I agree entirely that different judges may approach it in different ways. However, it is important always to ask oneself the right questions and in an orderly manner. That is why it is advisable to approach article 8 in the same order in which the Strasbourg court would do so. There is an additional reason to do so in a case involving children. The family rights of children are of a different order from those of adults, for several reasons. In the first place, as *Neulinger* and *ZH (Tanzania)* have explained, article 8 has to be interpreted in such a way that their best interests are a primary consideration, although not always the only primary consideration and not necessarily the paramount consideration. This gives them an importance which the family rights of other people (and in particular the extraditee) may not have. Secondly, children need a family life in a way that adults do not. They have to be fed, clothed, washed, supervised, taught and above all loved if they are to grow up to be the properly functioning members of society which we all need them to be. Their physical and educational needs may be met outside the family, although usually not as well as they are met within it, but their emotional needs can only be fully met within a functioning family. Depriving a child of her family life is altogether more serious than depriving an adult of his. Careful attention will therefore have to be paid to what will happen to the child if her sole or primary carer is extradited. Extradition is different from other forms of expulsion in that it is unlikely that the child will be able to accompany the extraditee. Thirdly, as the Coram Children's Legal Centre point out, although the child has a right to her family life and to all that goes with it, there is also a strong public interest in ensuring that children are properly brought up. This can of course cut both ways: sometimes a parent may do a child more harm than good and it is in the child's best interests to find an alternative home for her. But sometimes the parents' past criminality may say nothing at all about their capacity to bring up their children properly. Fourthly, therefore, as the effect upon the child's interests is always likely to be more severe than the effect upon an adult's, the court may have to consider whether there is any way in which the public interest in extradition can be met without doing such harm to the child.

34. One thing is clear. It is not enough to dismiss these cases in a simple way – by accepting that the children's interests will always be harmed by separation from their sole or primary carer but also accepting that the public interest in extradition is almost always strong enough to outweigh it. There is no substitute for the careful examination envisaged by Lord Hope in *Norris*. How the court is to go about investigating the situation of the children is a question to which I shall

return. In each of the cases before the court, the interests of the children have been fully investigated. In the Polish case, this was done by those representing the mother. In the Italian case, the children have had the benefit of separate representation by the Official Solicitor. I turn, therefore, to the facts of each case, beginning with the more straightforward Polish case.

F-K v Polish Judicial Authority

35. The father, MF-K, and the mother, AF-K, were married in 1991. They are both Polish. They have five children. A, who is now 21, B, who is now 17, and C, who is now 13 years, were born in Poland before the family moved to this country in June 2002. D was born here on 17 February 2004, so is now aged eight, and E was born here on 14 August 2008, so is now aged three years and ten months. The whole family live together in a house where they have lived since December 2007. The father works as a builder. The mother looks after the family. They applied for permanent residence here before these proceedings were begun and were granted it in 2010.

36. The mother's extradition is sought on two European Arrest Warrants. The first in time (EAW1 – issued by the Gliwice Circuit Court) is dated 10 January 2006. It alleges that she, together with her husband, misappropriated clothing entrusted to her for sale to a value equivalent to £4307, between 19 June and 24 August 2001. The second (EAW2 – issued by the Katowice Regional Court) is dated 9 July 2007. It alleges three offences: (i) falsifying customs documents in relation to an imported car between 17 November 1997 and 24 January 1999; (ii) seven instances of fraud involving a total equivalent to £1160 between 19 May and 12 June 2000; and (iii) a further instance of a similar fraud, on 21 June 2000.

37. It appears from the further information obtained from the issuing judicial authorities that the bill of indictment in relation to the offences alleged in EAW2 of July 2007 was filed at court in May 2002. It is also said that she failed to appear at court in relation to the theft offences alleged in EAW1 of 10 January 2006 despite having been instructed to do so whenever required by the district public prosecutor on 10 June 2002. AF-K denied this or that she and the children left Poland later that same month in order to escape prosecution. It is, as the District Judge observed, difficult to match some of the information received from Poland to the offences in the two EAWs, and some of it appears to relate to different matters. But having heard evidence from AF-K, he made a clear finding that she fled in June 2002 to avoid prosecution and that she was a fugitive from justice (for the purpose of section 14 of the Extradition Act 2003).

38. Domestic warrants for her arrest in Poland were not issued until 9 January 2003 in respect of the customs offence in EAW2 (by the District Court in Chorzów), until 7 April 2003 in respect of the fraud offences in EAW2 (by the District Court in Bytom), and until 29 March 2004 in respect of the theft offences in EAW1 (by the District Court in Racibórz). Further information (from the District Court in Bytom, via the Circuit Court in Katowice) in relation to EAW2 states that the police informed the (Bytom) court in May 2004 that she might be staying outside Poland. The request for EAW2 was made in April 2007, three years after that, and the warrant issued that July. Further information (from the Circuit Court in Gliwice) states that the request for EAW1 was made on 1 December 2005 and the EAW issued on 10 January 2006. The international search started in January 2006.

39. EAW2 issued on 9 July 2007 was certified by SOCA on 14 April 2008. EAW1 issued on 10 January 2006 was certified on 2 September 2008. AF-K was arrested under both warrants on 10 March 2010. Senior District Judge Riddle ordered her extradition on 28 September 2010. Ouseley J dismissed her appeal to the Administrative Court on 19 January 2012: [2012] EWHC 25 (Admin).

40. The District Judge had before him a report on the family from Dr Ruth Armstrong, a consultant clinical psychologist; Ouseley J had before him a second report from Dr Armstrong, to which was attached some literature on attachment (Dr Peter S Cook) and on the effect of parental incarceration on young children (Ross D Parke and K Alison Clarke-Stewart). Both reports were based on long visits to the home, interviews, observations, psychological tests and questionnaires and information provided by the children's school and college.

41. In her first report, dated 2 July 2010, Dr Armstrong stated that all the children had good health and good emotional and social adjustment. The mother appeared to be "at the heart of the family, providing loving warmth and nurturing of a high calibre". If she were extradited, the children's secure attachment to her "would be ruptured and many negative consequences are likely to ensue". D and E, in particular, were "likely to be devastated by the loss of their mother" which would be "very likely to have severe detrimental consequences psychologically and for their developmental trajectories". They were reported to have reacted very badly to the mother's short absence after her arrest in 2010. The father had shown evidence of significant emotional disturbance (and even suicidal traits) on psychological testing. Without his wife he would have to give up work to look after the children and this was likely to lead to severe and crippling depression. Returning to Poland would cause a significant upheaval and damage to the older children's education. She concluded that "the potential psychological damage all the other six members of the family would be very likely to suffer and the educational setbacks for each of the children, were [the mother] to be deported, would be extreme".

42. In her second report, of 15 July 2011, she remained very concerned for the welfare of the family should the mother be extradited. The father had had to give up work because of an earlier accident. His physical mobility had deteriorated markedly (although his physical symptoms might in part have a psychosomatic origin) and he might even be more psychologically fragile than before, although he was trying to create a good impression, and determined to keep the family together. The enormous attachment of the children to their mother means that they might be plummeted into what could be paralysing grief. There could be many risks to the young children. Apart from grief and loss, the two youngest, who are girls, would be looked after only by older males, which "could pose risks in terms of inappropriate relationships developing as the family members seek comfort normally provided in an entirely appropriate way by the presence of a nurturing and competent mother and wife".

43. There was also evidence that if extradited the mother would be detained in prison pending trial and would not be able to have her youngest child, who is still under four, with her in prison. Mr Fitzgerald drew attention to two Strasbourg decisions in which the length of pre-trial detention in Poland had been held to violate article 5.3: *Dyller v Poland* (Application No 39842/05) (unreported) given 7 July 2009; *Kumenda v Poland* (Application No 2369/09) (unreported) given 8 June 2010.

Discussion

44. If we were only concerned with the three oldest children, things would be different. They would be very unhappy at the loss of their mother, and might suffer some educational setbacks as a result, but they would be able to get on with their lives with the help of their father, who is determined to keep the family together. They would be able to recall their mother while she was away, even if they were only able to see her rarely, and they would be able to look forward to her coming back. As Dr Armstrong points out, the consequences for the two youngest would be far more severe. E, in particular, would be deprived of her primary attachment figure while she is still under the age of four. Such losses can have lasting effects upon a child's development and it does not appear that her father would have the psychological resources to fill the gap or that help would be available from the social or other services to support the family. The eight-year-old would also suffer from the loss of her mother, might well blame herself for it, and would find it hard to look forward to her return. It is not an abuse of language to describe the effects upon these two children as exceptionally severe. Indeed, Ouseley J accepted "without reservation that the impact on the two younger children would be very severe": para 44.

45. Against that, there is the constant factor of the need to honour our obligations under the Framework Decision. But as these are subject to the need to respect fundamental rights, they do not absolve us of the duty to weigh the competing interests as required by article 8. The various offences for which extradition is sought are by no means trivial. But they are offences of dishonesty which can properly be described as "of no great gravity". Furthermore, we can take notice of the fact that no prosecutorial discretion is exercised by the Polish authorities when deciding whether or not to apply for the issue of an EAW, no matter how comparatively minor the offences, how much time has elapsed since they were committed, and how respectable the life which the offender has led since then. The European Commission has criticised the lack of a proportionality check in some states before issuing an EAW: it is not suggested that an article 8 proportionality check is required, but that there should be some relationship of proportionality between the offending and the consequences.

46. The delay in this case has been considerable. There was some delay between the offences themselves and the bringing of the Polish prosecutions; there was further delay between the appellant's failure to attend court in Poland and the issue of the domestic arrest warrants; even further delay between the issue of the domestic arrest warrants and the requests for the EAWs; and again between the issue of the EAWs and the appellant's arrest in March 2010. While the district judge did find that the appellant fled Poland in order to avoid prosecution, and thus was not entitled to rely upon passage of time as a bar for the purpose of section 14 of the 2003 Act, the overall length of the delay is relevant to the article 8 question. Whatever the reasons, it does not suggest any urgency about bringing the appellant to justice, which is also some indication of the importance attached to her offending.

47. During that lapse of time, the appellant and her family have made a new, useful and blameless life for themselves in this country. Two more children have been born. D must have been conceived approximately eleven months after the family arrived here and E more than four years after that. At neither time did the parents have any reason to believe that the Polish authorities were seeking the mother's return. Whatever the relevance of deliberately conceiving children in order to strengthen the case against extradition (which does arise in the next case) it does not arise on the facts of this case.

48. In all the circumstances, the public interest in returning the appellant to face trial and sentence upon the charges in these two warrants is not such as to justify the inevitable severe harm to the interests of the two youngest children in doing so. I would allow this appeal.

HH and PH v Deputy Prosecutor of the Italian Republic, Genoa

49. PH, the father, and HH, the mother, were married in 1996. Both are British citizens but HH was born and bred in Morocco, where they met while PH was working as a long distance lorry driver all over Europe. They bought a house in Spain in 2000. Their first child, X, was born in England on 23 November 2000, so he is now aged 11. The events which led to these proceedings took place between April and September 2003, when X was only two, and his mother was pregnant with their second child. The parents were arrested in Italy on 23 September 2003. HH, then 8 months pregnant, was released under house arrest on 20 October 2003. The child, Y, was born in Italy on 21 November 2003, and so she is now aged eight. HH left Italy in July 2004 in breach of the conditions of her release. PH remained in prison in Italy until the custody time limit ran out and he too was conditionally released on 7 October 2004. He too left Italy shortly afterwards, also in breach of his conditions. Both were formally declared to be unlawfully at large on 15 March 2005. Having heard their evidence, District Judge Evans found (in his judgment of 25 March 2009) that both HH and PH had "quite deliberately breached their bail and fled Italy in the full knowledge that they were to be tried for very serious offences".

50. They were arrested for two offences connected with drug trafficking: (1) criminal association for the purpose of drug trafficking, which carries a sentence of between ten and 24 years' imprisonment; and (2) a specific act of importation, transportation, possession and supply of drugs, aggravated by being committed by more than three persons, which carries a sentence of between three and nine years' imprisonment.

51. As to (1), it was alleged that they had conspired with one another, with HH's uncle Hassan El Faria, with a courier Brian Stott, with Hassan El Faria's wife, Virginia Donnarumma, with Abderrahin Fadlam, and with other people as yet unknown, to commit multiple offences of smuggling hashish. The uncle was the point of contact with the suppliers; PH and HH received the drugs, recruited the couriers and took part in the importation; Fadlam received the drugs in Italy and was in charge of trading them there; and Donnarumma was in charge of trading the proceeds and sending it back to her husband to finance further operations. These operations continued from April to September 2003.

52. As to (2), it was alleged that they had imported over 205 kilos of hashish into Italy on 23 September 2003. It was also alleged that there had been six earlier such episodes involving similar quantities, totalling some 1613 kilos in all. These formed part of the subject matter of the later convictions, but not of the original remands in custody. The Italians had been intercepting their telephone calls and monitoring the car, rented in Spain, in which they were travelling. This showed that they were in repeated contact with the courier, Stott, guiding him into the hotel car park where they met. The courier's car had been hired by him in Italy, but paid for by PH, and the car was carrying false English number plates. After they left the

car park, heading for France, Stott was arrested with the drugs. They both phoned him to find out what had happened. Once they found out that he had been arrested, they both phoned their accomplices, in particular Hassan, to explain what had happened. Hassan advised HH to take advantage of her pregnancy to avoid pre-trial custody and escape from justice.

53. On 17 December 2004, they were both convicted in the first instance court in their absence and sentenced to 14 years' imprisonment. The first European Arrest Warrants (EAWs) were issued on 11 January 2006. The first instance judgment was confirmed in the second instance in the Court of Appeal in Genoa on 19 April 2006. The EAWs with which these proceedings began were issued on 1 August 2008. These were still accusation warrants, because the proceedings were not yet finally over. There was a further appeal to the Court of Cassation, which on 28 April 2009 confirmed the sentence on HH which then became final. A conviction European Arrest Warrant was therefore issued in respect of HH on 23 October 2009. This states that she has nine years, six months and 21 days of her 14 year sentence still to serve. However, the conspiracy case against PH was sent back to the Court of Appeal in Genoa to determine whether he had been organiser and instigator of the conspiracy or a mere participant. On 25 January 2010, a conviction EAW was issued in respect of PH for the seven specific importation offences, which states that he has four years of imprisonment of the original eight year sentence still to serve. On 9 February 2010, the Court of Appeal determined that he had been a lesser participant in the conspiracy and imposed a (total) sentence of nine years and four months imprisonment which became enforceable on 1 February 2011. On 21 September 2011, therefore, a new conviction EAW was issued in respect of all eight offences, which states that he has eight years and four months still to serve. According to the calculations of his legal team, however, if the collective clemency law and the potential reduction for good behaviour are taken into account, this would come down to four years and 22 days.

54. Proceedings first began in this country on 16 July 2008, after PH was arrested pursuant to the first EAW of 11 January 2006. He was arrested again on 4 August pursuant to the EAW dated 1 August 2008. HH was arrested pursuant to the EAW dated 1 August on 8 August 2008. The proceedings have been continuing ever since. Both parents have been on bail most of the time since their arrest. Between one and two months after her arrest, HH must have become pregnant with their third child, Z. Z was born on 10 June 2009 (it is said in one of the reports that she was born one month prematurely because of her mother's diabetes) and so is now just three years old. District Judge Evans commented that "It must remain an open question whether Z's conception was (irresponsibly and selfishly) intended to provide a useful argument in support of HH and PH's opposition to the extradition request" (Judgment of 14 April 2010, para 44). But in the Divisional Court, Laws LJ considered this comment to be "unwarranted" (para 38).

55. After a number of vicissitudes, the hearing before the District Judge was fixed for 20 February 2009. Both parents gave evidence, but it was adjourned part heard. They were told by counsel that things were not looking good and extradition was likely. This was an accurate prediction as District Judge Evans ruled on 25 March 2009 that he would have ordered extradition against both had it not been for HH's illness. He later observed that on 20 February she was able to give coherent if untruthful evidence and was not suffering from any significant ill-health (judgment of 14 April 2010, para 45). HH collapsed shortly after the hearing, was taken to A & E in London, transferred to a psychiatric hospital and then admitted to a psychiatric ward in Nottinghamshire, initially under section 2 of the Mental Health Act 1983. She remained there voluntarily until discharged on 17 or 18 June 2009, a week after the birth of her younger daughter. From March 2009 she was unfit to attend court. Eventually, on 14 April 2010, District Judge Evans ordered the extradition of HH on the conviction EAW, and on 21 June 2010, he ordered the extradition of PH on both the accusation and the first conviction warrants. Their appeals were dismissed by Laws LJ in the Administrative Court on 11 May 2011: [2011] EWHC 1145 (Admin).

56. In relation to the mother's mental health, there were reports from her consultant psychiatrist, Dr Meats, dated 20 March 2009 and 3 April 2009, finding "no evidence of any psychotic illness", diagnosing a "conversion disorder in association with repeated court appearances", for which a small dose of anti-anxiety medication had been prescribed, and predicting that her condition would persist and become long term, but that a decision one way or the other would allow resolution of her anxiety symptoms. There was a report commissioned by the Crown Prosecution Service, from Dr Philip Joseph, dated 22 May 2009. He agreed that she had suffered an acute stress reaction after court on 20 February, but other forms of mental illness had been excluded and she was not suffering from mental disorder of a nature or degree which would prevent her extradition. There was a report commissioned by HH's solicitors, from Dr Seyyed Nabavi, dated 8 August 2009. He diagnosed post traumatic stress disorder with co-morbid depressive and anxiety disorders of moderate to severe severity, precipitated by her experience of arrest and being treated inappropriately in Italy, and continued by the lengthy legal proceedings. She was unable to look after herself or her children. The prognosis was moderately poor and she was currently unfit to plead and stand trial. In a follow-up report on 26 October 2009, Dr Joseph strongly disagreed with these diagnoses. He maintained the diagnosis of an acute stress reaction to the fear of being extradited to Italy and being separated from her children. If there were no court proceedings she would have no difficulty living her life and managing her family.

57. In November 2009, there was another brief admission to hospital under section 2 of the Mental Health Act 1983, after HH "walked blindly" (according to PH) into the road shortly before they were due to appear in court on 10 November

2009. A follow-up report from Dr Nabavi, dated 31 December 2009, maintained the view that her current mental disorder, a dissociative (conversion) disorder, was a reaction to her arrest in Italy, maintained by the continuing court proceedings. He ruled out malingering or factitious disorders and remained of the view that she was unfit to look after her family or take part in the proceedings.

58. These reports were all before District Judge Evans on 14 April 2010. There was also a letter from Gabrielle O'Brien, a mental health support worker who had been regularly visiting the home, where she found that HH appeared to be extremely unwell and withdrawing into herself on each visit, lying on a mattress and apparently unaware of her husband, her children or visitors. A witness statement from HH's solicitor described the pitiful condition in which he had found her when visiting the home in September 2009 and the unedifying events when she was (eventually) arrested on the conviction warrant and brought to court in London in February 2010. It had not proved possible to transfer her from the security van into court and the hearing had to be held in the car park. Incontinence was a feature on both occasions.

59. The district judge heard evidence from both Dr Nabavi and Dr Joseph and found Dr Joseph the more compelling. He concluded that HH had a real condition, which she was not putting on only when she was in public, but that it appeared to be self-induced and not as severe as suggested by Dr Nabavi. He had little doubt that she would recover quickly if not extradited. Similarly the realisation that "the game was up" could also assist in her speedy recovery. There was therefore no medical condition rendering her extradition inappropriate and it would not be oppressive to order it (judgment of 14 April 2010, paras 58-59).

60. When the appeal came before Laws LJ, there were fresh psychiatric reports. Dr Samantha Dove was instructed by HH, whom she had visited at home. In her report of 6 December 2010, her opinion was that HH's presentation was consistent with the initial diagnosis of dissociative conversion disorder, but that the symptoms of a moderate to severe depressive disorder had now become more marked. It was likely that the stress of the current legal situation had precipitated her mental illness. This was of a nature or degree to warrant her detention in hospital as she was unable to look after herself, including taking her medication and maintaining personal hygiene. She was not fit to plead or attend court. Dr Joseph provided a further report dated 20 January 2011. He had read the records of HH's short readmission to hospital in November 2009, after which it had been concluded that "her presentation was due to a current life situation rather than a mental illness". He had also discussed the case with Dr Dove, and concluded that it would not help for him to see HH again. He disagreed with the diagnosis of dissociative disorder and also that her disorder warranted detention in psychiatric hospital or that she was unfit as opposed to unwilling to take part in the proceedings.

61. Laws LJ heard brief evidence from both doctors. He also took into account the observations of Dr Pettle, the psychologist (instructed by the Official Solicitor) who had visited the family to assess the children. The children's comments suggested that HH's withdrawn state persisted within the family and not just when professionals visited. He considered that there was a third explanation for HH's behaviour pattern, not that it was all a deliberate pretence, or that it was the product of a mental illness, but that it was an extreme reaction to the extradition proceedings (hardly different from the notion of an "unconscious fabrication" spoken of by Dr Dove) (paras 44 to 46). If so, it was perhaps more likely to be resolved once the proceedings were over. Her mental condition was not such that it would be oppressive to extradite her. Further, "that is not to say that I would have found the other way had I concluded she was suffering from a mental illness". There was every reason to conclude that she would be properly looked after in Italy (para 47). (It may be that Laws LJ had in mind psychosis when he referred to mental illness, for many – perhaps most - psychiatrists would label the mother's condition an illness.)

62. By the time of that judgment (in May 2011), following a suggestion made in Dr Dove's report, HH had already been referred by her GP to the neuropsychiatry unit at the Maudsley Hospital, where she was admitted on 11 June 2011. This Court has a report from Professor Anthony David dated 30 January 2012. He had prompted an unannounced visit in February from Gabrielle O'Brien, who found HH in the kitchen talking (and not lying mute on a mattress in the lounge). HH had taken a significant overdose of diazepam and citalopram on 9 May 2011 (perhaps connected with or in anticipation of the High Court judgment handed down on 11 May 2011). On admission, she walked with a pronounced stoop, was very tearful, had difficulties with sleep, refused meals at times, showed very poor levels of self-care and personal hygiene, with episodes of incontinence, showed little interest in ward activities but apparent signs of severe memory difficulties and an inability to perform routine tasks such as boiling a kettle. Her very poor performance in psychometric testing showed that she was not engaging with the tasks. Professor David's opinion is that her "initial presentation was characterised in part by regressive and 'pseudo-demented' behaviour which though variable to an extent, was persistent and highly dysfunctional. This may have been 'feigned' or a gross exaggeration given the close temporal relationship between the onset of the disorder and court appearances connected with extradition to Italy". Once they had been able to get her to relinquish these behaviours, there was revealed "a clear and genuine phobic anxiety disorder (agoraphobia with panic) associated with busy streets, policemen and women, and sirens and alarms – obviously relating to her dread of extradition and separation from her children", together with "an underlying affective component of low mood and hopelessness". His view is that "there was a strong element to the regressive behaviour which was under conscious control" but that once HH had sunk into this state it "took on a life of its own". Given that there was a background of low mood and fear, complicated perhaps by a reawakening of adverse childhood experiences, it was impossible for

her to simply "snap out of it". The behaviours then became habitual and ingrained. It had taken three months in a specialist unit to overcome this. Further court appearances would cause major disruption in her mental state. He is convinced that the profound overt distress they would cause would soon become intractable and "she would end up once again in a totally dependent and dilapidated condition". She would resist extradition and "any attempt to force her to return to Italy under any circumstances would result in a catastrophic collapse".

63. Following the proceedings in the Magistrates' Court, the Official Solicitor was permitted to file evidence and make submissions on behalf of the children in the Administrative Court. Dr Sharon Pettle, a clinical psychologist, prepared a report dated 13 September 2010. X, then nearly ten, generally appeared to be a well-adjusted boy, sensitive and caring, with a strong bond with his father, but he was "highly anxious about the deterioration in his mother's functioning, and has no clear explanation of what is wrong". Y, then nearly seven, was a bright and articulate child who did not express anxiety about her mother's condition, and whose strongest relationship was with her father. Z, then 15 months old, was meeting all her developmental milestones and clearly looked to her father as her primary attachment figure. It was "inevitable that separation for years from one or both parents would cause the children intense and long lasting distress". Being left in the sole care of their mother would be an "intensely worrying experience" unless she were to make an immediate recovery. Separation from their father would be acutely emotionally distressing for all the children, and their responses would vary in severity according to what other losses followed. If separated from their mother, X and Y would be likely to worry about her health and who was looking after her, but if they remained with their father, it seemed likely that he would go on looking after them well and offer them as much support as possible. "To be suddenly faced with the departure of both parents, and a move to live with strangers is one of the most catastrophic events to befall any child, and represents a massive emotional and psychological challenge." "The departure of both parents, even for children with some resilience, is likely to be an overwhelmingly painful experience, and their immediate reactions may be very similar to bereavement: over activity, profound sadness and distress, withdrawal and regression, anger and defiance, poor sleeping and eating, and a deterioration in their school performance". The research on children of imprisoned parents would suggest that X, Y and Z are all in a highly vulnerable group. Generally siblings should be kept together. X and Y would find it hard to understand if Z were to be cared for by their mother's family in Morocco and would worry about her. Worst of all would be if all three had to be separated, with Z in Morocco and X and Y in different foster placements.

64. In an addendum report, dated 24 March 2011, based on an interview with PH who had brought Z with him, she described Z as a very happy and well adjusted two-year-old, secure enough in her attachment to her father to be able to

spend time at playschool and with other familiar people. But from her father's description, she had not formed a significant bond with her Moroccan grandmother while she was staying with the family. Based on school reports, the older children appeared to be showing signs of strain which were not apparent last year. Dr Pettle expected that they would be hopeful that their mother would return from her stay in the Maudsley Hospital more like the mother they remembered (and it would appear from Professor David's report that such hopes have been fulfilled). If she were then to be removed to serve a prison sentence, this would be particularly difficult for them to accept. It was likely that Z would be extremely distressed at being uprooted from her family and going to live in Morocco, all her familiar routines disrupted and in a new culture with a different language spoken around her. If all the children were in foster care, there would be some advantage to all of them in being able to remain in touch with one another even if placement together were not possible.

65. The Official Solicitor also prompted a report, dated 15 September 2010, from Gemma Manzoor, of the local Children's Services department, who had been the children's allocated social worker from August 2009 until June 2010. The reason for this was concern about the children's welfare because of their mother's mental state. The case was closed in June 2010 because there were no issues about their father's care of them. Were the extradition to go ahead, PH accepted that it might be difficult to place all three children together, so he had agreed to X and Y being looked after by the local authority, but was at that time hoping that Z would be looked after by HH's family in Morocco. However, as explained in the witness statement of the solicitor instructed by the Official Solicitor of 24 November 2010, the maternal grandmother did not feel able to look after any of the children, owing to her other responsibilities and her own ill-health.

66. Their solicitor then explored with PH whether there were other members of the family who might be able to look after the children. In his witness statement of 30 March 2011, he explains why none of the father's four siblings or his three children by an earlier marriage is able to help. None of them has appropriate accommodation to take in three more children, all have jobs, and most have other children to look after. The solicitor has recently made further inquiries of the local authority, from which it is clear that they will not reopen the case until they are told that the parents are to be extradited, even if this means that there would then be only a very short time in which to make the arrangements. Thus the prospect of the children being placed together, and in an area close to where X and Y are at school, will not be known until the decision is made. It follows that no thought has been given to how the children will be able to keep in contact with their parents if they are extradited to Italy.

Discussion

67. Before Laws LJ, HH relied, not only on article 8, but also on section 25 of the Extradition Act, which permits the judge to discharge the person or adjourn the hearing if her physical or mental condition is such that it would be unjust or oppressive to extradite her. As by now she was wanted on a conviction warrant, the question was whether it would be oppressive (as opposed to unjust) to extradite her. Having heard the evidence described earlier, he concluded that it would not. The question certified for this court relates only to the article 8 question. It is open to the court to consider issues other than those certified: *Attorney General for Northern Ireland v Gallagher* [1963] AC 349. However, this court would not normally entertain an appeal on a question of fact or on the application of settled law to the facts of the case. It would be difficult for us to differ from the factual findings of Laws LJ, who heard as well as read the psychiatric evidence. His findings on the nature and causes of the mother's condition are in any event broadly consistent with Professor David's report, although they do differ in their predictions as to the effect of extradition. That is not, however, a reason for us to differ from the conclusion reached by Laws LJ. He concluded that it would not be oppressive to extradite the mother in the condition she was then, before she had had the benefit of three months' specialist treatment in the Maudsley. She is better now, and would be no worse than she was when Laws LJ reached his conclusion, even if she were to regress in the way predicted by Professor David. We cannot, therefore, reach any different conclusion under section 25. But we can, of course, take the mother's mental condition into account when we are considering the situation of the whole family under article 8.

68. The principal focus of this appeal has been on the article 8 rights of the children, not of the adults. It is a very rare case indeed when the extradition of both parents is sought. The table prepared by JUSTICE contains only one other, apart from the case of *BH and KAS v United States of America*, which was heard along with this case (see *Lord Advocate on behalf of Criminal Court of Lisbon, Portugal v JK and NF* [2011] HCJAC 121, 9 December 2011). These are all young children, Z is just three and still at the age when the effect of breaking her most secure attachment will be severe, Y is also at a vulnerable age, and X appears to be less resilient than she. They have already had to cope with living with a mother who, on any view, has not been able to look after them properly since February 2009. The father has given up work to look after them all and by all accounts has done a very good job. They are happy and well adjusted children now, but the evidence is that separation for years from one or both parents would inevitably cause the children "intense and long lasting distress". It would be akin to taking the children compulsorily into care. But whereas children are only taken compulsorily into care if they are already suffering or likely to suffer significant harm, these children have not so far suffered significant harm. On the contrary, they are doing well in difficult circumstances. It is the compulsory separation from their parents, and the move to live with strangers, which will do them harm; it is, in Dr Pettle's words, "one of the most catastrophic events to befall any child, and represents a massive emotional and psychological challenge".

69. There is, of course, every incentive for parents in this position to fail to find or encourage other family members to take care of the children, so that they will have to be looked after by the local authority. But in this case we have the benefit of the enquiries made by the Official Solicitor, and it would appear that the family members whom the children know have good and genuine reasons for not being able to look after them if their parents are extradited. It is regrettable in the extreme that the local authority have apparently made no plans at all for where they will place the children if extradition is ordered. This means that no work has been done with the children to prepare them for this; that places will have to be found in a hurry; that it is quite likely that those places will be short-lived; and it is also quite likely that they will be placed in separate foster homes. These too may well be short lived and unstable, not through any fault of the local authority, but because of the pressures under which they have to work. The state, however well-meaning, is no substitute for the family. There has even been mention of the possibility that Z might be compulsorily placed for adoption, but Lord Wilson and I share the view that it is unlikely that a court would find that her welfare required it to dispense with parental consent in circumstances such as these. Evidently, too, no thought has been given by the local authority to how they will maintain contact with their parents while the parents are in prison in Italy. Yet such contact will obviously be essential for them.

70. That harm would be much reduced if only one parent were to be extradited. If the mother were extradited alone, the children would no doubt grieve for her, and worry about her, but they have been used to her absence in hospital before. They have not been used to relying upon her for their day to day care and emotional support. Their father would be able to help them maintain contact with her. If their father were extradited alone, on the other hand, they would lose the mainstay of their lives to date. Z would lose her primary attachment figure. And we have been presented with no evidence that their mother is capable of looking after them alone. The plain fact of the matter, therefore, is that from the children's point of view, the extradition of their father would be seriously damaging, but the extradition of their mother would not.

71. Against all that there is, of course, the constant public interest in extradition and the gravity of the offences of which both parents have been convicted. We are not here dealing with comparatively routine crimes of dishonesty, but with a major drug smuggling conspiracy, persisted in over many months. As Laws LJ put it, the appellants were effectively caught red-handed while escorting a consignment to its destination. The sentences imposed were lengthy, although possibly not as lengthy as the sentences which would be imposed for comparable offences here.

72. Just as the harm to children will be greater if the father is extradited than it will be if the mother is extradited, it is also the case that the public interest in extraditing the mother is greater than the public interest in extraditing the father.

The Italian courts have held that the mother played the greater part in the conspiracy and imposed a correspondingly longer sentence upon her. She fled the country having spent only three weeks in prison. Although Dr Nabavi attributed her initial mental distress to the treatment which she had received in Italy, she was in apparent good health until the hearing on 20 February 2009.

73. By contrast, although the father has now been convicted of both the conspiracy and the seven specific smuggling offences, he has been held to have played a lesser part in the conspiracy. He also spent a year in prison in Italy before his release. He has therefore paid some part, albeit only a small part, of the debt he owes to society on account of his very serious and persistent offending. Furthermore, he has so far evaded paying the rest of that debt by breaching the conditions of his release.

74. But the point urged most strongly upon us on his behalf is that his lawyers' researches suggest that, if the family were living in Italy, he would be allowed to serve most of the rest of his sentence at home in order to look after the children. They calculate that the total sentence of 9 years and 4 months would be reduced: (1) to 6 years and 4 months, because of the Collective Clemency Bill, Law 214/06, which reduces all sentences for offences committed before 2 May 2006 by three years; then (2) to 5 years and 3 and a half months, because of the time already spent in prison; then (3) to one year and 27 days, because of the Prison Reform Law No 354 of 26 July 1975, which allows sole carers of young children who have served one third of their sentence to serve the remainder on home detention; and finally (4) to 10 months, because of the potential reduction (of 45 days per six months) for good behaviour. We have looked at the laws in question but have no expert evidence as to how they would operate in a case where the primary carer was the father rather than the mother. The position is not, however, disputed by the respondent.

75. Thus, it is argued, if the family were living in Italy, the Italian state would not consider it in the public interest for this father to serve more than ten more months in a prison. They would prioritise the interests of his children over the serving of his sentence. It is wrong, therefore, to conclude that the public interest requires him to be sent back to Italy to serve a further four years and 22 days in prison. Against that, of course, is the fact that the Italian authorities have issued these warrants to secure his return.

76. In common with the other members of this court, I have found the case of PH the most difficult of all the five parents in the three cases with which we are concerned. There is no doubt that the offences of which he has been convicted are very serious indeed. They are the sort of cross-border offending in which international co-operation is particularly important. If we were concerned only

with the two older children, I would have concluded that these considerations were sufficiently weighty to justify the interference with their lives. They are old enough to retain memories of their father, and to understand that he will come back to them one day, and they would have one another. There is a better chance that they would be found a foster placement together, or even that other members of the family would be persuaded to step in after all.

77. But Z is in a different situation. She is still at the most vulnerable age. And her presence makes finding satisfactory placements to keep the children together more difficult. It is troubling that Z was conceived so very soon after the parents were arrested on the EAWs. No court wishes to send a message that drug smugglers – or other serious criminals – might escape extradition by getting their partners pregnant. However, the district judge declined to make a finding to that effect, despite the generally unfavourable view that he took of the parents' evidence and the information from Italy that the mother had been advised to take advantage of her earlier pregnancy to escape from justice. Laws LJ described his remark that it remained an "open question" as unwarranted. We must therefore approach this particular case on the basis that it has not been shown that this was a deliberate attempt to improve their position in the proceedings.

78. If there had been such a finding, what relevance would it have had? Z did not ask to be born and is in no way to be blamed for her parents' conduct. But it would have made the parents' offending behaviour even more serious than it already was: it is an act of some wickedness deliberately to bring a child into the world in an attempt to evade justice. It would have added to the weight on one side of the scales, while in no way diminishing the weight to be given to the child's interests on the other.

79. The circumstances in this case can properly be described as exceptional. The effect upon the children, but Z in particular, of extraditing both their parents will be exceptionally severe. The effect of extraditing their mother alone would not be so severe and is clearly outweighed by the public interest in returning her to Italy. But the same cannot be said of the effect of extraditing their father. I have, not without considerable hesitation, reached the conclusion that it is *currently* so severe that the proportionality exercise requires the court to consider whether it can be mitigated. If he is discharged in the current proceedings (and in these I would include the proceedings under the warrant issued in September 2011), it will remain open to the Italian authorities to consider whether to issue another warrant in the future, when the effect upon the children will not be so severe. In doing so, they would no doubt wish to consider whether the spirit, if not the letter, of the Prison Reform Law of 1975 reduces the public interest in having him return to Italy to serve the balance of his sentence, in circumstances were, if it were an Italian family, he would be able to serve it at home looking after his children. We do not know whether this consideration was present to the minds of the authorities

when the warrants were issued. Left to myself, therefore, I would have struck the balance in that way in this very unusual case and discharged PH in the current proceedings.

Postscript: Conviction in absentia

80. Mr Jones sought to raise a further point on behalf of HH. Section 20 of the 2003 Act has not been amended to take account of the amendments to the 2002 Framework Decision made by the Framework Decision of 2009 (2009/299/JHA), which required implementation by 28 March 2011 (with a possibility of delayed implementation by March 2014). This adds a new article 4a to the Framework Decision, permitting the executing authority to refuse to execute an EAW if a person was convicted in her absence, unless she was unequivocally made aware of the date and place of the trial. The EAW in question was issued before the 2009 Framework Decision took effect and does not state that HH was unequivocally made aware of the date and place of her trial.

81. Were this to raise a discrete point of law as to the alleged non-implementation of the 2009 Framework Decision in UK law, it would in my view be quite inappropriate for this court to consider it. It has not been certified as a point of law of general public importance and it has not been fully explored in the arguments before us. Rather, the point has been argued as a technical matter concerned with the content of the EAW. It is difficult to believe that HH has been the victim of a serious injustice in this case, as she was represented by lawyers throughout the Italian proceedings, who clearly pursued every avenue of appeal on her behalf, while she had deliberately deprived herself of any additional advantage that presence at those proceedings might have given her. Indeed, given the circumstances of the arrest and the nature of the evidence against her, it is perhaps difficult to envisage what that advantage would have been. For the same reasons, it is difficult to see what this factor adds to the strength of the article 8 case on her behalf.

Procedure

82. If the children's interests are to be properly taken into account by the extraditing court, it will need to have some information about them. There is a good analogy with domestic sentencing practice, although in the first instance the information is likely to come from the parties, as there will be no pre-sentence report. The court will need to know whether there are dependent children, whether the parent's removal will be harmful to their interests and what steps can be taken to mitigate this. This should alert the court to whether any further information is needed. In the more usual case, where the person whose extradition is sought is not

the sole or primary carer for the children, the court will have to consider whether there are any special features requiring further investigation of the children's interests, but in most cases it should be able to proceed with what it has.

83. The cases likely to require further investigation are those where the extradition of both parents, or of the sole or primary carer, is sought. Then the court will have to have information about the likely effect upon the individual child or children involved if the extradition is to proceed; about the arrangements which will be made for their care while the parent is away; about the availability of measures to limit the effects of separation in the requesting state, such as mother and baby units, house arrest as an alternative to prison, prison visits, telephone calls and face-time over the telephone or internet; and about the availability of alternative measures, such as prosecution here or early repatriation.

84. Some of this information should be available from the parents, but the court may also wish to make a referral to the local Children's Services for the children's needs to be assessed under the Children Act 1989. If the children are to lose their sole or primary carer for any length of time, they may well have to be accommodated under section 20 of the 1989 Act and will almost certainly be children in need for the purposes of section 17(10) of that Act. In some cases, especially where there is a very young child or a child with health or developmental problems, it may be necessary to obtain a psychological or psychiatric assessment, as in fact was done in these cases.

85. There is also the question of the children's own views (or "wishes and feelings") to consider. Article 12 of UNCRC provides:

> "1. States Parties shall assure to the child who is capable of expressing his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The United Nations Committee on the Rights of the Child, in its General Comment No 12 on "The Right of the Child to be Heard" (CRC/C/GC/12, July 2009), points

out that this is one of the fundamental values of the Convention and that "there can be no correct application of article 3 if the components of article 12 are not respected". This poses a problem in extradition cases, as there is no obvious machinery for ascertaining the child's views, save by making the child party to the case or (at least in the Administrative Court) by allowing the child to file evidence or make representations under CPR rule 52.12A. The Official Solicitor accepts that this will rarely be necessary, as Laws LJ observed in the postscript to his judgment (para 68), but the Coram Children's Legal Centre submit that this understates the strength of the obligation to hear the child. They point out that the children's views and interests do not always coincide with their parents' and that, especially in criminal cases, the parents may not be able properly to put the children's views before the court. There is the further problem, exemplified in these cases, that a loving parent may be reluctant to discuss the problem with the children, hoping to spare them the distress and anxiety involved in what may be a long drawn out process. Indeed, that problem illustrates only too well how the interests of the parents and the children diverge. The parents may wish to fight extradition for as long as and as hard as they can, thus increasing the stress and the delay which, as section 1(2) of the Children Act 1989 tells us, is bad for children whose sense of time is so different from that of adults.

86. I share the view of the Official Solicitor that separate legal representation of the children will rarely be necessary, but that is because it is in a comparatively rare class of case where the proposed extradition is likely to be serious damaging to their best interests. The important thing is that everyone, the parties and their representatives, but also the courts, is alive to the need to obtain the information necessary in order to have regard to the best interests of the children as a primary consideration, and to take steps accordingly.

Conclusion

87. I would therefore allow the appeal in the cases of Mrs F-K and Mr PH, but dismiss the appeal in the case of Mrs HH.

LORD HOPE

88. I am grateful to Lady Hale for her careful description of the facts of these cases and for her analysis of the extent to which the approach of the Supreme Court in *Norris v Government of the United States of America (No 2)* [2010] 2 AC 487 needs to be modified in the light of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166. I agree with her that the need to examine the

way the process will interfere with the children's best interests is just as great in extradition cases as it is in cases of immigration control.

89. The context in which the exercise must be conducted is, of course, quite different and the nature and weight of the interests that are to be brought into the balance on each side will differ too. But I remain of the view which I expressed in *Norris*, para 89 that it would be wrong to treat extradition cases as falling into a special category which diminishes the need to examine carefully the article 8 issues that the separation of the parents from the children will give rise to. As Lady Hale says in para 33, this involves asking oneself the right question and in an orderly manner, following the example of the Strasbourg court.

90. That having been said, each case will depend on its own facts and some cases will be more easily resolved than others. An exploration of the theoretical basis for the exercise can only carry one so far. Ultimately it will come down to the exercise of judgment as to where the balance must be struck between what Lord Wilson has described in para 150 as two powerful and conflicting interests. The facts are fully before us, and so are the factors that must be weighed in the balance.

91. I agree with Lady Hale that the public interest in returning Mrs F-K to Poland is not so great as to justify the severe harm that this would cause to the two youngest children. The offences of dishonesty that are alleged against her, while not trivial, are relatively minor and certainly not of the kind that could be described as seriously criminal. There has been a conspicuous delay on the part of the prosecuting authorities. The welfare of these children would be at serious risk if their mother were to be removed from them. For these and all the reasons that Lady Hale gives I too would allow this appeal.

92. The offences of which PH and HH have been convicted are of a quite different kind. We are dealing in their case with serious professional cross-border crime involving trading in narcotic drugs which there is an international obligation to suppress. As Lord Judge says (see para 137), there are very strong reasons of public policy that persons who are accused or found guilty of such crimes and who break their bail conditions abroad should not be permitted to find a safe haven in this country. I agree with Lady Hale (see para 79) that the part the mother HH played in the conspiracy was such that the effect on her children is clearly outweighed by the public interest in returning her to Italy. So I too would dismiss her appeal.

93. This leaves the case of the father PH. Like Lady Hale, I have found this by far the most difficult of all the cases that are before us, including those of the

parents in *BH and KAS v Lord Advocate* [2012] UKSC 24. For the reasons she has explained, the effects that the extradition of both parents would have on their children, and on the youngest child Z in particular, are likely to be deeply painful and distressing and the long term effects very damaging. Such steps as might be taken to minimise these effects and ensure that the children will be adequately cared for are unresolved and are likely to remain so until extradition takes place. The uncertainty that this creates increases one's deep sense of unease. The circumstances can, as Lady Hale puts it in para 79, properly be described as exceptional.

94. To accord them that description is, of course, not the end of the exercise. It cannot, in itself, be the test: see *Norris*, para 89. What then are the factors on the other side of the balance which would justify the father's extradition despite the effects that have been described? Are the very strong reasons of public policy referred to in para 91 above as strong in his case as they are in the case of the mother? The fact that the father was not proved to have organised or promoted the trafficking enterprise shows that he played a lesser part in it. But I cannot attach much weight to this in view of the serious nature of the other offences of which he has been convicted. He too came to this country in breach of his bail conditions. There is really not much to choose between the father and the mother in these respects.

95. I was initially attracted by the argument that, if the family were living in Italy, the father would be allowed to serve most of the rest of his sentence at home so that he could look after the children. I was attracted too by the point that Lady Hale makes in para 79 that if extradition were to be refused now it would remain open to the Italian authorities to issue another warrant in the future when the effects on the children would not be so severe. But I have concluded that it is not open to us, as the requested court, to question the decision of the requesting authorities to issue an arrest warrant at this stage. This is their case, not ours. Our duty is to give effect to the procedure which they have decided to invoke and the proper place for leniency to be exercised, if there are grounds for leniency, is Italy. If these factors are left out of account, as I think they must be, the decision remains a very difficult one. Taking everything into account, however, the balance seems to me to lie in favour of the father's extradition. For all the reasons that Lady Hale gives, I very much hope that leniency will be exercised in his case having regard to the interests of the children. But that must be left to the authorities in Italy. I would dismiss his appeal.

LORD BROWN

96. I have read with great admiration the draft judgments respectively of Lady Hale in favour of allowing Mr PH's appeal and Lord Judge and Lord Wilson for dismissing it. Of all the many final appeals to which I have been party, truly I have found this to be one of the most troubling, each of the *two* "powerful and conflicting interests" (per Lord Wilson at para 150) at stake carrying such obvious weight. In the end, however, sorely tempted though I confess to have been to adopt Lady Hale's approach, I am persuaded by the majority judgment that it would not be right to succumb. PH's criminality here was simply at too high a level of gravity to be outweighed by the interests of his children, heart-rending though in the result their plight must be. For what seemed to me ultimately the yet more compelling reasons given by Lord Judge and Lord Wilson I too, therefore, would dismiss Mrs HH and Mr PHs' appeals whilst (in common with the rest of the Court) allowing that of Mrs F-K.

LORD MANCE

97. I have read to great advantage the draft judgments prepared by other members of the Court. Each case falls for consideration on its own facts, but, speaking generally, I agree that there may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion (Lady Hale, para 8(1)). One difference between extradition and deportation or expulsion is that the former process is usually founded on mutual international obligations (Lady Hale, para 31 and Lord Judge, paras 120-121).

98. Both the UN Convention on the Rights of the Child dated 20 November 1989 and the Charter of Fundamental Rights referred to in article 6 TEU make the child's best interests "a primary consideration" in all actions concerning children. This means, in my view, that such interests must always be at the forefront of any decision-maker's mind, rather than that they need to be mentioned first in any formal chain of reasoning or that they rank higher than any other considerations. A child's best interests must themselves be evaluated. They may in some cases point only marginally in one, rather than another, direction. They may be outweighed by other considerations pointing more strongly in another direction.

99. In some circumstances, it may be appropriate from the outset to identify competing primary considerations. Thus, in *Wan (Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133), cited by Lord Kerr in his para 145, the court found it appropriate to refer to the expectations of the Australian community (in an effective immigration policy) as one primary consideration and

the separate interests of the children of the applicant for a visa as another (see para 33 in the judgment in *Wan*).

100. Under article 8 of the European Convention on Human Rights, the ultimate substantive issue, where a right to respect for family life is engaged, is whether there exist factor(s) within article 8(2) outweighing that right. It is likely to be helpful at some point to address the issue specifically in those terms. But I do not think that any particular starting point or order can or should be imposed in the way in which courts address such an issue in the context of extradition. On this I agree with Lord Judge (para 126) and Lord Wilson (para 155). So long as it is clear that the issue has in substance been addressed and answered, that is what matters, rather than how or in what order the judge has expressed him or herself.

101. At root, therefore, what is required is a balancing of all relevant factors in the manner called for by the Supreme Court's decision in *Norris v Government of the United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487. The Court's subsequent decision in *ZH (Tanzania) v Secretary of the State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, as explained by Lady Hale in para 15 of her judgment on the present appeal, emphasises the importance of any relevant child's interests as a primary consideration, and is consistent with all that I have already said.

102. Taking the present appeals, I entirely agree with and have nothing to add to Lady Hale's reasoning on and disposition of the appeal in *F-K v Polish Judicial Authority*.

103. Like other members of the Court, I have found the appeal in *HH and PH v Deputy Prosecutor of the Italian Republic, Genoa* much more troubling. The difficulty is not just that the considerations on each side are powerful and conflicting, but that they are entirely different in nature. Balancing them against each other is inherently problematic. Like other members of the Court, I see no reason to disturb the factual or legal assessment of the position relating to the mother HH. But, ultimately and although this will involve the extradition of both parents, I also conclude that the children's interests are under article 8 outweighed by the very strong considerations (identified in particular by Lord Judge in para 135 and Lord Wilson in paras 163-172) militating in favour of the extradition of the father PH as well as the mother HH.

104. I am not persuaded that the position (as to the length of time that PH would have to serve) that would apparently apply if the family were living in Italy is relevant in circumstances where it cannot be said, by any stretch, that the sentence which PH would in fact to serve following return would be objectively

disproportionate to what one might expect for the offences committed. Nor do I do think that it could be appropriate to invite the Italian authorities in effect to make another application in some years' time. It is not easy to fit such a possibility within the scheme of the relevant Council Framework Decision of 13 June 2002 (2002/584/JHA) and Part 1 of the Extradition Act 2003, both of which contemplate a speedy once and for all resolution of any request for surrender. But, assuming that that problem were overcome, such a procedure would mean that the shadow of extradition would hang over the father and children for an uncertain period and would require at some future point to be dissolved or resolved under different circumstances which could prove no less difficult to balance than the present.

105. In reaching my decision relating to HH and PH, I am - though this is not essential to my conclusion - comforted by the hope that it may be possible for both parents to be returned speedily to the United Kingdom to serve here the balances of their sentences under Council Framework Decision 2008/909/JHA of 27 November 2008. The Court was informed that this Framework Decision has now been transposed into Italian law. Mr Perry QC's instructions were that, under the previous regime of the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983, repatriation from Italy took 8 to 12 months, although statistics for all repatriations from all Council of Europe countries show a longer average period of around 18 months. Whichever figure is taken, it is to be hoped that much speedier results can be achieved under the Framework Decision, the purpose of which is to limit the rupture of environmental and family links resulting from imprisonment abroad.

LORD JUDGE

106. The issue in these appeals from the Administrative Court in England and Wales is summarised in the certified questions. This reads:

> "Where, in proceedings under the Extradition Act 2003, the Article 8 rights of children of the defendant or defendants are arguably engaged, how should their interests be safeguarded, and to what extent, if at all, is it necessary to modify the approach of the Supreme Court in *Norris v Government of the United States of America (No 2)* in light of *ZH (Tanzania)*?"

The same issue arose, via the devolution route, in the appeal from the High Court of Justiciary in Scotland.

107. In *Norris v the Government of the United States* [2010] 2 AC 487, sitting in a constitution of nine Justices, this court addressed the impact of section 21 and section 87 of the Extradition Act 2003 (the Act) in the context of the right to respect for private and family life contained in article 8 of the European Convention of Human Rights. The case was concerned with the rights of a husband and wife, neither of whom was in good health, who had been married for many years. The interests of children were not directly involved and did not arise for consideration. Nevertheless this decision was focussed on the single issue of article 8 rights in the context of extradition proceedings.

108. Consistently with section 21 of the Act, section 87 provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 84, 85, or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited."

109. The legislative structure of the Act clearly envisages that the extradition process should be sequential, and that the question whether the extradition of any individual would be compatible with Convention rights does not arise for consideration until the statutory requirements have otherwise been fulfilled. The procedures envisaged in the Act include an examination of the relevant material sent to the court by the Secretary of State (section 78), and the requirement for the judge to address the question whether there is any bar to extradition (sections 79-83). These include, among other considerations, whether extradition is being sought for the purpose of prosecuting or punishing an individual on the basis of his race, religion, nationality, gender, sexual orientation or political opinions, and whether at any trial in the country seeking extradition he might be prejudiced on these grounds. By section 84 itself, which applies where there has been no conviction, the judge must decide whether there is sufficient evidence "to make a case requiring an answer". If, in relation to any of these stages in the process, the application for extradition is flawed, the process comes to an end. It is only when the judge is otherwise satisfied that the statutory requirements justifying extradition are established that the final hurdles remain. One is the compatibility of the extradition with Convention rights, including article 8 (section 87): another is

that extradition would be "unjust or oppressive" because of the physical or mental ill health of the person to be extradited (section 91).

110. Article 8 of the Convention is familiar. It provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others."

111. In *Norris* it was accepted without reservation, and in accordance with section 87 of the Act, that on occasions in the extradition process article 8 rights may "prevail", with the result that what would otherwise be a well-founded extradition application would be dismissed. All that acknowledged, the judgments are unequivocal about the importance of giving full weight to the public interest in well-founded extradition proceedings:

> (a) Lord Phillips of Worth Matravers speaking for the Court, made clear at para 56 that these occasions would inevitably be rare:
>
> "The reality is that only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves."
>
> (b) Lord Hope of Craighead, at para 87, observed:
>
> "Resisting extradition on this ground (respect for family life under article 8) is not easy."

He continued by expressly agreeing with the passage from the judgment of Lord Phillips referred to in the previous paragraph:

"The public interest in giving effect to a request for extradition is a constant factor, and it will always be a powerful consideration to which great weight must be attached. The more serious the offence the greater the weight that is to be attached to it" (para 91).

(c) Lord Brown of Eaton-under-Heywood, at para 95, added:

"It will be only in the rarest cases that article 8 will be capable of being successfully invoked under section 87 of the Extradition Act 2003."

(d) Lord Mance, at para 107, stated:

"Interference with private and family life is a sad, but justified, consequence of many extradition cases. Exceptionally serious aspects or consequences of such interference may however outweigh the force of the public interest in extradition in a particular case."

(e) Lord Collins of Mapesbury, at paras 127 and 128, commented:

"It hardly needs to be said that there is a strong public interest in international co-operation for the prevention and punishment of crime. Consequently, the public interest in the implementation of extradition treaties is an extremely important factor in the assessment of proportionality … As a result, in cases of extradition, interference with family life may easily be justified under article 8(2) … ."

(f) Lord Kerr of Tonaghmore, at para 136, addressed the "exceptionality" question:

"It is entirely possible to recognise that article 8 claims are only likely to overcome the imperative of extradition in the rarest of cases without articulating an exceptionality test. … The essential point is that such is the importance of preserving an effective system of extradition, it will in almost every circumstance outweigh any article 8 argument. This merely reflects the expectation of what *will* happen. It does not erect an exceptionality hurdle."

112. These observations from the Supreme Court speak for themselves. They provide the clearest, authoritative, indication of the approach to be taken to extradition proceedings where article 8 considerations are engaged. What is more, the approach is entirely consistent with the views adopted in the European Court of Human Rights itself.

113. The jurisprudence of the European Court of Human Rights to which reference was made by Lord Phillips (with whose wide ranging judgment every member of the Court agreed) includes a number of decisions of the court where the interests of young children of the individual whose extradition was in contemplation were engaged. In *Launder v United Kingdom* (1997) 25 EHRR CD67 a complaint of a potential violation of article 8 if the applicant were extradited to Hong Kong was found to be manifestly ill-founded. The Commission emphasised that it was "only in exceptional circumstances" that extradition to face charges of serious criminal offences would constitute an unjustified or disproportionate interference with the right to respect for family life. In *King v United Kingdom* (Application No 9742/07) (unreported) given 26 January 2010 a much more recent case, the defendant was facing serious drug trafficking charges in Australia. His extradition was ordered. He was a husband, father of two children born in 1998 and 2004, and his mother was in poor health. If convicted he faced a very lengthy term of imprisonment. The application was unanimously declared to be inadmissible:

> "Mindful of the importance of extradition arrangements between states in the fight against crime (and in particular crime with an international or cross-border dimension), the court considers that it will only be in exceptional circumstances that an applicant's private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition... If the applicant were [eventually] sentenced to imprisonment [in Australia, with the consequent impact on the rest of his family,] his extradition cannot be said to be 'disproportionate to the legitimate aim served'."

114. It is unnecessary to add to the authorities, but the trend has been consistent. (See, for example, *Aronica v Germany* (Application No 72032/01) (unreported) given 18 April 2002 and *Kleuver v Norway* (Application No 45837/99) (unreported) given 30 April 2002 another drug trafficking case, in which a baby was separated at birth from his mother). As far as counsel have been able to discover in the European Court itself the article 8 rights of young children whose parents have been involved in extradition proceedings, have never yet prevailed over the public interest considerations involved in their extradition. That, of course, and entirely consistently with the decision in *Norris* does not mean that they never will, or that they never should, (see *R (Gorczowska) v District Court in Torun, Poland* [2012] EWHC 378), but it does underline that there is no difference

between the approach of this court in *Norris* and the European Court of Human Rights to the possible impact of article 8 considerations in the context of extradition.

115. Not long after *Norris* was decided, in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, this court was concerned with the implementation of immigration law in the context of a decision to remove or deport a non-citizen parent of two UK citizens, who were born and had lived here throughout their 12 and 9 years. Their article 8 rights were clearly engaged because, if their mother were deported, they would inevitably have to accompany her. In the Supreme Court it was conceded on behalf of the Secretary of State that the decision to remove the mother was incompatible with article 8. Article 8, it was submitted, involved a careful evaluation of all the relevant factors, with no one factor decisive or paramount. Counsel argued that although the best interests of the child were "a" primary consideration, they were not "the" primary consideration.

116. The issue of principle was examined in the context of immigration control, and well-established principles in the House of Lords in *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115 and *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159 and the Privy Council decision in *Naidike v Attorney General of Trinidad and Tobago* [2005] 1 AC 538. The Strasbourg jurisprudence, again in the context of immigration control, was also analysed. Baroness Hale identified two different situations, the first involving long-settled alien residents who had committed criminal offences, and the second where an individual was to be removed because he or she had "no right to be or remain in". Having described the entitlement of states to control the entry and residence of aliens as "the starting point", Baroness Hale concluded that:

> "In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations."

She identified what she described as the "countervailing considerations", which, in the particular context of *ZH*, did not begin to displace the best interests of the children. However the best interests of the children were not the paramount nor even "the" primary consideration.

117. Lord Kerr spoke of a "primacy of importance" to be accorded to the best interests of a child, which although not a factor of "limitless importance" was said

to “rank higher than any other”. They should normally “dictate the outcome of cases such as the present”.

118. The approach of the European Court of Human Rights to the relationship between immigration control and article 8, like its approach to the relationship between extradition and article 8, is well-established. Taken together, *Boultif v Switzerland* (2001) 33 EHRR 1179 and *Üner v The Netherlands* (2006) 45 EHRR 421, identify no less than ten factors or guiding principles which might arise for consideration in the context of immigration control and article 8. None is given priority over any of the others, and by the same token, none is secondary to any of the others.

119. *ZH (Tanzania)* was not concerned with and did not address extradition. Neither the decision in *Norris*, nor the judgment of Lord Phillips, nor those of any other members of the court, nor the decisions relating to extradition from the European Court of Human Rights, nor indeed the structure of the Act itself, were cited or addressed, nor was it suggested that in the context of extradition proceedings the principles identified in *Norris* were subject to any further amplification or modification. It seems improbable that, without doing so expressly and unequivocally, the Court in *ZH (Tanzania)* intended to or would have modified the way in which *Norris* had stated that the article 8 rights of the family of a proposed extraditee should be approached.

120. Stripped to essentials *ZH (Tanzania)* decided that in the context of immigration control and the entitlement of this country to decide which aliens may reside here, the article 8 rights of a child or children should be treated as a primary consideration against which other relevant factors might “countervail”, whereas in *Norris*, in the context of extradition, it was decided that article 8 rights might “prevail” notwithstanding the immense weight or “imperative” which attached to the public interest in the extradition of those convicted or suspected of having committed offences abroad. It is of course well understood that the critical question, whether the decision arises for consideration in the context of immigration or extradition, is whether the interference is “necessary in a democratic society … for the prevention of disorder or crime”. Unlike the absolute prohibition against torture in article 3, the right to family life involves a proportionality assessment. In this assessment public interest considerations arising from the control of immigration and the implementation of extradition obligations arise in distinct contexts. Dealing with it briefly, in the immigration process this country is exercising control over the presence of aliens. This is a purely domestic decision made subject to domestic considerations, in the light of domestic legislation, including the Human Rights Act 1998 and the Borders, Citizenship and Immigration Act 2009. An order for deportation may be wholly unconnected to any criminal activity, and even when it is consequent on criminal convictions, it usually follows after not before the appropriate sentence has been

imposed and served here. On the occasions when, because of fears of persecution or prosecution abroad, an order is not made, that continues to be a reflection of domestic rather than international processes.

121. As explained in *Norris e*xtradition is concerned with international co-operation in the prevention and prosecution of crime. The objectives served by the process require international co-operation for the prosecution of crimes and the removal of sanctuaries or safe havens for those who have committed or are suspected of having committed criminal offences abroad. The private and family rights of the victims of criminal offences committed abroad will themselves have been damaged by offences like rape and wounding, theft and robbery and child abduction, as well as drug-trafficking and fraud. That consideration is absent from the immigration context.

122. Consistently with this analysis, section 55 of the Borders, Citizenship and Immigration Act 2009 made specific provision which imposed an obligation on the Secretary of State to make arrangements to ensure that the welfare of children in the United Kingdom should be safeguarded and promoted in the context of immigration, asylum or nationality processes without identical responsibilities being enacted in the context of the exercise of the extradition process. And, as already noted, to date at any rate, the European Court of Human Rights has treated immigration and extradition as distinct concepts, while in the context of immigration control, enumerating guiding principles of equal importance to the balancing exercise.

123. For these reasons, in my judgment, assuming for the sake of argument that the child or children are in identical family situations, it follows that an extradition order for one or both parents may be appropriate when deportation or removal would not. In other words, because distinct issues are involved, the same facts, involving the same interests of and the same potential or likely damage to the child or children, may produce a different outcome when the court is deciding whether to remove foreign citizens from this country or extraditing convicted or suspected criminals (including citizens of this country) to serve their sentences or stand trial for crimes committed abroad.

124. The impact of *ZH (Tanzania)* and the valuable submissions made to this court founded on it in the context of the extradition process, is to highlight that *Norris* has been subject to a deal of misunderstanding. *Norris* did not decide that the article 8 rights of the family of the proposed extraditee can never "prevail" unless an "exceptionality" test is satisfied. What it suggested was that when article 8 rights were properly examined in the extradition context, the proportionality assessment would be overwhelmingly likely to be resolved in favour of extradition. This description of the likely *results* of the extradition process appears

to have been adopted as a forensic shorthand for the *test*. Just because courts fully appreciate that children who are subjected to long term separation from their parent or parents will almost without exception suffer as a result, the application of a stark "exceptionality" test may, even if unconsciously, diminish the weight to be given to the interests of the children. The prohibited thought processes run along readily identified lines: as separation from their parent or parents inevitably causes damage to virtually every child, what is "exceptional" about the situation of the children involved in this particular case, and what would be exceptional about the extradition of their parent or parents? Accordingly the decision in *ZH (Tanzania)* provided a helpful opportunity for the application of *Norris* to be re-evaluated, and the principles identified in the judgments to be better understood. In the end, however, the issue remains proportionality in the particular circumstances in which the extradition decision has to be made when the interests of dependent children are simultaneously engaged.

125. With respect to those who, by reference, by example, to an international Convention like the UN Convention on the Rights of the Child or the Charter of Fundamental Rights of the European Union, or indeed article 8 of the Convention itself, take a different view, it does not seem to me appropriate to prescribe to the judges who deal with extradition cases any specific order in which they should address complex and sometimes conflicting considerations of public policy. Indeed in some cases it may very well be sensible to postpone any detailed assessment of the interests of children until the crime or crimes of which their parents have been convicted or are alleged to have committed, and the basis on which their extradition is sought have all been examined. Self evidently theft by shoplifting of a few items of goods many years earlier raises different questions from those involved in an armed robbery of the same shop or store: possession of a small quantity of Class C drugs for personal use is trivial when set against a major importation of drugs. Equally the article 8 considerations which arise in the context of a child or children while nearly adult with the advantages of integration into a responsible extended family may be less clamorous than those of a small baby of a single mother without any form of family support. Ultimately what is required is a proportionate judicial assessment of sometimes conflicting public interests.

126. Like the sentencing decision following conviction, the extradition process arises in the context of alleged or proved criminal conduct. The sentencing decision is similarly based on statute. By section 142 of the Criminal Justice Act 2003 (the 2003 Act) the court "must have regard" to a number of wide ranging and sometimes inconsistent specific purposes of sentencing. Thus, they include the punishment of offenders and their rehabilitation. By section 143 the seriousness of the offence must be considered and when it is being determined, the court is required to "consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have

caused". By section 166 any matters which the sentencing court considers relevant to mitigation may be taken into account. It is at this stage of the sentencing process that, among other matters of mitigation, the interests of the defendant's child or children, and any of his or her or their dependants and indeed his or her health, and the health and wellbeing of members of the family usually fall to be considered. Bringing the somewhat complex statutory threads together, unless it is justified by the seriousness of the offence a custodial sentence may not be imposed, and when a custodial sentence is justified, it must be no longer than appropriate in the light of all the aggravating and mitigating features (see section 152(2) and section 153(2)). From this it follows that even if the custody threshold is passed, matters of mitigation may nevertheless result in the imposition of a non-custodial sentence: and even if a custodial sentence must be imposed, it may be reduced for the same reasons. However, in accordance with statute and practice, the starting point is not usually the mitigation, whatever form it may take, but the offence and its seriousness. In the end what of course matters, whatever starting point may have been taken, is that all the considerations should have been carefully evaluated and a fair balance struck between them.

127. Long before the enactment of the Human Rights Act 1998, sentencing courts had taken account of the likely impact of a custodial sentence on children dependent on the defendant, not in his or her interests, but in the interests of the children. The history can be traced in the first and second editions of *Principles of Sentencing*, first published in 1970, and by the date of publication of the second edition in 1979, based on a study by Dr David Thomas of the Institute of Criminology at Cambridge University of many thousands of judgments in sentence appeals, beginning in 1962. Dr Thomas identified what he described as a "marked difference" in the approach to sentences imposed on mothers with caring responsibilities. There are numerous examples; thus, in *Smith* (February 1965) the sentence of 18 months' imprisonment for cheque book frauds by a deserted mother with four dependent children was varied to a probation order. Some ten years later, in *Charles* (July 1975) a woman convicted of unlawful wounding, using a pair of scissors to stab her victim, was suspended partly because the defendant was "the mother of a number of small children".

128. The continuing responsibility of the sentencing court to consider the interests of children of a criminal defendant was endorsed time without number over the following years. Examples include *Franklyn* (1981) 3 Cr App R(S) 65, *Vaughan* (1982) 4 Cr App R(S) 83, *Mills* [2002] 2 Cr App R (S) 229, and more recently *Bishop* [2011] EWCA Crim 1446 and, perhaps most recently in *Kayani; Solliman* [2011] EWCA Crim 2871, [2012] 1 Cr App R 197 where, in the context of child abduction, the court identified

> "… a distinct consideration to which full weight must be given. It has long been recognised that the plight of children, particularly very

> young children, and the impact on them if the person best able to care for them (and in particular if that person is the only person able to do so) is a major feature for consideration in any sentencing decision."

129. Recent definitive guidelines issued by the Sentencing Council in accordance with the Coroners and Justice Act 2009 are entirely consistent. Thus, in the Assault Guideline, taking effect on 13 June 2011, and again in the Drug Offences Guideline, taking effect on 29 February 2012, among other features the defendant's responsibility as the sole or primary carer for a dependant or dependants is expressly included as potential mitigation.

130. The principle therefore is well established, and habitually applied in practice. However it should not obscure the reality that in the overwhelming majority of cases when the criminal is convicted and sentenced for offences which merit a custodial sentence, the innocent members of his family suffer as a result of his crimes. Although custodial sentences are sometimes avoided altogether where the level of seriousness is relatively minor and are sometimes reduced by reference to the needs of dependent children, care must also be taken to ensure that considerations like these do not produce injustice or disparity as between co-defendants with different family commitments, or undermine the thrust towards desirable consistency of approach to sentencing decisions on a national basis, a process which began with the issue of sentencing guidelines by the Court of Appeal, Criminal Division, and now given statutory authority by the creation of first, the Sentencing Guidelines Council (by section 167 of the 2003 Act), and now the Sentencing Council itself. Accordingly, while for generations making allowances for the interests of dependent children, and what would now be described and in *Bishop* were described as their article 8 interests, the need to impose appropriate sentences in accordance with established, and now statutory provisions, is unchanged. As Hughes LJ has recently explained in *R v Boakye and others* (3 April 2012)

> "The position of children and a defendant's family may indeed be relevant, but it will be rare that their interests can prevail against society's plain interest in the proper enforcement of the criminal law. The more serious the offence, generally the less likely it is that they can possibly do so."

This observation mirrors observations to the same effect in *Norris* in the context of extradition.

131. The effect of this analysis is to underline that the starting point in the sentencing decision involves an evaluation of the seriousness of the crime or crimes and the criminality of the offender who committed them or participated in their commission and a balanced assessment of the countless variety of aggravating and mitigating features which almost invariably arise in each case. In this context the interests of the children of the offender have for many years commanded principled attention, not for the sake of the offender, but for their own sakes, and the broader interests of society in their welfare, within the context of the overall objectives served by the domestic criminal justice system. Sadly the application of this principle cannot eradicate distressing cases where the interests even of very young children cannot prevail.

132. The extradition process involves the proper fulfilment of our international obligations rather than domestic sentencing principles. So far as the interests of dependent children are concerned, perhaps the crucial difference between extradition and imprisonment in our own sentencing structures is that extradition involves the removal of a parent or parents out of the jurisdiction and the service of any sentence abroad, whereas, to the extent that with prison overcrowding the prison authorities can manage it, the family links of the defendants are firmly in mind when decisions are made about the establishment where the sentence should be served. Nevertheless for the reasons explained in *Norris* the fulfilment of our international obligations remains an imperative. *ZH (Tanzania)* did not diminish that imperative. When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence).

F-K (FC) v Polish Judicial Authority

133. The facts are fully described in the judgment of Lady Hale. They are stark, and in the present context highlight the combination of circumstances which can

fairly be described as borderline. We must proceed on the basis that the appellant fled Poland knowing of the criminal charges she was due to face. The offences were not trivial, but nor were they of the utmost seriousness. The most recent occurred over a decade ago. The prosecuting authorities have been dilatory in the extreme. As far as we can tell, the extradition process began without reference to the new life the appellant and her husband have made for themselves in this country, and in particular the birth to them of two further children, one of whom is very young, and the other who is only just past the toddler stage. Given the interests of the two youngest children in the context of the current long established family arrangements in this country, and not least the uncertain health of their father, it can safely be said that an immediate custodial sentence would not be in contemplation. In agreement with Lady Hale I agree that the damage to the interests of the two youngest children would be wholly disproportionate to the public interest in the extradition of the appellant on the two European Arrest Warrants.

R (HH) and R (PH) v Deputy Prosecutor of the Italian Republic Genoa.

134. The facts are fully described in the judgments of Lady Hale and Lord Wilson. They show something of the heavy burden resting on judges responsible for the application of the Act.

135. They are agreed that the appeal of HH should be dismissed. I, too, agree. The effect of this decision is to highlight the desperate plight which will befall the children if the appeal of PH, too is dismissed. This is movingly analysed in the judgment of Lady Hale, and no member of the Court could be unaware of it or fail to give it the full measure of importance which it commands. What, then, is the basis on which the extradition of PH is sought? HH and PH were both engaged in serious professional cross-border crime. This involved not one but seven separate expeditions from Morocco across the Mediterranean into Europe for onward distribution from their eventual destination in Genoa. Although PH was not to be treated as an organiser of the enterprise in the sense required for a conviction of this offence in Italy (see the decision of 9 February 2010) in English law he was undoubtedly guilty of conspiracy to import drugs. Whether correctly described in law as a conspirator or not, PH was an active participant and member of a gang of professional criminals, with a crucial role as a trusted member of the gang, trusted to supervise and see to the safe arrival and eventual disposal and distribution of the drugs after they arrived in Italy. He was therefore crucial to the inner workings and success of the enterprise. As to the offences themselves, there was no personal mitigation. At all material times PH was a mature intelligent adult who appreciated exactly what he was doing. Unlike some of those who become involved in drug smuggling he was not under any form of pressure or compulsion, whether arising from fear of the consequences of non-participation or motivated by some desperate

family need for funds. In short he was no more, and certainly no less than a professional criminal.

136. Making full allowance for the interests of his children and their welfare in the absence of their mother, in England and Wales anything lower than a 10 year sentence would be improbable. On the basis of such a sentence, imposed today he would serve 5 years, with credit given for the time spent in custody on remand before sentence.

137. In the extradition context, but not the sentencing context, there is this further consideration. PH was granted bail in Italy and almost immediately broke his bail conditions and has now made his home in the United Kingdom. In this jurisdiction that would constitute a separate offence, normally dealt with by way of a consecutive sentence. In the extradition context it is sufficient to underline the very strong public policy consideration that professional criminals who break their bail conditions abroad should not be permitted to find a safe haven here.

138. Taken together, I cannot avoid the conclusion that the overwhelming public interest requires the extradition of PH as well as HH, and accordingly that his appeal, like her appeal, should be dismissed.

139. By way of further comment, I should add that I have ignored my misgiving that the youngest child may have been conceived in an endeavour by the parents to improve their position in the criminal justice and extradition processes. Of course that would neither be the fault of nor diminish the article 8 entitlements of the child. Nevertheless it would in my view have had an impact on the proportionality test adverse to the irresponsible parent who treated the conception of a child as a selfish device to evade justice.

LORD KERR

140. Should the approach of the courts to article 8 rights be radically different in extradition cases from that in deportation or immigration cases "because of the very important obligation of the State to ensure that those who are to be investigated, prosecuted or imprisoned for criminal offences are returned to those countries" – as *per* Silber J in para 55 of his judgment in *B v District Courts in Trutnov and Liberec* [2011] EWHC 963 (Admin)?

141. There is a principled distinction to be recognised between extradition and expulsion. The latter is performed unilaterally and is designed to protect the state's

national interest; the former involves compliance with an international obligation and is performed in furtherance of the suppression of transnational crime and the elimination of safe havens. But, just because the interests that require to be protected are different in the two contexts, it does not automatically follow that the approach to an evaluation of article 8 rights has to be different. It is true that the importance of protecting a system of extradition carries greater weight than will (in general terms) arrangements to expel unwanted aliens or the control of immigration. Extradition is, *par excellence*, a co-operative endeavour and it depends for its success on comprehensive (if not always total) compliance by those who participate in the system. As a matter of generality, therefore, it will be more difficult to overcome the imperative for extradition by recourse to article 8 rights than it will be in the field of expulsion and immigration. But that is a reflection of the greater importance of the need to promote the system of extradition rather than a diminution in the inherent value of the article 8 right. The intrinsic value of the right cannot alter according to context; it will merely be more readily defeasible in the extradition context.

142. Although there were some references in *Norris* (*Norris v Government of the United Sates of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487) to article 8 considerations arising from separation from dependent relatives, these were, at most, fairly oblique. There was no discussion in *ZH* (*ZH (Tanzania) v Secretary of State for the Home Department*) [2011] UKSC 4, [2011] 2 AC 166 about extradition but I agree with Lady Hale that this does not mean that it has nothing to say about how article 8 issues involving children should be approached in the extradition context. As she has pointed out, these cases provide the opportunity to synthesise the reasoning that underlies both *Norris* and *ZH*.

143. The debate about whether the interests of the child should be, in article 8 terms, *a* primary consideration or *the* primary consideration is a fairly arid one but I have to say that I find the notion that there can be several primary considerations (or even more than one) conceptually difficult. Primary, as an adjective, means "occurring or existing first in a sequence or series of events or circumstances" (Oxford English Dictionary). Its natural synonyms are 'main', 'chief', 'most important', 'key', 'prime', and 'crucial'.

144. I have found the argument about the place that children's interests should occupy in the hierarchy of the court's consideration of article 8 most persuasively expressed in the Coram Children's Legal Centre note submitted in the course of this appeal. It is unquestioned that in each of these cases, the children's article 8 rights are engaged. As a matter of logical progression, therefore, one must first recognise the interference and then consider whether the interference is justified. This calls for a sequencing of, first, consideration of the importance to be attached to the children's rights (by obtaining a clear-sighted understanding of their nature), then an assessment of the degree of interference and finally addressing the

question whether extradition justifies the interference. This is not merely a mechanistic or slavishly technical approach to the order in which the various considerations require to be evaluated. It accords proper prominence to the matter of the children's interests. It also ensures a structured approach to the application of article 8. Lord Wilson says (in para 153) that there is no great logic in suggesting that in answering the question, "does A outweigh B", attention must first be given to B rather than to A. At a theoretical level, I do not disagree. But where a child's interests are involved, it seems to me that there is much to be said for considering those interests first, so that the risk that they may be undervalued in a more open-ended inquiry can be avoided.

145. Lady Hale (in para 14 above) has correctly described my statement in para 46 of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 as expressing more strongly than other members of the court the importance that should be attached to their best interests in reaching decisions that will affect children. In suggesting that these should be given a primacy of importance, I did not intend to stoke the debate about the distinction between "*a* factor of primary importance" and "*the* factor of primary importance". What I was seeking to say was that, in common with the opinion of the High Court of Australia in *Wan* (*Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133), no factor must be given greater weight than the interests of the child. This is what that court said at para 32:

> "Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of Mr Wan's children, it was entitled to conclude, after a proper consideration of the evidence and other material before it, that the strength of other considerations outweighed the best interests of the children. However, it was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and *then* to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration." (Emphasis added).

146. In the field of extradition, as in every other context, therefore, the importance of the rights of the particular children affected falls to be considered first. This does not impair or reduce the weight that will be accorded to the need to preserve and uphold a comprehensive charter for extradition. That will always be a factor of considerable importance, although, as Lady Hale has said (in para 8(5)), the weight to be attached to it will vary according to the nature and seriousness of the crime or crimes involved and (at para 8(6)), delay in applying for extradition may reduce the weight to be attached to the public interest in maintaining an effective system of extradition.

147. Following the approach that I have outlined, I have no hesitation in expressing my agreement with Lady Hale in her proposed disposal of the appeal in *F-K v Polish Judicial Authority*. As she has pointed out, the offences, although not trivial, do not rank among the most serious in the criminal calendar. There has been substantial delay. The offences are already of considerable vintage. The public interest importance of maintaining a comprehensive system of extradition will not suffer a significant impairment if F-K's surrender to the Polish authorities is not ordered. By contrast, the adverse impact on her family and, particularly its younger members, is likely to be profound and irretrievable. I too would allow the appeal in that case.

148. In the case of PH and HH, the consequences of both parents being extradited have been thoroughly charted by Lady Hale and Lord Wilson and need no further elaboration. The anticipated plight of these innocent children, the momentous upheaval to their lives and the inevitable emotional damage that they will suffer are indeed, as Lord Wilson has put it, heart-rending. But pitted against those circumstances are the extremely serious crimes of which both PH and HH were convicted; the nature of their participation in those crimes; and the fact that they have exploited the criminal justice system in Italy in their attempts to avoid punishment. These considerations, allied to the pressing need to preserve an effective system of extradition based on international co-operation and the denial of safe havens, create a formidable case in favour of the appellants' extradition.

149. Ultimately, as Lord Wilson has said (para 150), the differing conclusions as to the disposal of these appeals rests not on any difference in legal analysis but on a judgment as to where the balance of the competing interests is found to fall. For the reasons given by Lord Judge and Lord Wilson, with which I agree, I have concluded that it must firmly fall in favour of the appellants' extradition. I would dismiss their appeals.

LORD WILSON

150. In her judgment Lady Hale sets out the facts of the appeals comprehensively; and analyses the law in terms to which, in most respects, I can readily subscribe. But while I agree with her, for the reasons which she gives, that the appeal of Mrs F-K should be allowed and that that of Mrs HH should be dismissed, I do not agree with her that the appeal of Mr PH should be allowed. The difference between us represents no difference of legal analysis. It is a difference of value judgement upon the weight to be attached to two powerful and conflicting interests. To be more specific, our sense of *proportion* in relation to them is different. In accordance with that reached by Laws LJ, and now by Lord Judge, the Lord Chief Justice, with whose judgment I agree, I have reached the conclusion,

heart-rending in the light of its devastating effect upon his three children, that the order for the extradition of PH to Italy should stand.

151. Section 21 of the 2003 Act provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c 42)."

The reference to sections 11 and 20 is a reference to subsections (4) of each of the sections, which relate to warrants prior to, and following, conviction respectively. What section 21(1) adds to the overarching obligation of the court under section 6 of the Human Rights Act 1998 not to act in a way which is incompatible with Convention rights is to identify the stage in its sequential consideration of an application for an extradition order under Part 1 of the 2003 Act at which it must turn to that question. It follows that the nature of the offence of which the person stands convicted or accused will already have been considered at an earlier stage or stages, in particular at that of considering pursuant to section 10(2) whether the offence specified in the warrant is an extradition offence.

152. Where it is suggested to the court (or, in the light of its free-standing obligation not to act incompatibly with Convention rights, where it appears to the court) that the defendant's extradition might infringe the rights of himself and of the other members of his family to respect for their family life under article 8, the requisite inquiry under para 2 of the article is likely to reduce to one issue. There is likely to be no doubt (a) that the extradition would interfere with the exercise of their rights; (b) that, inasmuch as the application for the extradition order will have survived the earlier stages of the inquiry, the interference would be in accordance with the law; and (c) that the aim of the extradition would be one of those specified in para 2, namely the prevention of crime. The issue is likely to be whether the "interference is necessary in a democratic society". "[The] notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued": *Olsson v Sweden (No 1)* (1988) 11 EHRR 259. The concept of a pressing social need adds little, if anything, to that of a legitimate aim: in *Norris v Government of the United States of America (No 2)*, [2010] UKSC 9, [2010] 2 AC 487, Lord Phillips, with whose judgment all the other members of the court agreed, equated them (para 10). So the court must survey the individual, or private, features of the case, namely the circumstances of the family on the one hand and of the offence (or alleged offence) on the other and, in the light also of the public interests on both sides to which I will refer in paras 156 and 167, must proceed to assess the proportionality of the interference.

153. Is the right question whether the likely gravity of the interference with respect for family life outweighs the potency of the legitimate aim of the extradition order? Or is it whether the potency of the legitimate aim outweighs the likely gravity of the interference? Such is a question, of significance no doubt much more theoretical than practical, in which, perhaps to its credit, the European Court of Human Rights ("the ECtHR") seems not much interested. It stated in *Babar Ahmad v UK*, (2010) 51 EHRR SE97, at para 172, that

> "it will only be in exceptional circumstances that an applicant's private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition."

As it happens, however, I agree with the submission on behalf of the Coram Children's Legal Centre, reflective of an observation by Lord Kerr in the *Norris* case, at para 137, that the structure of article 8, which requires the state to justify interference, is such as to cast the question in the opposite way: does the aim outweigh the interference? In *ZH (Tanzania) v Secretary of State for the Home Department*, [2011] UKSC 4, [2011] 2 AC 166, Lady Hale said, at para 33:

> "In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first."

With great respect, I do not consider that Lady Hale's second sentence follows logically from her first. Nor do I discern any greater logic in a conclusion that, in answering a question "does A outweigh B?", attention must first be given to B rather than to A. In my view a judge is entitled to decide for himself how to approach his task.

154. No doubt in some cases a defendant to an application for an extradition order will invoke the article 8 rights of himself and his family in circumstances in which the judge can swiftly reject the suggested incompatibility. But in others, in particular where the defendant lives in a family with a minor child, of whom he is (or claims to be) the sole or principal carer, a full inquiry is necessary, such as was indeed conducted in the case of PH and HH by the district judge and, on appeal and with the benefit of additional evidence adduced by the Official Solicitor, by Laws LJ.

155. Article 3.1 of the UN Convention on the Rights of the Child dated 20 November 1989 provides that "in all actions concerning children... the best interests of the child shall be a primary consideration". Analogously article 24.2 of

the Charter of Fundamental Rights of the European Union (2000/C 364/01) dated 7 December 2000 provides that "in all actions relating to children... the child's best interests must be a primary consideration". The word "concerning" in article 3.1, like the phrase "relating to" in article 24.2, encompasses actions with indirect, as well as direct, effect upon children: the *ZH (Tanzania)* case, para 26 (Lady Hale). The rights of children under article 8 must be examined through the prism of article 3.1: see paras 21 to 23 of the same case. Thus, in the present inquiry, article 8 affords to the best interests of the three children a substantial weight which, following examination, other factors may earn and even exceed but with which, under the law of the article, they do not start.

156. When we come to consider the other side of the equation, we will notice, at para 167 below, not just the importance that PH should be punished for his wrong-doing but the *public* importance of adhering to arrangements for extradition. So, at this earlier stage, we should notice not just the grave effects of his extradition upon these three children but the *public* importance that children should grow up well-adjusted. The principle which pervades the despatch of issues relating to children in the family courts is that, as a rule, they are more likely to grow up well-adjusted if they continue to live in the home of both or at least one of their parents: see, for example, *In re KD (A Minor) (Ward: Termination of Access)* [1988] 1 AC 806 at p 812 B-C (Lord Templeman). I agree with Lady Hale's comments on this point at para 25 above. To "A commentary on the UN Convention on the Rights of the Child", published by Nijhoff in 2007, Professor Freeman contributed Chapter 3, of which the title was "Article 3: The Best Interests of the Child". He wrote, at p 41:

> "There are also utilitarian arguments in favour of prioritizing children's interests. Thus, it may be thought that giving greater weight to children's interests maximises the welfare of society as a whole. Barton and Douglas have even argued that children are important for the continuity of order in society. Putting children first is a way of building for the future. It is significant that countries reconstructing after nightmares of rightlessness have put children's interests in the foreground."

157. I turn to consider the likely arrangements for the children in the event that PH, as well as HH, was to be extradited to Italy. Although there are wider members of the family, to whom I will refer in para 158, who would be likely to continue to have contact with the children, none of them is in a position to offer any of them a home. So the local authority would have to accommodate the children. In para 69 above Lady Hale criticises the authority for not having made plans for them in that event and thus for not having done work with them in preparation for it. But the parents have decided not to explain, even to X, that they might be removed to Italy so no work could have been done with the children until they had been persuaded to reverse that decision. They raise the spectre that,

notwithstanding their refusal to consent, Z might be adopted. It is, however, clear to me that, in circumstances in which a loving father was to say that, following the next four years in prison, he wished to resume his care of a child, a court could not properly be satisfied that the child's welfare required it to dispense with his consent pursuant to section 52(1)(b) of the Adoption and Children Act 2002. So the authority would accommodate all three children in foster homes. Under section 22C(7)(b) and (8)(c) of the Children Act 1989 ("the 1989 Act") the authority would have a duty to place all three children together so far as was reasonably practicable. My past service in the Family Division emboldens me to predict, with fair confidence, that they would succeed in placing X and Y together but that it might prove not reasonably practicable to place Z with them.

158. The three children have a close relationship with each other and any placement of Z separately from X and Y would be highly unfortunate, perhaps particularly for Z herself. But the local authority would undoubtedly arrange regular contact between the three of them; and it is of some, if limited, comfort that, in the event of the sudden dismantling of their home life, at least the three of them would have a continuing relationship with each other to which to cling. Paragraph 15(1) of Schedule 2 to the 1989 Act would oblige the authority, so far as was reasonably practicable and consistent with their welfare, to endeavour to promote contact not only as between the children themselves, if placed separately, but also between them and their parents and other relatives. It would be naïve to consider that more than about one annual visit to PH and HH in prison in Italy would prove practicable. But PH's wide extended family is close-knit: both one of his sisters and the wife of one of his sons by his former marriage have, in particular, been visiting the three children on a regular basis and have expressed a wish to continue to do so. Equally HH's mother came from Morocco to help to look after the children for three months in 2011 and might well make further visits to them.

159. Nevertheless, although she acknowledged the value of the likely continuing contact to which I have referred, Dr Pettle expressed in stark and convincing terms the emotional damage likely to be caused to the children by the extradition of PH as well as of HH. It would, she said, be likely to be catastrophic for them; a massive emotional and psychological challenge; overwhelmingly painful; and analogous to a bereavement. She predicted that the carers would need to cope with withdrawal, regression, anger and defiance on the part of the children; that they would sleep and eat poorly; and that the performance of X and Y at school would deteriorate.

160. Although he lacked the benefit of Dr Pettle's evidence, the district judge squarely confronted the effect of his order upon the children. He said that it would tear the family apart, would profoundly affect the children's physical and emotional health and might lead to multiple future problems for them. With the

benefit of her evidence, Laws LJ endorsed the district judge's conclusions. In relation to Z the Official Solicitor also pressed upon Laws LJ, as he does upon this court, the statement on p 19 of the paper published by the Children's Commissioner for England in January 2008, entitled "Prison Mother and Baby Units – do they meet the best interests of the child?", that

> "Attachment between babies and their mothers or primary caregivers starts in the early stages of life and babies become attached by around six months. Severe psychological damage may occur to babies if the bond or attachment with the primary caregiver is severed between the age of six months and four years...."

Z will not attain the age of four until a year from now; and so the Official Solicitor suggests that consideration of PH's extradition might at least be delayed until next year.

161. It is now clear that the law does not welcome, still less require, an examination of whether the circumstances disclosed by the inquiry under article 8 are exceptional. In the *Norris* case, cited above, there are helpful observations by Lord Phillips in para 56, by Lord Hope in para 89 and by Lord Mance in para 109, about the snare that, as in many other areas of the law, a test of exceptional circumstances sets: for it may lead to the wrongful downgrading of the significance of circumstances just because they happen not to be exceptional or to their wrongful upgrading just because they happen to be exceptional. "Take", suggested Lord Mance at para 109, "a case of an offence of relatively low seriousness where the effect of an extradition order would be to sever a genuine and subsisting relationship between parent and baby": the circumstances might not be exceptional yet the proper application of article 8 might lead to a refusal to make the order. Lord Kerr observed, at para 136, that "the importance of preserving an effective system of extradition ... will in almost every circumstance outweigh any article 8 argument" but he explained that such was a fact which exemplified the likely result of the inquiry rather than furnished the criterion by which the issue should be resolved. I should add that I am not convinced that, in the eleven appeals to the Divisional Court cited in para 22 of Lady Hale's judgment, the judges fell, as suggested, into the error of applying a test of exceptional circumstances.

162. In his judgment in the *Norris* case Lord Phillips stated in para 56:

> "Instead of saying that interference with article 8 rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of

> interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition."

He added in para 62:

> "If... the nature or extent of the interference with article 8 rights is exceptionally serious, careful consideration must be given to whether such interference is justified. In such a situation the gravity, or lack of gravity, of the offence may be material."

He gave an example at para 65:

> "[In] trying to envisage a situation in which interference with article 8 might prevent extradition, I have concluded that the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration. If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee...."

No one suggests a need to dilute the strength of these remarks just because in the present appeal, unlike in the *Norris* case, the rights in play under article 8 are those of children, whose interests are a primary consideration. Nevertheless my view of the evidence in the present appeal supports a conclusion that the consequences of extradition upon the rights of the three children under article 8 would be interference with them of an exceptionally serious character. The importance of PH's extradition might therefore fail to outweigh consequences of such seriousness. But does it?

163. On 23 September 2003 HH and PH drove across the French border into Italy. They were escorting another car, driven by a courier and containing 205.7 kg of hashish. By telephone they instructed the courier to drive to a rendezvous at which he was supposed to deliver the drugs to them for onward distribution to others. But the Italian police were intercepting their calls. When the police were about to arrest him, the courier alerted PH and HH, who, by telephone, acquainted others with what had happened and tried to drive back into France. On their way back, however, they too were arrested, charged and remanded in custody.

164. HH and PH were charged with, and later convicted of, being concerned in the importation of cannabis into Italy from Morocco, through France, not just on

23 September 2003 but also on six earlier occasions. The details of the seven charges were as follows:

(a)	25 April 2003	350	kg
(b)	11 June 2003	94.2	kg
(c)	19 July 2003	120	kg
(d)	6 August 2003	310	kg
(e)	29 August 2003	334.6	kg
(f)	13 September 2003	200	kg
(g)	23 September 2003	205.7	kg
	Total	1614.5	kg

165. An eighth charge was brought against HH and PH, namely of conspiracy with other persons, of whom four were named, to import cannabis into Italy. They were both also convicted under the eighth charge. But on 28 April 2009 the Court of Cassation in Rome ordered a retrial of that charge in the case of PH; and on 9 February 2010 the Court of Appeal in Genoa held that, unlike in the case of HH, it had not been proved that PH, albeit an active participant, had organised or promoted the trafficking enterprise in the sense necessary for a conviction under the eighth charge. His acquittal in this respect explains the fact that, whereas the time likely to be served by HH in prison in Italy is nine and a half years, that likely to be served by PH, following various adjustments, is four years and 22 days. I should add that the fact that, had he been resident with the family in Italy, a further significant adjustment would have been made in his favour adds yet further piquancy to the case; but it is not for the requested court to pick over the rules of the requesting court which govern the time to be served by the defendant in prison any more than it should appraise the justice of his sentence itself although it must be long enough to qualify as an extradition offence.

166. There is an important extra dimension to the gravity of PH's conduct. Just as in 2004 HH had sought to evade justice by leaving Italy in breach of her conditions of bail, so too, later in 2004, did PH. On 7 October 2004, following a year spent in custody on remand, he was granted bail on condition that he should reside in Genoa and report daily to the police; but three weeks later he left Italy and rejoined HH in Spain.

167. In *Gomes v Government of the Republic of Trinidad and Tobago* [2009] UKHL 21, [2009] 1 WLR 1038, Lord Brown, giving the opinion of the appellate committee, said at para 36:

> "The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this

> country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international co-operation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad."

Rolled up in Lord Brown's observations are several overlapping considerations which combine to confer upon the UK's extradition arrangements their profound importance:

(a) perpetrators of crimes should be punished;
(b) crime is deterred by the likelihood of punishment;
(c) cross-border crime is increasing;
(d) the movement of criminals across borders has become easier;
(e) inter-state co-operation is increasingly necessary in order to combat crime and to bring criminals to justice;
(f) states which offer sanctuary to criminals substantially undermine the efforts of the others to eliminate any advantage in remaining in, or indeed escaping to, a jurisdiction other than that of the prosecuting court; and
(g) the UK should adhere to its bilateral (or multilateral) treaty obligations and its breaches or perceived breaches may generate a more widespread unravelling of them on both (or all) sides.

The especial importance of adherence to arrangements for extradition is written across all the judgments in the *Norris* case, and one could well argue that it transcends even the importance of immigration control. Of course I accept that an effective system of removal, or deportation, from the UK of a foreign citizen who has had no right, or has forfeited his right, to remain here carries an importance which extends well beyond his particular circumstances; but the destructive effects on societies of crime are far less plainly and directly countered by immigration control than by adherence to arrangements for extradition.

168. There is a dearth of decisions in which an order for extradition has been refused by reference to the rights of the defendant and his family under article 8. There is *Ministry of Justice of Lithuania v AI*, [2010] EWHC 2299 (Admin): the defendant had served eight months of a sentence of 20 months for fraud prior to

her departure, in breach of the conditions of her release, from Lithuania to England, where she was forced into prostitution, suffered serious trauma and was providing valuable assistance to the police, such combination of circumstances being (said Leveson LJ at para 21) "truly exceptional" and from which "nobody should seek to derive any wider principles". There is *Jansons v Latvia* [2009] EWHC 1845 (Admin): the defendant was accused of thefts to a value of about £450 and would commit suicide if extradited. Now, today in these conjoined proceedings, also arrives the unanimous decision of this court in *F-K v Polish Judicial Authority*: the facts are set out by Lady Hale in paras 35 to 43 above and reveal not only the need of children aged eight and three for the defendant's care but also, and in particular, the relative lack of gravity of the offences alleged against her, their antiquity and the delay in the seeking of her extradition.

169. Counsel can find no evidence that article 8 has ever operated so as to bar extradition for an offence approaching the gravity of those of which PH has been convicted, whether in the courts of England and Wales or of any other member state of the Council of Europe or in the European Court of Human Rights itself. No doubt the constituency of defendants who provide the sole or main care to young children is relatively small. But in my view the principal driver behind such absence of authority is the high degree of public importance attached throughout (and no doubt beyond) Europe to the extradition of persons so that they may answer for serious crime. Indeed the Conseil d'Etat in France, for example, appears even to take a step further in considering that, as a matter of principle, extradition will justify any interference with rights under article 8: the *Norris* case, para 50 (Lord Phillips).

170. The effects on family life of a defendant's imprisonment in England and Wales following domestic criminal proceedings, on the one hand, and of his imprisonment abroad following extradition there, on the other, are likely to be somewhat different. Visits to him by his family members would more easily be arranged if his prison was in England and Wales although whether, for his children, the positives outweigh the negatives would – so I have long considered - be an interesting subject for study; and special facilities, such as for a mother to have her baby with her in prison, might be available in England and Wales but not abroad. In my view, however, it remains of substantial relevance to note the extent to which rights under article 8 affect the process of sentencing in domestic criminal proceedings. In para 128 above Lord Judge quotes from para 54 of his own recent judgment on behalf of the Court of Appeal in *R v Kayani*, *R v Solliman* [2011] EWCA Crim 2871, [2012] 1 Cr App R 197. But having stressed in the passage which he has set out, the need in every case for careful scrutiny of the plight of children for whom a defendant has primarily been caring, Lord Judge continued, at para 56:

> "Dealing with it generally, where the only person available to care for children commits serious offences, even allowing fully for the interests of the children, it does not follow that a custodial sentence, of appropriate length to reflect the culpability of the offender and the harm consequent on the offence, is inappropriate."

There are a number of reported examples of sentences of immediate imprisonment, almost all measured in months, which, even before article 8 acquired the force of law, the Court of Appeal set aside in the interests of children of whom the defendant was the sole or primary carer: see, for example, *R v Whitehead* [1996] 1 Cr App R(S)111; and now see also *R v Bishop* cited above. But, on behalf of the Deputy Prosecutor of the Italian Republic, Genoa, Mr Perry made an unchallenged submission that, were PH to have been sentenced in England and Wales for offences of drug-trafficking of gravity equivalent to those of which he has been convicted in Italy, he would be likely to have received a very substantial sentence of imprisonment which, in that they would have been outweighed, the rights of his children under article 8 would not have displaced. Indeed Lord Judge predicts, at para 136 above, that the sentence would be likely to have been at least ten years; and there can be no more authoritative prediction than his.

171. In *M v The State* [2007] ZACC 18 the Constitutional Court of South Africa delivered judgment on the following question, posed by Sachs J at para 1:

> "When considering whether to impose imprisonment on the primary caregiver of young children, did the courts below pay sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount?"

Sachs J thereupon offered an analysis of the relevant principles; and with that part of his judgment all the other members of the court agreed. He referred, at para 10, to the classic approach to sentencing, articulated in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H, that "what has to be considered is the triad consisting of the crime, the offender and the interests of society". He explained, at para 26, that, when used in s 28(2) of the Constitution, the word "paramount" does not mean that the interests of the children necessarily dictate the result. He proceeded as follows:

> "33... Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.

> 34 In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct. This would be a mischaracterisation of the interests at stake...
>
> 35... Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.
>
> 36...
>
> > (c) If on the *Zinn* triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
> > ...
> >
> > (e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."

172. The judgment of Sachs J draws the interests of children vividly into the foreground and it has led me to reflect again, albeit more profoundly, upon the plight of the three children of PH. It is also important to observe that the exercise mandated by article 8 is not identical to that required by the Constitution of South Africa. For we do not start, as a "given", with the "legitimate range of choices" and then fit the interests of the children into it; under article 8 their interests may, through the proportionality exercise, help to identify the legitimate range. But, in a judgment of especial child-sensitivity, the weight which Sachs J nevertheless places upon the public interest in the punishment of serious domestic crime confirms me in my conclusion, firm if bleak, that the public interest, not identical but no less powerful, in the extradition of PH to Italy outweighs the interference with the rights of his children.