[2013] IEHC 323

THE HIGH COURT

Record No.: 2012 No. 247 EXT.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS AMENDED)

Between/

THE MINISTER FOR JUSTICE & EQUALITY

Applicant

-AND-

T.E.

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 19th day of June, 2013

Introduction:

The respondent is the subject of a European arrest warrant issued by the Republic of France on the 19th of July, 2012. The warrant was endorsed by the High Court for execution in this jurisdiction on the 5th of September, 2012, and it was duly executed on the 19th of September, 2012. The respondent was arrested by Sergeant M.O.E. on that date, following which she was brought before the High Court on the following day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter, the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing

The respondent does not consent to her surrender to the Republic of France. Accordingly, this Court is now being asked by the applicant to make an order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive her. The Court must consider whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 issues

The Court has received an affidavit of Sergeant M.O.E. sworn on the 23rd of April, 2013 testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

I am satisfied following my consideration of these matters that:

(a) The European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the Act of 2003;

(b) The warrant was duly executed;

(c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) The warrant is in the correct form;

(e) The warrant purports to be a prosecution type warrant and the respondent is wanted in France for trial in respect of the two offences particularised in Part E of the warrant as follows:

> "- laundering, as an organized criminal gang, by investment, concealment or conversion, of the proceeds of the crimes of procuring and/or of living off immoral earnings, committed as an organized criminal gang, and of trafficking in human beings, committed as an organized criminal gang;
> - criminal conspiracy for the purposes of preparing to commit the crimes of procuring and/or of living off immoral earnings, committed as an organized criminal gang and of trafficking in human beings, committed as an organized criminal gang."

(f) The underlying domestic decision on which the warrant is based is an arrest warrant issued on the 18th of June, 2012 by Judge G Examining Magistrate in Lyon, France.

(g) The issuing judicial authority has invoked para. 2 of article 2 of Council Framework Decision 02/584/JHA on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of both offences listed in Part E, by the ticking of the box in Part E.I of the warrant relating to "Participation in a Criminal Organisation", and also the box relating to "Laundering of the Proceeds of Crime". Accordingly, subject to the Court being satisfied that the invocation of para. 2 of article 2 is valid (*i.e.* that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence;

(h) The minimum gravity threshold in a case in which para. 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It is clear from Part C (1) of the warrant, read in conjunction with the information concerning the nature and legal classification of the offences set out within Part E that both offences carry a potential penalty of up to ten years imprisonment, and up to twice that term of imprisonment in the case of repetition of the offences. Accordingly, the minimum gravity threshold is comfortably met;

(i) The description of the circumstances in which the offences in question were committed as set out in the warrant is as follows:

> "Following several complaints made by Nigerian prostitutes regarding the acts of violence committed against them, they brought to the attention of the judicial authorities that they had been taken to Italy, then to France and had afterwards been forced into prostitution in order to repay an imaginary debt in the amount of 50,000 Euros.
>
> Investigations revealed that several procuresses known by the name 'Mama' participated in networks transporting young Nigerian women for the purposes of forcing them into a life of prostitution in France and notably in Grenoble (Isere, France).
>
> Financial analyses revealed that the funds handed over by the victims, from which the 'Mamas' benefited and which were in the amounts representing several tens of thousands of Euros, transited via T.E.'s bank accounts in Ireland before being transferred to Nigeria. The procuresses asked her to carry out the transfers of funds by Western Union Money Order. By knowingly receiving on a very regular basis the sums gathered in this way by the procuresses so as to send those funds to Nigeria by means of a financial arrangement of her own devising, T.E permitted the conversion of the proceeds of acts of procuring. By engaging in such collections of funds she

> herself is also a part of a highly structured organisation committing acts of procuring. The offences of which she is accused were committed in Grenoble, (Isere, France) on French national territory and on an indivisible basis in Nigeria and in Ireland, between 1st April 2008 and 14th March 2011, and at all events within a time period to which the Statute of Limitations does not yet apply."

There is no reason, upon a consideration of the underlying facts as set out above, to believe that the ticking of the boxes relating to "Participation in a Criminal Organisation", and "Laundering of the Proceeds of Crime" was in error;

(j) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(k) There are no circumstances that would cause the Court to refuse to surrender the respondent under s.22, s.23 or s.24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 2) Order 2004 (S.I. No. 130 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 and the Schedule to the 2004 Designation Order, "France" (or more correctly the Republic of France) is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision.

The Points of Objection

Points of Objection were filed pleading various different grounds of objection and running to 34 paragraphs. However, only three grounds were ultimately relied upon, namely, an objection based upon s.21A of the Act of 2003, an objection based upon s. 44 of the Act of 2003 and an objection based upon s. 37 of the Act of 2003.

Paragraphs 7 to 11 inclusive raise a s. 21A objection that is pleaded in the following terms:

"7. The Respondent is not a person who is sought by France for the purposes of conducting a criminal prosecution against her within the meaning of article 1 of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (hereafter the "Framework Decision").

8.

(a) The French Republic does not intend to bring proceedings for the alleged offences to which the European Arrest Warrant relates against the Respondent;
(b) The Respondent is not at present the subject of proceedings in that State for those offences; and
(c) The Respondent has not been convicted or sentenced in respect of, an offence to which the European arrest warrant relates; and
(d) The Respondent is not a person on whom a sentence of imprisonment or detention has been imposed in France in respect of an offence to which the European arrest warrant relates.

9. Consequently the Respondent is not a person whom the State is obliged to arrest and surrender to France pursuant to section 10 of the European Arrest Warrant Act, 2003.

10. In particular, a decision has not been made to charge the Respondent and try her with the alleged offences in France. On the contrary the surrender of the Respondent is sought because she is a suspect.

PARTICULARS

(i) The Mandat d'arret (arrest warrant) on which the European arrest warrant is based was issued in respect of the Respondent on the 18th June, 2012 by Mr. Bertrand Grain, Investigating judge at the High Instance Court of Lyon, for the purpose of criminal prosecution (hereafter referred to as "His Honour Judge Grain").

(ii) His Honour Judge Grain is the investigating judge or *juge d'instruction* in the case of the Respondent.

(iii) If his Honour Judge Grain considers that there is sufficient evidence to send the Respondent for trial to the Court d'Assize (or other competent trial Court) pursuant to Article 175 of the French Procedure Penal, he will no longer have jurisdiction in respect of the investigation. In other words, if he concludes that there is sufficient evidence, he must close the file and send the Respondent for trial.

(iv) It is therefore submitted that his Honour Judge Grain has formed the view that there is not enough evidence, at the moment, to send the Respondent for trial and to close the examination phase.

(v) The decision to prosecute is dependent on the investigation producing sufficient evidence to put the Respondent on trial.

(vi) As a matter of fact, no decision has been made to place the Respondent on trial for the alleged offences.

(vii) If the Respondent were surrendered to France on the warrant it would be at the investigation stage of the case.

11. By reason of the foregoing, the surrender of the Respondent is prohibited by section 21A of the European Arrest Warrant Act, 2003 as inserted by section 79 of the Criminal Justice (Terrorist Offences) Act, 2005."

Paragraph 16 raises the s. 44 objection and is pleaded as follows:

16. The act or omission of which the alleged offences consist do not, by virtue of having been committed in a place other than the State, constitute offences under the law of the State. Consequently the surrender of the Respondent is prohibited by section 44 of the European Arrest Warrant Act, 2003.

PARTICULARS

(i) The European Arrest Warrant, issued in respect of the Respondent by Mrs Virginie Brelurut, Deputy State Prosecutor, on the 19th July, 2012, stated that it was issued in respect of:

(a) Laundering, as an organised criminal gang, by investment, concealment or conversion, of the proceeds of the crimes of procuring and/or of living off immoral earnings, committed as an organized criminal gang, and of trafficking in human beings, committed as an organized criminal gang; and

(b) Criminal conspiracy for the purposes of preparing to commit the crimes of procuring and/or of living off immoral earnings, committed as an organised criminal gang and of trafficking in human beings, committed as an organized criminal gang.

(ii) The said alleged offences are covered by Articles 450-1, 450-3, 450-5, 324-1, 324-2, 324-3, 324-4, 324-5, 324-6, 324-7 and 324-8 of the French Criminal Code.

(iii) The offences of which the Respondent is accused were allegedly committed in Nigeria and Ireland and Grenoble, (Isere, France), and, allegedly "on an indivisible basis" between the 1st April 2008 and the 14 h March 2011.

(iv) Consequently the French authorities, as regards the alleged offences, are purporting to exercise extra territorial jurisdiction over a person who is neither a French citizen nor a resident of France.

(v) The alleged offence at (a) above derives from Articles 324-1, 324-2, 324-3, 324-4, 324-5, 324-6, 324-7 and 324-8 of the French Criminal Code.

(vi) Article 324-1 prohibits money laundering, which is defined as *"facilitating by any means the false justification of the origin of the property or income of the perpetrator of a felony or misdemeanour which has brought him a direct or indirect benefit."*

(vii) The corresponding offence under the Law of the State is created by section 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010, which provides that a person commits an offence if—

(a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:

(i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;

(ii) converting, transferring, handling, acquiring, possessing or using the property;

(iii) removing the property from, or bringing the property into, the State, and

(b) the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct.

(viii) Section 8 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 provides that:

‘(1) A person who, in a place outside the State, engages in conduct that would, if the conduct occurred in the State, constitute an offence under section 7 commits an offence if any of the following circumstances apply:

(a) the conduct takes place on board an Irish ship, within the meaning of section 9 of the Mercantile Marine Act 1955,

(b) the conduct takes place on an aircraft registered in the State,

(c) the conduct constitutes an offence under the law of that place and the person is—

(i) an individual who is a citizen of Ireland or ordinarily resident in the State, or

(ii) a body corporate established under the law of the State or a company registered under the Companies Acts,

(d) a request for the person's surrender, for the purpose of trying him or her for an offence in respect of the conduct, has been made under Part ii of the Extradition Act 1965 by any country and the request has been finally refused (whether or not as a result of a decision of a court), or

(e) a European arrest warrant has been received from an issuing state for the purpose of bringing proceedings against the person for an offence in respect of the conduct, and a final determination has been made that—

(i) the European arrest warrant should not be endorsed for execution in the State under the European Arrest Warrant Act 2003, or

(ii) the person should not be surrendered to the issuing state.'

(ix) The alleged offences were not committed on board a French ship or on an aircraft registered in French.

(x) The Respondent is not a French citizen and is not ordinarily resident in France.

(xi) No request for the extradition of the Respondent has ever been refused by the French authorities.

(xii) Consequently, the alleged offence, by virtue of having been committed in a place other than the State, does not constitute an offence under the law of the State.

(xiii) The Respondent reserves the right to adduce such further and better particulars that may come to light in advance of the hearing of the application herein or as may become apparent in the course of the hearing."

Finally, paras. 29 to 31 inclusive plead the s. 37 objections in the following terms:

"29. The surrender of the Respondent would be incompatible with the State's obligations under the Convention for the Protection of Fundamental Freedoms and the protocols thereto and would therefore be contrary to section 37(1)(a) of the European Arrest Warrant Act, 2003.

30. The surrender of the Respondent would be incompatible with the State's obligations under the provisions of Bunreacht na hEireann (other than for the reason that the offence specified in the European Arrest Warrant is an offence to which section 38(1)(b) applies) and would therefore be contrary to section 37(1)(b) of the European Arrest Warrant Act, 2003.

31. The surrender of the Respondent would be incompatible with the State's obligations under the Charter of Fundamental Rights of the European Union and would therefore be contrary to the law of the European Union."

Although the specific rights relied upon are not identified in the pleadings it was indicated at the hearing by counsel for the respondent that he was content to confine his case under s. 37 of the Act of 2003 to a contention that surrender of his client would be incompatible with her rights under the European Convention on Human Rights (hereinafter "the ECHR"), and in particular that her surrender would constitute a disproportionate interference with her right to respect for family life under article 8 of the ECHR.

The Respondent's Evidence

The Court has before it an affidavit of a Mr. D.T. sworn on the 18th of February, 2013 in which he states:

"2. I have been a specialist in Criminal Law since 1981. I have participated in a professional capacity in a number of extradition/surrender cases. I am a former Secretary of the Conference du stage of the Paris Bar, a former member of the Board of Paris Bar (*Conseil de I'Ordre du Barreau de Paris),* a current member of the panel of International Experts of 'Fair Trials International' and General Secretary of the International Helsinki Federation for Human Rights. I am one of the lawyers recommended by the Consulates of the United Kingdom, the United States of America and Canada to assist their citizens in matters of Criminal Law before French Courts.

3. I refer to the warrant for arrest (*mandat d'arrret)* issued in respect of the Respondent on the 18th June, 2012 by Judge Bertrand Grain, Investigating Judge at the Court of Appeal of Lyon, France (hereafter referred to as "Judge Grain"). I also refer to the European Arrest Warrant issued in respect of the Respondent by Ms Virginie Brelurut, Deputy State Prosecutor, State Prosecutor's Office, Lyon, issued on the 19th July, 2012.

4. Judge Grain is the investigating judge or *juge d'instruction* in the case of the Respondent.

5. The surrender of the Respondent has been requested in respect of the following alleged offences:

(i) money laundering, as an organised criminal gang, by investment, concealment or conversion, of the proceeds of crimes of procuring and/or living off immoral earnings, committed as an organised criminal gang, and of trafficking of human beings, committed as an organised criminal gang; and

(ii) criminal conspiracy for the purposes of preparing to commit the crimes of procuring and/or living off immoral earnings, committed as an organised

criminal gang and of trafficking in human beings, committed as an organised criminal gang.

Relevant French Criminal Procedure

6. In France, criminal proceedings usually begin with a preliminary examination (*enquête préliminaire)* which may or may not lead to the appointment of an investigating judge *(juge d'instruction)*. The preliminary examination of criminal matters may be entrusted to the police under the authority of the Public Prosecutor prior to the appointment of an investigating judge. The investigation phase *(instruction)* begins once the investigating judge has been appointed.

7. At the investigation phase, the investigating judge may decide to issue an arrest warrant for a person in respect of whom there are serious and corroborating indications (*indices graves et concordants)* that the person has committed, or has tried to commit, the alleged offenses. Once arrested, the person is brought before the investigating judge.

8. An investigating judge who wishes to question a person who lives outside France in respect of an allegation of criminal conduct can issue an arrest warrant for that purpose (Article 133 of the Code of Criminal Procedure should be read together with its Article 122, which refers to issuing an arrest warrant against a person).

9. When a person appears for the first time before the investigating judge on foot of an arrest warrant, the investigating judge may decide either to put the person "*under examination" (mise en examen)* or to hear the person as a witness.

10. The investigating judge shall decide to put a person *"under examination" (mise en examen)* when s/he has before him/her serious and corroborating indications that the person has committed the alleged acts but does not (yet) have sufficient evidence to charge the suspect and put him on trial. It is only once such sufficient evidence is available that the investigating judge can charge the suspect and put him on trial, which will close the investigation phase of the procedure.

11. If there is not sufficient evidence to charge the suspect, s/he will not be sent to trial and the criminal proceedings will end at the investigation phase.

12. The *investigation* phase of the procedure affords a number of rights to the person *mise en examen* in that it places him/her under judicial supervision of the investigating judge. A person *mise en examen* has the right to legal representation and a right to remain silent. Further, there is a right of appeal to the *Chambre d'Instruction* against the investigating judge's decisions.

13. Pursuant to Article 175 of the Code of Criminal Procedure, once the investigating judge considers that there is sufficient evidence to send the person *mise en examen* before a court for trial s/he automatically loses jurisdiction over that case. Thus the decision to prosecute a person is entirely dependent upon the production of sufficient evidence at the investigation stage.

Current stage of the procedure

14. At present, the case against the respondent is at the investigation phase. Judge Grain has decided that there are serious and corroborating indications that the respondent committed the alleged acts. He has accordingly issued an arrest warrant for the respondent to appear before him.

15. However it follows that it cannot be inferred from the issuance of an arrest warrant against the respondent that there is sufficient evidence to put her on trial, let alone charge her with any offence. On the contrary, for so long as Judge Grain has not made a decision to put her '*under examination'* the respondent is not the subject of criminal proceedings and a decision has <u>not</u> been taken to place her on trial in respect of the alleged offences.

European arrest warrant relates to alleged or suspected offences that have been committed in whole or in part outside French territory

16. The French Criminal Code and the jurisprudence thereunder assert a wide territorial jurisdiction.

17. Article 113-2 paragraph 2 of the Criminal Code provides: '*An offense is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.*'

18. Under the principle of indivisibility, French courts have jurisdiction over acts committed abroad by a non-French national where the acts alleged against the accused appear to constitute an indivisible whole with acts committed in France and together constitute the alleged offense.

19. It follows that once one of the constituting elements of the alleged offence has been committed in France, that offence is deemed to have been committed in France and French courts have jurisdiction over it.

20. As noted above, the alleged offences in this case are: (i) money laundering, as an organised criminal gang, by investment, concealment or conversion, of the proceeds of the crimes of pimping committed as an organised criminal gang, and of trafficking human beings, committed as an organized criminal gang; and (ii) criminal conspiracy for the purposes of preparing to commit the crimes of pimping, committed as an organised criminal gang and of trafficking in human beings, committed as an organised criminal gang.

21. The commission of a primary offence (pimping) is required in order to constitute the offenses of money laundering and criminal conspiracy. It is alleged that this primary offence was committed in Grenoble, France.

22. Under French law, since parts of the constituting elements of both offences were committed in France, its courts have jurisdiction over the offences even though parts of the offences are alleged to have been committed in Nigeria and in Ireland.

Entitlement of Respondent to bail during the investigation into the alleged offences and, if charged and placed on trial, entitlement to bail pending trial

23. The person *mise en examen* is presumed innocent and remains free.

24. However, if the investigation so requires, or as a precautionary measure, the person may be subjected to one or more obligations of judicial supervision,

or, if the latter are insufficient, to house arrest under the surveillance of an electronic bracelet.

25. If these measures are insufficient, and the alleged offence is punishable by at least three years imprisonment, the respondent may, in exceptional cases, be remanded in custody. (Articles 137 and 143-1 of the Code of Criminal Procedure refers).

26. In the current case, where the respondent is a non-French national who has been arrested abroad for offences punishable by terms of ten years imprisonment, it is very unlikely that bail would be granted. The respondent is thus likely to remain in custody until the end of the investigation and any subsequent trial notwithstanding that she may have complied fully with the terms of her bail in Ireland pending the determination of the extradition proceedings."

In addition, the Court has been furnished with a forty six paragraph affidavit sworn by the respondent on the 27th of February, 2013. This affidavit, to the extent that it is relevant to the remaining grounds of objection before the Court, states:

"2. I was born on the xx xxxx xxxx in A, Nigeria. I beg to refer to a true copy of my certificate of birth upon which marked with the letters and numbers 'TE1' I have signed my name prior to the swearing hereof.

3. I was married to P.E. on the xx xxxx xxxx in A, Nigeria. I beg to refer to a true copy of our certificate of marriage upon which marked with the letters and number **'**TE2' I have signed my name prior to the swearing hereof.

4. My husband is a citizen of Nigeria. I beg to refer to a true copy of his passport upon which marked with the letters and numbers 'TE3' I have signed my name prior to the swearing hereof.

5. I say that your Deponent came to Ireland on the 19th November 2001. My husband came to Ireland shortly thereafter on the 10th day of January 2002.

6. Our first son, X, was born on the xx xxxx xxxx. He is 11 years old at present and in this regard I beg to refer to a true copy of her [sic.] certificate of birth

upon which marked with the letters and number ‘TE4’ I have signed my name prior to the swearing hereof.

7. I say that our daughter, Y, was born on the xx xxxx xxxx. She is 9 years old at present and in this regard I beg to refer to a true copy of her certificate of birth upon which marked with the letters and number ‘TE5’ I have signed my name prior to the swearing hereof.

8. Our second son, Z, was born on the xx xxxx xxxx. He is 4 years old at present and in this regard I beg to refer to a true copy of his certificate of birth upon which marked with the letters and number ‘TE6’ I have signed my name prior to the swearing hereof.

9. I say that our children are all citizens of Ireland and in this regard I beg to refer to true copies of their Irish passports upon which pinned together and marked with the letters and number ‘TE7’ I have signed my name prior to the swearing hereof.

10. In August 2005 the Applicant granted my husband and I permission to reside in the State on the basis of our parentage of Irish citizen children.

11. In 2010 my husband and I applied to the applicant for certificates of naturalisation. The applicant acceded to my application on the 1st June 2012 whilst my husband's application is pending. In this regard I beg to refer to a true copy of my letter from the Minister for Justice dated 1st June 2012 which marked with the letters and number ‘TE8’ I have signed my name prior to the swearing hereof. I say that I have been issued a Certificate of Naturalisation which is now held by the Passport Office by Order of this Honourable Court.

12. I say that all of our children attend primary school [in] Dublin …. X is currently in 5th Class; Y is currently in 3rd Class; and Z is currently in ‘Early starters’ (Junior Infants).

13. My husband is employed as a bus driver with Bus Atha Cliath - Dublin Bus since 30th March 2008 and in this regard I beg to refer to a true copy of a letter dated 28th March 2008 from Dublin Bus upon which marked with the letters and number ‘TE9’ I have signed my name prior to the swearing hereof.

14. My husband and I purchased our home at xxx xxxx, xxxx, xxxx [Dublin] xx on or about March 2008 and it has been our family home since then. In this regard I beg to refer to a true copy of a Certificate of Interest/Mortgage Tax Relief Claimed and Annual Mortgage Statement upon which marked with the letters and number "TE10" I have signed my name prior to the swearing hereof."

Circumstances of arrest

Paras 15 – 27 inclusive- no longer relevant.

Merits of surrender request

Paras 28 – 30 inclusive - amount to legal submissions.

Paras 31 – 32 inclusive – no longer relevant.

33. To the extent that the acts or omissions of which the alleged offences consist are alleged to have been committed in a place other than the State, I am advised that they do not constitute offences under the law of the State. Consequently I believe that my surrender in that regard is prohibited.

34. In this context, it should be noted that I am not a French citizen nor have I ever resided in that country.

35. - no longer relevant

Prohibition of surrender on basis of fundamental rights

36. - amounts to a legal submission.

37. As noted above, your deponent is the mother of three young children, of Irish Citizenship, who are aged xx, x and x years of age. I believe that if I am surrendered to France my husband will find it difficult to keep his job and to look after our three children.

38. I say that although I have complied with the terms on which I was admitted to bail by this Honourable Court, I am deeply concerned that I will not be admitted to bail if surrendered to France. In this regard I beg to refer to the Affidavit of D.T. where, at paragraph 25 he deposes as follows:

'If these measures are insufficient, and the alleged offence is punishable by at least three years imprisonment, the respondent may, in exceptional cases, be remanded in Custody. (Articles 137 and 143-1 of the Code of Criminal Procedure refers).'

39. Even if admitted to bail, however, I have been advised that there is no provision in French social assistance to provide for my accommodation and food pending the investigation into the alleged offences and, if a decision were to be taken to place me on trial, pending the commencement and duration of any such trial. Even if my husband retains his employment in the State, and I know he would do his best, he has financial commitments in this State, in particular a mortgage, and he will need to pay for child care (assuming that he is able to keep working).

40. I say that I am fearful that I will be detained under inhuman and degrading conditions pending the investigation and I fear that were [sic] a decision was taken to put me on trial, and were I to be subsequently convicted and sentenced, that I would be detained under inhuman and degrading conditions.

41. I am deeply concerned that my husband, as a citizen of Nigeria, will be refused permission to enter France to visit me while I am in custody. He is not yet an Irish citizen and, as the national of a third country, I have been advised by my solicitor that he may not be granted a visa to enter France. I further believe that it will be difficult for him to visit me while looking after our three children. I further believe that bringing my children to visit me while in custody in France would prove difficult for my husband logistically and financially and will also be very upsetting for my children.

42. In this context, it will be recalled that the purpose for which my surrender is sought is not to place me on trial for any criminal offences, but to pursue an investigation. Obviously this is something that the French authorities could conduct in Ireland, with the co-operation of An Garda Síochána, if they so wished.

43. I further believe that it is of note that the locus of the alleged offences' seems to be in Ireland and not in France. As noted above, I have never resided in France and I do not operate a French bank account.

Paras 44 – 45 inclusive – amount to legal submissions. "

The S.44 objection

The relevant statutory provision

S.44 of the Act of 2003 provides:

"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

S. 44 as interpreted by the Supreme Court

The meaning and application of s. 44 of the Act of 2003 was considered by the Supreme Court in *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16 (Unreported, Supreme Court, 1st March, 2012). The Court has considered carefully all of the judgments in that case. It may be helpful in the context of the present case to quote some passages from that of Denham C.J who stated:

"19. The Framework Decision provided grounds for optional non-execution of a warrant. It states in Article 4 that the executing judicial authority may refuse to execute the warrant in a number of circumstances, including, in paragraph 7:-

'4.7: where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;

or

> (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.'

20. The Framework Decision thus provides two options in Article 4.7 for non execution of a warrant. The choice of applying the options was made by the Oireachtas.

21. In Ireland, the initiating legislation was the Act of 2003. Article 4.7(a) was ultimately not incorporated as part of Irish legislation, and thus it is not an option open to the Court.

22. The option described in Article 4.7.b of the Framework Decision was implemented by the legislature in the provisions of s. 44 of the Act of 2003, which has not been amended in any later legislation and which retains the same wording since its enactment.

23. It appears to me that the words of s. 44 are clear: a person shall not be surrendered if two specific conditions are satisfied. The first part of the section states that:-

"A person shall not be surrendered under this Act if the offence specified in the European Arrest Warrant in respect of him or her was committed in a place other than the issuing State …"

The first of these conditions is that the offence was committed or alleged to have been committed in a place other than the issuing State. In this case the offence of murder of Mme. Toscan du Plantier took place in Ireland and thus outside the issuing State, which is France. Therefore, the first condition is met. However, this finding is insufficient to prohibit surrender under s. 44 of the Act of 2003 and it is necessary to consider the balance of the section, the second condition.

24. This first issue therefore turns on the meaning of the words in the balance of s. 44, which sets the second condition as:-

"and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State".

It is helpful to read the third phrase before the second, in construing the meaning of the section. This would thus be:

"and the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State".

These are clear words and so may be considered and applied literally. The section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland.

25. The terms of s. 44 are an option, exercised by Ireland, grounded on Article 4.7.b. of the Framework Decision.

26. The European Arrest Warrant procedure is based on the concept of mutual trust and confidence between judicial authorities of the Member States. However, Article 4.7 of the Framework Decision and s. 44 of the Act of 2003 reflect other principles also. It is necessary to analyse the Article and the section to determine the issue raised by the appellant.

27. The travaux preparatoires on Article 4.7 of the Framework Decision, and thus on the foundations of s. 44 of the Act of 2003, are of interest. It is unfortunate that they were not opened to the Court by counsel.

28. The concept of reciprocity has long been utilised by States in making extradition treaties.

29. The European Convention of Extradition 1957 provided in its Article 7:

> Article 7 - Place of Commission
>
> ‘1. The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.
>
> 2. When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.’

30. Article 26 provided for reservations, stating:-

> ‘1. Any Contracting Party may, when signing this Convention or when

depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.

3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.'

31. The Explanatory Memorandum on Article 7 states:-

'Paragraph 1 permits a Party to refuse extradition for an act committed in whole or in part within its territory or in a place considered as its territory. Under this paragraph it is for the requested Party to determine in accordance with its law whether the act was committed in whole or in part within its territory or in a place considered as its territory. Thus, for example, offences committed on a ship or aircraft of the nationality of the requested Party may be considered as offences committed on the territory of the Party.

Paragraph 2 was inserted in order to take into account the law of countries which do not allow extradition for an offence committed outside the territory of the requesting Party. This paragraph provides that extradition must be granted if the offence has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorise prosecution for an offence of the same kind committed outside its territory, or do not authorise extradition for the offence which is the subject of the request.

Under the terms of Article 26, a reservation may be made in respect of this paragraph, making it subject to reciprocity.'

32. Thus, under the previous Extradition system, where treaties were made between states, the specific treaty could make provision for a reservation, and make it subject to reciprocity.

33. The document dated 4th December, 2001, from the Permanent Representatives Committee, to Council, entitled "Proposals for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States",

14867/01 COPEN 79 CATS 50 stated:

> ‘3. Grounds for optional non-execution.
>
> 3.1 Grounds linked to the place where the act on which the grounds for the European arrest warrant was committed:
>
> Several delegations (NL/EL/IRL/L,/DK/A and S) wanted to introduce additional grounds for optional non-execution, making it permissible to refuse to execute a European arrest warrant issued for acts committed in whole or in part on the territory of the executing Member State or committed outside the territory of the issuing Member State, if the law of the executing Member State does not allow prosecution of offences of the same type committed outside the territory of the executing Member State. This question should be examined together with the French proposal referred to in point 1 above.
>
> The Presidency will make a proposal to COREPER/COUNCIL on this point as part of an overall compromise.’

The Framework Decision annexed (as of 4th December 2001) included:

> "7. [Where the act on which the European arrest warrant is based was committed in whole or in part in the territory of the executing State or in a place treated as the territory of that Member State, and the competent authority of the executing State undertakes to conduct the prosecution or to execute the sentence [2].]"
>
> The footnote 2 stated:-
>
> "NL (supported by EL/IRL/L/DK/A and S) has made a broader proposal, based on Article 7 of the 1957 European Extradition Convention:
>
> 'Where the European arrest warrant envisages offences which:
>
> (1) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State;
>
> (2) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member

State.'"

Thus, Ireland was one of the delegations seeking to introduce additional grounds for optional non-execution at this stage of the consideration of the proposed Framework Decision.

34. At the 2396th Council Meeting - Justice, Home Affairs and Civil Protection - Brussels, on the 6th and 7th December, 2001, the Council examined a draft Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, on a compromise proposal. The Presidency was able to record the agreement of 14 delegations on its compromise. One delegation was unable to support the proposal. The main features of the compromise were:-

- The arrest warrant is broad in scope. In particular, it gives rise to surrender in respect of 32 listed offences … without verification of the double criminality of the act and provided that the offences are punishable in the issuing Member State by a custodial sentence of a maximum of at least 3 years.

- A territoriality clause making it optional to execute an arrest warrant in respect of offences committed in the executing State for acts which took place in a third State but which are not recognised as offences by the executing State.

- A retroactivity clause making it possible for a Member State to process requests submitted prior to the adoption of the Framework Decision under existing instruments relating to extradition.

35. On the 6th December, 2001, the Presidency noted agreement of 14 delegations on the draft Framework Decision, one delegation could agree only on a narrower list of offences in Article 2(2). The draft Article 4 was headed as grounds for optional non-execution. It contained seven sections by which "[t]he executing judicial authority may refuse to execute the European arrest warrant" if the conditions in any section were adopted into domestic law. The draft Article 4.7 was:-

> ‘The executing judicial authority may refuse to execute the European arrest warrant […]
>
> 7. Where the European arrest warrant envisages offences which:
>
> (3) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the

territory of that Member State;

(4) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State.'

This draft indicates an agreement that the second option not to surrender would lie when the offence in issue had been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside the territory of the executing Member State.

36. The final wording agreed upon for Article 4.7 of the Framework Decision was:-

'7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;

or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.'

37. Ireland did not opt for Article 4.7.a. But the roots of Article 4.7.b. may be seen in Article 7 of the European Convention on Extradition, 1957, and there is a clear line of thought through to Article 4.7.b. of the Framework Decision.

38. Whether one classifies it as an option as to extra-territoriality or reciprocity, Article 4.7.b. makes provision for an exception to the requirement of surrender which is a fundamental principle of the Framework Decision.

39. Article 4.7 has been described as an example of the principle of reciprocity in the Framework Decision. As stated in Blextoon and van Ballegooij, eds., Handbook on the European Arrest Warrant, (T.M.C. Asser Press, 2005) in chapter 6. The Principle of Reciprocity, by Harman van der Wilt at p. 74:-

"Only one provision in the Framework Decision alludes to the principle of reciprocity. According to Article 4, s. 7 sub. (b), the executing judicial

> authority is allowed to refuse the execution of a European Arrest Warrant, whenever such a warrant envisages offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State. In the corresponding situation the executing state would simply not be able to issue an arrest warrant due to a lack of jurisdiction. The provision restores the equilibrium by offering this state the possibility to restrict the scope of its performances to its own expectations in similar circumstances. This section mirrors Article 7, s. 2 of the European Convention on Extradition."

The case made by the respondent

The European arrest warrant issued in respect of the respondent by Mrs Virginie Brelurut, Deputy State Prosecutor, on the 19th July, 2012, states that it was issued in respect of:

(a) Laundering, as an organised criminal gang, by investment, concealment or conversion, of the proceeds of the crimes of procuring and/or of living off immoral earnings, committed as an organized criminal gang, and of trafficking in human beings, committed as an organized criminal gang; and

(b) Criminal conspiracy for the purposes of preparing to commit the crimes of procuring and/or of living off immoral earnings, committed as an organised criminal gang and of trafficking in human beings, committed as an organized criminal gang.

The offences of which the respondent is accused were allegedly committed in Nigeria and Ireland and France, allegedly *"on an indivisible basis"*, between the 1st April 2008 and the 14th March 2011.

The offence alleged at paragraph (a), above, is contained in Articles 324-1, 324-2, 324-3, 324-4, 324-5, 324-6, 324-7 and 324-8 of the French Criminal Code.

Article 324-1 prohibits money laundering, defined as: *"facilitating by any means the false justification of the origin of the property or income of the perpetrator of a felony or misdemeanour which has brought him a direct or indirect benefit."*

Counsel for the respondent submits that the corresponding offence under the law of Ireland was created by s.7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. This provides that a person commits an offence if—

> "(a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:
>
> (i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;
>
> (ii) converting, transferring, handling, acquiring, possessing or using the property;
>
> (iii) removing the property from, or bringing the property into, the State, and
>
> (b) the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct."

It was submitted that this provision does not purport to have extra territorial effect. Section 8(1) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, however, provides for extra territorial effect in the following limited circumstances:

> "A person who, in a place outside the State, engages in conduct that would, if the conduct occurred in the State, constitute an offence under section 7 commits an offence if any of the following circumstances apply:
>
> (a) the conduct takes place on board an Irish ship, within the meaning of section 9 of the Mercantile Marine Act 1955,
>
> (b) the conduct takes place on an aircraft registered in the State,
>
> (c) the conduct constitutes an offence under the law of that place and the person is—
>
> (i) an individual who is a citizen of Ireland or ordinarily resident in the State, or
>
> (ii) a body corporate established under the law of the State or a company registered under the Companies Acts,
>
> (d) a request for the person's surrender, for the purpose of trying him or her for an offence in respect of the conduct, has been made under Part II of the Extradition Act 1965 by any country and the request has been finally refused (whether or not as a result of a decision of a court), or
>
> (e) a European arrest warrant has been received from an issuing state for the purpose of bringing proceedings against the person for an

offence in respect of the conduct, and a final determination has been made that—

(i) the European arrest warrant should not be endorsed for execution in the State under the European Arrest Warrant Act 2003, or

(ii) the person should not be surrendered to the issuing state."

Counsel points out that the offences are not alleged to have been committed on board a French ship or on an aircraft registered in France. Further, the respondent is not a French citizen and is not ordinarily resident in France. Further still, a request for the respondent's extradition has never been refused by the French authorities. Consequently, counsel for the respondent, submits that the alleged offence, by virtue of having been committed in a place other than the State, does not constitute an offence under the law of the State.

It was further contended that the alleged offence at (b) above derives from articles 450-1, 450-3, 450-5 of the French Criminal Code.

Article 450-1 provides that participation in a criminal association is an offence. Criminal association is defined as *"any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment"*.

Counsel for the respondent submitted that while it is difficult to identify an offence corresponding to article 450-1, s. 72(1) of the Criminal Justice Act 2006 (hereinafter "the Act of 2006") is perhaps the closest. That provides, *inter alia*, that a person who, for the purpose of enhancing the ability of a criminal organisation to commit or facilitate —

> *"(a) a serious offence in the State,*
>
> *(b) in a place outside the State, a serious offence under the law of that place where the act constituting the offence would, if done in the State, constitute a serious offence, knowingly, by act—*
>
> *(i) in a case to which paragraph (a) applies, whether done in or outside the State,*
>
> *(ii) in a case to which paragraph (b) applies, done in the State, on board an Irish ship or on an aircraft registered in the State,*
>
> *participates in or contributes to any activity of the organisation is guilty of an offence."*

Counsel for the respondent made the point that it is not entirely clear whether it is claimed that the offences alleged under Articles 450-1, 450-3, 450-5 of the French Criminal Code were committed to assist "*a serious offence*" in France, or were committed to assist "*in a place outside France, a serious offence under the law of that place where the act constituting the offence would, if done in France, constitute a serious offence*". Nevertheless, it was submitted that, on balance, the respondent is, in effect being charged with enhancing the ability of others to commit, in a place outside France, a serious offence under the law of that place where the act constituting the offence would, if done in France, constitute a serious offence.

It was pointed out that in so far as the offences are alleged to have occurred outside France they are not alleged to have been committed on board a French ship or on an aircraft registered in France.

Counsel for the respondent cites, and seeks to rely upon, this Court's decision in *Minister of Justice v. Connolly* [2012] IEHC 575 (Unreported, High Court, Edwards J., 6th December, 2012) where I stated:

> " … it is manifest that the applicant cannot in fact validly rely upon s.71 of the Act of 2006 as conferring the required extra-territorial jurisdiction to prosecute the respondent in Ireland for the corresponding but hypothetical offence of conspiring outside of Ireland to commit a serious offence outside of Ireland. The case does not satisfy any of the conditions set out in s.71(2) of the Act of 2006. Equally, it seems to the Court that s.71(3) of the Act of 2006 could not be availed of as the Director of Public Prosecutions could not, in the circumstances of this case, be satisfied as to the matters specified in s. 74(3)(a), (b) or (c) of the Act of 2006. The Court has therefore concluded that the second condition within s. 44 of the Act of 2003 is also satisfied. Accordingly, the Court is obliged to refuse to surrender the respondent on extra-territoriality grounds."

It was submitted that similar considerations apply in the present proceedings with regard to the alleged offence of participation in a criminal association.

The case made by the applicant

Counsel for the applicant has submitted that in so far as the respondent's lawyers refer to 'corresponding offences' in the context of their client's s.44 objection that label constitutes something of a misnomer, and creates a danger that two wholly different legal concepts might be conflated.

Counsel for the applicant sought to emphasise that, for the purposes of s. 44 of the Act of 2003, it is not required that there be an offence which corresponds in Irish law to the offence with which the respondent is charged but rather that the act or omission '*constitutes an offence under the law of the State*'. It was submitted that while the offences have been characterised in a particular way in the European arrest warrant the Court must look to the underlying acts or omissions as described, *i.e.* the factual matrix as disclosed in the warrant, to determine whether or not, were the position reversed so as to place Ireland in the position of the requesting state, those acts or omissions would constitute an offence under the law of the State capable of being prosecuted before an Irish Court.

In that regard it was submitted that the underlying acts as described in the European arrest warrant in this case would constitute an offence under the law of the State capable of being prosecuted before an Irish Court.

They are stated to be:

"- Laundering, as an organised criminal gang, by investment, concealment or conversion, of the proceeds of the crimes of procuring and/or of living off immoral earnings, committed as an organized criminal gang, and of trafficking in human beings, committed as an organized criminal gang" (for convenience, the Court will hereinafter refer to this as "Laundering *etc*.");

and

"- Criminal conspiracy for the purposes of preparing to commit the crimes of procuring and/or of living off immoral earnings, committed as an organised criminal gang and of trafficking in human beings, committed as an organized criminal gang" (for convenience, the Court will hereinafter refer to this as "Criminal conspiracy *etc*.").

In relation to the matters characterised as "Laundering *etc*.", it was urged that it is clear, from a consideration of the totality of the information before the Court, that the specific role being attributed to the respondent in all of this is that she received from abroad monies constituting the proceeds of the crimes of the said organised criminal gang (specifically immoral earnings from prostitution, and monies earned from trafficking in human persons), lodged them to a bank account in her name in Ireland and later forwarded them to Nigeria.

Counsel for the applicant submitted that, were the Irish state in the position of the requesting state, the underlying acts said to constitute "Laundering *etc*." would constitute an offence under s.72(1) of the Act of 2006 and that offence could indeed be prosecuted in Ireland.

S. 72(1) of the Act of 2006 provides:

"A person who, for the purpose of enhancing the ability of a criminal organisation to commit or facilitate –

(a) a serious offence in the State, or

(b) in a place outside the State, a serious offence under the law of that place where the act constituting the offence would, if done in the State, constitute a serious offence,

knowingly, by act –

(i) in a case to which paragraph (a) applies, whether done in or outside the State, and

(ii) in a case to which paragraph (b) applies, done in the State on board an Irish ship or on an aircraft registered by the State,

participates in or contributes to any activity of the organisation is guilty of an offence."

Section 72 goes on to further provide in subsections (2) to (5) thereof:

"(2) In proceedings for an offence under subsection (1), it shall not be necessary for the prosecution to prove that—

(a) the criminal organisation concerned actually committed a serious offence in the State or a serious offence under the law of a place outside the State where the act constituting the offence would, if done in the State, constitute a serious offence, as the case may be,

(b) the participation or contribution of the person concerned actually enhanced the ability of the criminal organisation concerned to commit or facilitate the offence concerned, or

(c) the person concerned knew the specific nature of any offence that may have been committed or facilitated by the criminal organisation concerned.

…

(4) For the purposes of this section, facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

(5) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both."

A "serious offence" is defined in s.70(1) of the Act of 2006 as "an offence for which a person may be punished by imprisonment for a term of 4 years or more."

It should be noted in passing that the provisions just quoted are from s. 72 as originally enacted. A new s. 72 was substituted by s. 6 of the Criminal Justice (Amendment) Act 2009 and the new section came into effect on the 23rd of July, 2009. The relevance of this is that the underlying acts are stated in the warrant to have taken place "between the 1st of April 2008 and 14th March 2011."

To the extent relevant, s. 72 in its amended form provides:

“72.— (1) A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not)—

(a) intending either to—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence, or

(b) being reckless as to whether such participation or contribution could either—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.

(3) The reference in subsection (1) to the commission of a serious offence includes a reference to the doing of an act in a place outside the State that

constitutes a serious offence under the law of that place and which act would, if done in the State, constitute a serious offence.

(4) In proceedings for an offence under this section it shall not be necessary for the prosecution to prove—

(a) that the criminal organisation concerned or any of its members actually committed, as the case may be—

(i) a serious offence in the State, or

(ii) a serious offence under the law of a place outside the State where the act constituting the offence would, if done in the State, constitute a serious offence,

(b) that the participation or contribution of the defendant actually—

(i) enhanced the ability of the criminal organisation concerned or any of its members to commit, or

(ii) facilitated the commission by it or any of its members of, a serious offence, or

(c) knowledge on the part of the defendant of the specific nature of any offence referred to in subsection (1)(a) or (b).

…"

It was urged that when the underlying acts said to constitute the offence of "Laundering *etc*." are considered it is evident that we are concerned with the facilitation of the serious offences of organising prostitution, and of trafficking in

human persons. Those are serious offences as defined in s. 70(1) both under French law (where the potential penalty for both is up to 10 years imprisonment) and under Irish law (where the potential penalty for organising prostitution is imprisonment for up to 5 years (s.9 of the Criminal Law (Sexual Offences) Act 1993) and the potential penalty for trafficking in human persons is imprisonment for up to life. The facilitation involved was the act of processing the monies through accounts in the name of the respondent. The offence is created by the respondent knowingly doing the act in question and it matters not whether it was done within or outside of the State. Accordingly, it is clear that the required reciprocity exists and that if the situation were reversed, and Ireland was in the position that the requesting State France is now in, Ireland would be entitled to assert extra territorial jurisdiction in respect of the acts underlying the offence characterised as "Laundering *etc*." on the basis that they would be prosecutable here as a offence contrary to s. 72(1) of the Act of 2006, whether that be s.72(1) or originally enacted or as later substituted.

In so far as the acts underlying the offence characterised in the warrant as "Criminal Conspiracy *etc*." are concerned, it was submitted these acts could be prosecuted under s.71 of the Act of 2006 (were the facts reversed).

In its original form, s. 71 stated:

"(1) Subject to subsections (2) and (3), a person who conspires, whether in the State or elsewhere, with one or more persons to do an act—

(a) in the State that constitutes a serious offence, or

(b) in a place outside the State that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence,

is guilty of an offence irrespective of whether such act actually takes place or not.

(2) Subsection (1) applies to a conspiracy committed outside the State if—

(a) the offence, the subject of the conspiracy, was committed, or was intended to be committed, in the State or against a citizen of Ireland,

(b) the conspiracy is committed on board an Irish ship,

(c) the conspiracy is committed on an aircraft registered in the State, or

(d) the conspiracy is committed by an Irish citizen or a stateless person habitually resident in the State.

(3) Subsection (1) shall also apply to a conspiracy committed outside the State in circumstances other than those referred to in subsection (2), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings for an offence under subsection (1) except in accordance with section 74 (3).

(4) A person charged with an offence under this section is liable to be indicted, tried and punished as a principal offender.

(5) A stateless person who has his or her principal residence in the State for the 12 months immediately preceding the commission of a conspiracy is, for

the purposes of subsection (2), considered to be habitually resident in the State on the date of the commission of the conspiracy."

Section 4 of the Criminal Justice Act of 2009 later effected some minor amendments to s. 71 of the Act of 2006. However, these are of no consequence in the present proceedings.

The applicant contends that the respondent could be prosecuted for conspiracy to commit a serious offence contrary to s. 71 of the Act of 2006, and could be so prosecuted regardless of whether the conspiracy was committed in Ireland, in France or in Nigeria, or in any two or more of those states. The offence of dealing with the proceeds of criminal conduct, contrary to s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 could constitute the serious offence. Moreover, to the extent that the conspiracy to commit that offence may have been committed outside the State the respondent could rely upon s. 71(2)(a) on the basis that acts done in furtherance of the conspiracy were committed within the State *i.e.*, monies constituting the proceeds of crime were dealt with in the State in as much as they were lodged by the respondent to a bank account in this State before being transferred to Nigeria.

The Court's Decision

The first condition for the engagement of s. 44 requires that *"the offence specified in the European arrest warrant … was committed or is alleged to have been committed in a place other than the issuing state"*. It is specifically alleged that both crimes, the subject matter of the warrant, were allegedly committed in France, Ireland,

and Nigeria *"on an indivisible basis"*. The Court interprets that as an assertion that these were transnational crimes. In those circumstances it might be contended, on one view of matters, that the warrant does not in fact allege that the crimes in question were committed in a place other than the issuing state. However, it also has to be borne in mind that to the extent that the respondent is personally implicated, the alternative view that could be taken is that relevant acts can be said to have been committed in Ireland and/or Nigeria.

If, for the moment, the Court proceeds upon an assumption that the first condition can be satisfied, it must then consider whether in addition to that the second condition for the engagement of s.44 can also be satisfied. The second condition requires that "*the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State*". Transposing that, as suggested by Denham C.J. in *Minister for Justice, Equality and Law Reform v. Bailey* [2012] IESC 16 (Unreported, Supreme Court, 1st March, 2012) the requirement is that "the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State".

The Court agrees with counsel for the applicant that the acts underlying the offence characterised in the warrant as "Laundering *etc.*" could be prosecuted in Ireland as acts of participation in or contribution to the activities of a criminal organisation done for the purpose of enhancing the ability of that criminal organisation to commit, or to facilitate, the serious offences of organising prostitution, and of trafficking in human persons. The enhancement of ability, or facilitation,

involved the lodgment of monies consisting of immoral earnings and/or the proceeds of those crimes through accounts in the name of the respondent, and the subsequent onward forwarding of those monies to Nigeria. The offence is clearly prosecutable in Ireland in that at least some of the underlying acts are alleged to have been committed in the State. Moreover, to the extent that it is alleged that they may have been committed in the issuing state, it is clear that they constitute a serious offence under French law and would, if done in Ireland, constitute a serious offence here. It is clear that the required reciprocity exists and that if the situation were reversed, and Ireland was in the position that the requesting State France is now in, Ireland would be entitled to assert extra territorial jurisdiction in respect of the acts underlying the offence characterised as "Laundering *etc*." on the basis that they would be prosecutable here as an offence contrary to s. 72(1) of the Act of 2006, whether that be s.72(1) as originally enacted or as later substituted.

The quotation relied upon by the respondent from this Court's judgment in *Minister for Justice & Equality v. Connolly* related to s.71 of the Act of 2006 and it has no application in the context of s.72 of that Act.

Turning then to the acts underlying the offence characterised in the warrant as "Criminal conspiracy *etc*.", it must be stated that, once again, it not entirely clear in circumstances where the offence is alleged to have been committed in France, Ireland, and Nigeria *"on an indivisible basis"*, that the first condition specified in s.44 can be satisfied. However, proceeding once again upon an assumption that it can indeed be satisfied, the Court must then consider whether in addition to that the second condition for the engagement of s.44 in relation to this offence can also be satisfied.

The Court agrees with counsel for the applicant that the acts in question are prosecutable in Ireland as the offence of conspiracy to do an act in the State that constitutes a serious offence, contrary to s.71 of the Act of 2006, *i.e.*, the offence of dealing with the proceeds of criminal conduct, contrary to s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010.

To the extent that the crime of conspiracy to commit a serious offence may have been committed in France, the applicant can indeed rely upon s. 71(2)(a). It is important to remember that conspiracy does not exist as an offence in its own right, whether at common law or under statute. It exists only as an inchoate form of some substantive offence. A conspiracy is no more than an agreement, frequently clandestine or surreptitious, to do something. The thing that renders it a crime is when the "something" is the commission of an unlawful act. In the context of s. 71 of the Act of 2006, the statutory offence is committed by the formation of an agreement to commit some offence that is defined as a serious offence by s. 70(1) of the same Act. The serious offence is the substantive offence. However, it is not required that the substantive offence be prosecutable on an extra territorial basis, merely that the inchoate version of that offence *i.e.*, the entering into of an agreement to commit the substantive offence, is prosecutable on an extra territorial basis. Section 71(2)(a) allows an agreement entered into at a place outside the State (*e.g.*, in France) to commit a serious offence, *i.e.*, a s.71 type conspiracy, to be prosecuted in the State where it was intended by the conspirators that the substantive offence should be committed in Ireland, and the substantive offence also constitutes a serious offence under the law of the said place outside the State. In this case it was envisaged that

certain critical acts to be performed in furtherance of the conspiracy would be performed within the State *i.e.*, that monies constituting the proceeds of crime would be transferred into the respondent's possession and be lodged by her to a bank account in this State before being transferred onwards to Nigeria. In circumstances where it is clear that laundering the proceeds of crime is also a serious offence under French law, the applicant can avail of section 71(2)(a). In the circumstances the second condition of s. 44 of the Act of 2003 is not met in relation to the acts underlying the offence characterised as "Criminal conspiracy *etc*."

In the circumstances outlined the Court agrees with counsel for the applicant that s.44 of the Act of 2003 is not engaged in the case of either of the offences which are the subject matter of the warrant, and the respondent's s.44 objection cannot therefore be upheld.

The S. 37 objection

Relevant Statutory and Treaty Provisions

Section 37(1)(a) of the Act of 2003 provides:

"A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention,…"

Section 37(2) defines "Convention" as follows:

"In this section—

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994 …"

Article 8 of the ECHR 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 is 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 and freedoms of others."

Relevant Case Law

The first case in this jurisdiction in which article 8 of the ECHR was successfully invoked as a basis for resisting surrender in the European arrest warrant context was the case of *Minister for Justice, Equality and Law Reform v. Gorman* [2010] 3 I.R. 583. In that case the respondent was wanted by the Northern Ireland authorities for trial on charges of murder and conspiracy to murder. He was resident in this jurisdiction, not far from the border with Northern Ireland. The offences were alleged to have been committed by the respondent in 1992. In early 1994 he was arrested in this jurisdiction for the purpose of extradition to Northern Ireland and was brought before the District Court pursuant to the provisions of Part III of the Extradition Act, 1965, as amended. He was remanded in custody on a couple of

occasions until a date in April 1994 when Counsel for the Attorney General informed the Court that no evidence was being offered and the respondent was discharged. The background to those events was that another person, Joseph Magee, had also been arrested for the purpose of his extradition on similar charges, but the application for his extradition was refused by the High Court here, on the basis that the offences constituted political offences and that the case against him had been the subject of such adverse publicity in the requesting state that his right to a fair trial had been prejudiced. It was in the light of that situation that no evidence was offered in relation to the application for the respondent Gorman's extradition in 1994, and he was discharged. Prior to his being discharged, he had been in custody for approximately two months. Following his discharge in April 1994 Mr Gorman resided openly in Bailieborough, Co. Cavan with his wife and four children, working nearby and involving himself fully in the life of his community. Two of his children, who were still of school-going age, attended a local school. By his own account he had lived his life since 1994 on the basis that he neither could nor would be extradited or otherwise ordered to go back to the United Kingdom for trial on the charges mentioned above. However, following the coming into operation of the European arrest warrant system in 2003 the legal obstacles that had previously existed to his extradition were ostensibly removed. On the 14th of February, 2007 the U,K, issued a European arrest warrant seeking his return to Northern Ireland to face trial for the offences in question. Mr Gorman sought to resist his rendition on various grounds at a contested surrender hearing before Peart J. in the High Court. Among the grounds relied upon was a contention that his surrender would constitute a disproportionate interference with his right to respect for his private and family life under article 8 ECHR, and that

his surrender ought therefore to be refused under s. 37(1)(a) of the Act of 2003. He was successful in resisting his surrender on that basis.

In the course of dealing with this issue in his judgment, Peart J reviewed relevant Irish and European case law, including the Supreme Court's decision in *Minister for Justice, Equality and Law Reform v. Gheorgie* [2009] IESC 76 (Unreported, Supreme Court, Fennelly J., 9th April, 2009) and the decisions of the European Court of Human Rights (hereinafter ECtHR) in *Slivenko v Latvia* (Application No 48321/99, 9th October, 2003) and *Sezen v Netherlands* [2006] 43 E.H.R.R. 621.

Having done so, he stated:

> "It seems to me to follow that for the purposes of the present application for the respondent's surrender, this Court is required to consider the following questions in arriving at a conclusion as to whether an order for the surrender of the respondent to the United Kingdom would constitute a breach of this State's obligations under the Convention or its Protocols: (1) does surrender constitute an interference with the respondent's private/family right; (2) if so, is that interference one that is in accordance with law; (3) if further so, is the interference, by surrender of the respondent, in pursuit of a legitimate aim or objective; (4) and further if so, whether that interference is necessary in a democratic society (the latter meaning that it is justified by a pressing social need) and proportionate to the legitimate aim pursued."

Applying these principles to the facts of Mr. Gorman's case, Peart J. concluded that it would indeed be a disproportionate measure to surrender Mr. Gorman. In that regard he stated:

> "In assessing the question of the balance to be struck between this State's obligation to surrender and the rights of the respondent to family and private rights, I am of the view that proportionality is not satisfied on the unique and exceptional facts of this case. In my view, the obligation to surrender which this State is under by virtue of its

> international obligations must yield to the Article 8 rights of the respondent, and in my view therefore his surrender is prohibited by the provisions of section 37 of the Act."

It is, I believe, a matter of some significance that he chose to characterise the facts in that case as being "unique and exceptional". Moreover, the decision in *Gorman* was rendered against the background of the robust rejection of an objection to surrender on article 8 grounds in the case of *Gheorgie* previously referred to, both by Peart J. himself in the High Court, and later by the Supreme Court on appeal.

In *Minister for Justice, Equality and Law Reform v Gheorgie* [2008] IEHC 115 (Unreported, High Court, Peart J., 9th April, 2008) the respondents were husband and wife who left Romania and came to this State in August 2000, but in due course their surrender was sought on European arrest warrants so that they could be surrendered to serve lengthy sentences of imprisonment imposed upon them in their absence for offences of fraud committed in 1999/2000. The warrants had been issued in January 2007. The respondents had stated in affidavits that they had left Romania in August 2000 in order to make a new life elsewhere and were unaware, until much later, that they were being accused of certain offences. They went on to say that since their arrival in this State they had integrated into their local community here and had also had two children born here who were attending school here. It was submitted that an order for the surrender of both parents of these children would constitute a breach of family rights under the Constitution and under article 8 of the ECHR. Deciding that particular issue, Peart J stated as follows:

> "In my view this objection must be rejected *in limine*. There can be no basis for the contention that persons, who have by absconding settled in another jurisdiction, cannot be the subject of a surrender order pursuant to extradition or surrender arrangements entered into between states. No authority has been put forward on

> behalf of the respondents in this regard, and it could not possibly be the case, since the circumstances in which the respondents contend such breaches arise are likely to arise in very many cases where persons have left one jurisdiction and, by the time their surrender or extradition is sought, have settled in another jurisdiction with other members of their family. It is nowhere contemplated that such circumstances could prevent an order of surrender or extradition being made."

The Supreme Court dismissed the respondents' appeal. Giving judgment for the Court, Fennelly J. stated:

> "Like Peart J, I would also dismiss the third ground of appeal *in limine*. It is a regrettable but inescapable incident of extradition in general and, as in this case, surrender pursuant to the system of the European arrest warrant, that persons sought for prosecution in another state will very often suffer disruption of their personal and family life. Some states have historically refused to extradite their own nationals, but that is a special case. The Framework Decision expressly provides that, in Article 1, that it does 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." No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffer disruption, even severe disruption of family relationships."

The decision of the Supreme Court in *Gheorgie* reflects an important point and it is this. Article 8 of the ECHR does not guarantee private and family life. What it guarantees is *"respect for private and family life"*, which is an entirely different thing. This very point has previously been made by Feeney J. in his judgment in *Agbonlahore v. Minister for Justice, Equality & Law Reform* [2007] 4 I.R. 309. Feeney J stated at paragraph 13 of the reported judgment in that case:

> 'Article 8 does not protect private or family life as such. In fact it guarantees a "respect for these rights". In view of the diversity of circumstances and practices in the contracting states, the notion of "respect" (and its requirements) are not clear cut; they vary considerably from case to case: (see *Abdulaziz and Others v. United Kingdom* (1985) 7 E.H.R.R 471 at para. 67). The main issue which has concerned the

> European Court of Human Rights in relation to the concept and scope of "respect" is whether such obligation is purely a negative one or whether it also has a positive component. The court has stressed on many occasions that the object of article 8 is essentially that of protecting the individual against arbitrary interference by public authorities and that such is a primarily negative undertaking but that nevertheless it has on occasions indicated that there may in addition be positive obligations upon states that are inherent in effective respect for article 8 rights. There have been occasional challenges to deportations on the ground of interference with article 8 rights. Those challenges have almost always been based on interference with "family life" rather than "private life". In *Abdulaziz and others v. United Kingdom* the court held, at p. 497, that whilst there might be positive obligations to respect the family, a State "had a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals …".'

Ever since the decision in *Minister for Justice, Equality and Law Reform v. Gorman* the Courts have proceeded on the basis that non-surrender on article 8 grounds is possible in a European arrest warrant case, but that having regard to the strong public interest in extradition, and the need for this State to live up to its international obligations, the bar to be vaulted by an objector on article 8 grounds is set at a high level.

Consistent with this, I stated in *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011) that:

> " ….the Court notes and agrees with the views of Fennelly J in the *Gheorge* case that surrender is not to be refused just because a person may suffer disruption, even severe disruption, of family relationships. In my view the bar for judicial intervention is set at a significantly higher level than that. A refusal of surrender on article 8 grounds should only be contemplated where the interference is a gross one and constitutes a clear and unequivocal failure to respect the article 8 rights of those affected.

The level of disruption of family relationships occasioned by the imprisonment of a family member, even the parent of a minor child, will not normally be regarded as a gross interference with the right to respect for family life or a breach of the article 8 rights of those affected. It is of the essence of statehood that a sovereign state should be free to operate a police and criminal justice system for the prevention of crime and disorder and the protection of the rights and freedoms of its citizens and others. The entitlement to operate a police and criminal justice system must include the entitlement to operate a prison system, and in appropriate cases to deprive people of their liberty by sending them to prison.

It is in the nature of imprisonment that many of the personal rights (whether they be constitutional or convention rights) enjoyed by persons at liberty will be suspended or abrogated by the very fact of that person being remanded to or detained in a prison, especially where he or she has been sentenced to a term of imprisonment. Of course, a prisoner will always have certain residual personal rights which are not abrogated or suspended, such as the right to life and the right to be treated humanely and with human dignity. However, it needs to be said that the sending of a person to prison will inevitably severely impinge upon their opportunity to have society with, and to enjoy the company of, their family members including any children they may have. Such society as is permitted is likely to be occasional, limited and restricted in a multitude of ways in the interests of security and good order within the prison system. Moreover, the ability of a prisoner to earn a salary or wage to support his family will be suspended, and his ability to exercise his guardianship rights with respect to his children will also inevitably be severely curtailed. Such interferences with family life are a usual feature of, and are to be expected of, any prison system. Many of the rights or entitlements in that regard that the prisoner would otherwise have, but for the fact that he is in prison, are suspended or abrogated for the duration of his or her sentence or period of remand. Moreover such suspension or abrogation of the prisoner's rights to participation in family life will in most circumstances be considered to be a measure proportionate to legitimate aims and objectives of the imprisoning state.

That this is so is reflected in Article 8(2) of the Convention which permits interference by a public authority with the exercise of the right to respect for family life where that is "*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 and freedoms of others*". It would be preposterous to suggest that persons could not, or should not, be sent to prison simply because that would interfere, and indeed significantly interfere, with their enjoyment of family life, or that the sending of persons, particularly any person with a spouse and children, to prison would amount to a failure to respect the right of those affected to family life. That is not to say that there can never be circumstances in which a person's imprisonment could amount to a failure to respect family life but such circumstances would be highly exceptional and are likely to be exceedingly rare. Before a Court would intervene in that regard it would have to be satisfied as to the existence of some truly exceptional circumstance that would render the usually permitted level of interference with family life that imprisonment normally entails unacceptable in the circumstances of the particular case and disrespectful of the right to family life as guaranteed by article 8."

Accordingly, in *Bednarczyk* the test for the purposes of Irish extradition law was expressed in terms of an exceptionality requirement *i.e.*, that what was required to be demonstrated was *"some truly exceptional circumstance that would render the usually permitted level of interference with family life that imprisonment normally entails unacceptable in the circumstances of the particular case and disrespectful of the right to family life as guaranteed by article 8."*

In framing the test in that way this Court sought to reflect the approach advocated in a number of judgments of the ECtHR.

For example, in *Launder v. United Kingdom* (Application no. 27279/95, 8th December, 1997) [1997] E.C.H.R. 106 an admissibility decision of the former European Commission on Human Rights, it was stated:

> "The Commission considers that it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the

> requesting State would be held to be an unjustified or disproportionate interference with the right to respect for family life. The Commission finds that in the present case no such circumstances have been shown to exist."

Similarly, but more recently, the ECtHR, reiterated the Commission's view in *King v United Kingdom* (Application no. 9742/07, 26th January, 2010) [2010] E.C.H.R. 164 that:

> "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 (see *Launder v. the United Kingdom*, no. 27279/95, Commission decision of 8 December 1997). In the applicant's case, the Court notes that he relies on the fact that he has a wife, two young children and a mother in the United Kingdom, whose ill-health would not allow her to travel to Australia. This, in the Court's view, is not an exceptional circumstance which would militate in favour of the applicant's non-extradition. Although the long distance between the United Kingdom and Australia would mean the family would enjoy only limited contact if the applicant were extradited, convicted and sentenced to a term of imprisonment there, the Court cannot overlook the very serious charges he faces (see *Raidl v. Austria*, no. 25342/94, Commission decision of 4 September 1995). Given those charges, and the interest the United Kingdom has in honouring its obligations to Australia, the Court is satisfied that the applicant's extradition cannot be said to be disproportionate to the legitimate aim served. It follows that this part of the application must be also rejected as manifestly ill founded, pursuant to Article 35 §§ 3 and 4 of the Convention."

More recently still, the ECtHR again re-iterated that exceptional circumstances were required in *Babar Ahmad and Others v. United Kingdom*, (Application no 24027/07, 10th April 2012) [2012] E.C.H.R. 609, stating:

> "For the ninth complaint, that extradition would be a disproportionate inference with their family and private life in the United Kingdom, the Court reiterates 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 (see *King v. the United Kingdom* (dec.), no. 9742/07, 26 January 2010). There are no such exceptional circumstances in the fifth and sixth applicants' case, particularly given the gravity of the offences with which they are charged. This complaint is therefore manifestly ill founded."

Since the delivery of this Court's judgment in *Minister for Justice & Equality v. Bednarczk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011) it has applied the same test in a number of article 8 cases that have come before it, *i.e.*, *Minister for Justice & Equality v Machaczka*, [2012] IEHC 434 (Unreported, High Court, Edwards J., 12th October, 2012); *Minister for Justice & Equality v. Staniak* [2012] IEHC 508 (Unreported, High Court, Edwards J., 22nd November, 2012) ; *Minister for Justice & Equality v. Klier* [2012] IEHC 533 (Unreported, High Court, Edwards J., 27th November, 2012); and *Minister for Justice & Equality v. Jermolajevs* [2013] IEHC 102 (Unreported, High Court, Edwards J., 12th February, 2012).

In the case of *Machaczka* the Court was satisfied that truly exceptional circumstances had in fact been demonstrated and refused to surrender the respondent on the grounds that to do so would represent a disproportionate interference with his rights under article 8 of the ECHR. In the cases of *Staniak, Klier* and *Jermolajevs*, respectively the Court rejected objections based upon article 8.

However, the Court has now become aware of a line of jurisprudence that has developed in the United Kingdom suggesting that it is undesirable to frame the article 8 test in terms of an exceptionality requirement as it is too restrictive, and could theoretically lead to an injustice being done in that small number of cases where the existence of ordinary or at least unexceptional circumstances could, in the event of a

proposed surrender going ahead, give rise to consequences so profoundly affecting that person, or members of his or her family, as to render it disproportionate to surrender.

This line of jurisprudence can be traced back to a consideration of article 8 issues arising in the immigration context in the case of *Huang v. Secretary of State for the Home Department* [2007] 2 A.C. 167. However, before I refer to *Huang* in more detail, it is important to record that up until the House of Lords gave judgment in that case some Courts in the U.K. were propounding an article 8 test framed in terms of an exceptionality requirement.

For example, in *R (Bermingham) v. Director of the Serious Fraud Office* [2007] 2 WLR 635, Laws L.J. had stated:

> "117 Before drawing any conclusions from this learning I should refer to a decision of the Commission at Strasbourg which is directly in point. This is *Launder v United Kingdom* (1997) 25 EHRR CD 67. The applicant claimed that his extradition to Hong Kong would interfere with his family life in violation of ECHR article 8, and would be disproportionate to the proposed extradition's legitimate aim. On the issue of proportionality the Commission stated at para 3:
>
> > '[I]t is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting State would be held to be an unjustified or disproportionate interference with the right to respect for family life.'
>
> 118. In my judgment this statement and the authorities in their Lordships' House are, with respect, entirely in line. If a person's proposed extradition for a serious offence will separate him from his family, Article 8(1) is likely to be engaged on the ground that his family life will be interfered with. The question then will be whether the extradition is nevertheless justified pursuant to Article 8(2). Assuming compliance with all the relevant requirements of domestic law the issue is likely to be one of proportionality: is the interference with family life proportionate to the

> legitimate aim of the proposed extradition? Now, there is a strong public interest in "honouring extradition treaties made with other states" (*Ullah*, paragraph 24). It rests in the value of international co-operation pursuant to formal agreed arrangements entered into between sovereign States for the promotion of the administration of criminal justice. Where a proposed extradition is properly constituted according to the domestic law of the sending State and the relevant bilateral treaty, and its execution is resisted on Article 8 grounds, a wholly exceptional case would in my judgment have to be shown to justify a finding that the extradition would on the particular facts be disproportionate to its legitimate aim."

Returning then to the case of *Huang v. Secretary of State for the Home Department*; in that case the Appellate Committee of the House of Lords was concerned with an immigration appeal in which a proposed deportation was being resisted on, *inter alia*, article 8 grounds, and stated in the course of its judgment that:

> "While the case law of the Strasbourg court is not strictly binding, it has been held that domestic courts and tribunals should, in the absence of special circumstances, follow the clear and constant jurisprudence of that court: *R(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] [2003] 2 AC 295, para 26; *R(Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20. It is unnecessary for present purposes to attempt to summarise the Convention jurisprudence on article 8, save to record that the article imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it. The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the

family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment.

Proportionality

In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate:

> 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (p 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality

> ‘must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage’ (see para 20).

If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good.

In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in Razgar above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test.”

The decision in *Huang* was later considered in *Zigor Ruiz Jaso v. Central Criminal Court (No 2) Madrid* [2007] 1 W.L.R. 2798 in which article 8 was relied upon to resist surrender on foot of a European arrest warrant. (Somewhat confusingly, this case is at times cited in subsequent case law as *Ruiz v. Central Criminal Court (No 2) Madrid* and at other times as *Jaso v Central Criminal Court (No 2) Madrid*. It is, however, the same case. For the purposes of the present case it is proposed hereinafter to refer to “*Ruiz* (otherwise *Jaso*)”.) In his judgment in *Ruiz* (otherwise *Jaso*), Dyson L.J. stated:

“I turn finally to article 8. The district judge held that, even if the appellants were subject to incommunicado detention and prison dispersal, they had not established a case "of wholly exceptional circumstances which could be held to be an unjustified or disproportionate interference with their article 8 rights" (p 16). I refer to the prison dispersal policy at paras [59 and 61 below]. The reference to "exceptional circumstances is derived from *Launder v UK* (1997) 25 EHRR CD 67, para 3 (an extradition case) para 3 and *R Bermingham* v. Director of the Serious Fraud Office [2007] QB 727, para 118 where Laws LJ said that the execution of a properly constituted extradition could be resisted on article 8 grounds only where a ‘wholly exceptional case’ is shown ‘to justify a finding that the extradition would on the particular facts be disproportionate to its legitimate aim’. As I have said, in *Ullah’s case* [2004] 1 AC 323, Lord Bingham said that the difficulty facing an applicant will be no less where he is relying on article 8 than where he is relying on articles 5 and 6. *Ullah’s* case was an article 9 case. Article 8 was directly in play in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368. In *Huang’s case* [2007] 2 AC 167, the House of Lords said that in an immigration case, a fair balance must be struck between the rights of the individual and the interests of the community. There was no test of exceptionality, but there was an expectation that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority (para 20).

Mr Gordon submits that the district judge was in error in applying an exceptionality test. I agree that it is not right to apply such a test as a formula for proportionality. So much is made clear by *Huang’s* case. As Sedley LJ said in *AG (Eritrea) v Secretary of State for the Home Department* [2008] 2 All ER 28, para 31: ‘The fact that in the great majority of cases the demands of immigration control are likely to make removal proportionate and so compatible with article 8 is a consequence, not a precondition, of the statutory exercise’. The same applies in relation to extradition. What is required is that the court should decide whether the interference with a person's right to respect for his private or (as the case may be) family life which would result from his or her extradition is proportionate to the legitimate aim of honouring extradition treaties with other states. It is clear that great weight should be accorded to the legitimate aim of honouring extradition treaties made with other states. Thus, although it is wrong to apply an exceptionality test, in an extradition case there will have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's article 8 rights.”

Ruiz (otherwise *Jaso*) was followed by Richards L.J., when giving the leading judgment in the Divisional Court in *Tajik v. Director of Public Prosecutions and Government of the United States of America* [2008] EWHC 666 (Admin). He said at para. 156:

> "What is said in Jaso about the need for 'striking and unusual facts' to lead to the conclusion that extradition would be disproportionate does not constitute a separate legal test but recognises the practical reality that article 8 will rarely provide a ground for refusing extradition"

The approach commended by Dyson L.J. in *Ruiz* (otherwise *Jaso)* was endorsed, and elaborated further upon, by the U.K. Supreme Court in *Norris v. Government of United States of America (No 2),* [2010] 2 A.C. 487. In *Norris,* the Government of the United States of America sought the extradition of the defendant, a British citizen, and a former chief executive officer of a leading international manufacturer of carbon products, to stand trial on indictment in respect of four alleged offences, including one offence of conspiracy with other producers of carbon products to operate a price fixing arrangement or cartel in several countries including the United States, and three offences of conspiracy to obstruct justice by witness tampering and by the alteration, destruction, mutilation and/or concealment of evidence. In the course of the extradition proceedings, which were commenced before a district judge, the defendant was ultimately successful, following a series of appeals which went all the way to the House of Lords, in his objection to being extradited on the price fixing count on the grounds that correspondence could not be demonstrated with an offence under the law of England and Wales. Following the House of Lords decision, the case was remitted to the district judge with regard to outstanding issues. It was then unsuccessfully argued before the district judge that due to the ill-health of the defendant and his wife, who were then aged 65 and 64 respectively, their mutual

dependency based on a long and close marriage, and the effect that his extradition would have on his wife's depressive illness, the interference with their rights under article 8 of the European Convention on Human Rights that his extradition would entail would be disproportionate to the public interest in his extradition for charges subsidiary to the main cartel charge. Having rejected the defendant's article 8 objections, the district judge ordered the defendant's extradition. The defendant then appealed to a Divisional High Court in Queen's Bench Division, who rejected his appeal. He then further appealed to the U.K. Supreme Court but this appeal was also dismissed.

The main judgment in the case was given by Lord Phillips of Worth Matravers PSC, with whom all the members of the court agreed. He stated that the case concerned a primary issue of principle, and a number of subsidiary issues of principle. Referring to the primary issue of principle, he stated (at paras. 12 and 13):

> "12. The primary issue of principle is whether the court can properly require a person resisting extradition on article 8 grounds to demonstrate exceptional circumstances. Mr Sumption contends that the Divisional Court erred in doing just this. His argument is precisely expressed in the following two paragraphs of his written case:
>
> > '19. [The Divisional Court's] essential error was that they sought to balance the principle of international cooperation in enforcing the criminal law, against the respect due to the private and family life of accused persons. Concluding that the former was the more potent interest, they held as a matter of law that the latter could prevail only on facts which were 'striking or unusual' or which reached a 'high threshold'. Hence the question which they certified as being of general public importance: 'Is the public interest in honouring extradition treaties such as to require, in any extradition case, that an appellant must show 'striking and unusual facts' or reach 'a high threshold' if his article 8 claim is to succeed?'The effect is to create a strong

presumption against the application of article 8 in extradition cases, and to require exceptional circumstances before any objection to extradition on article 8 grounds can succeed, a proposition which has been rejected by the House of Lords, following a substantial body of case law in the European Court of Human Rights.

20. The correct approach is to balance the public interest in the extradition of this particular accused against the damage which would be done to the private or family life of this particular accused and his family. The court must ask how much damage will really be done to the orderly functioning of the system of extradition, or the prevention of disorder or crime, by declining to extradite Mr. Norris in this case. And whether that damage is so great as to outweigh the devastating impact that extradition would have upon the rest of his and his wife's life together. These questions must, moreover be answered with an eye to the fact that the test imposed by article 8(2) is not whether his extradition is on balance desirable, but whether it is necessary in a democratic society.'

13. For the Government Mr Perry QC has not sought to challenge the assertion that the court must not replace the test of proportionality with a test of exceptionality. His submission has been that the Divisional Court has not done so. All that it has done is to acknowledge the fact that, in an extradition context, an article 8 challenge will rarely succeed. This is unobjectionable."

Lord Phillips went on to state (at para. 15):

"Before embarking on an analysis of the jurisprudence I would make these preliminary observations. The jurisprudence often deals with deportation and extradition without distinguishing between the two. In one context this is understandable. Usually human rights issues relate to the treatment of an individual within the jurisdiction of the State whose conduct is under attack ("domestic cases"). Issues have, however, arisen as to whether, and in what circumstances, the Convention can be infringed by despatching a person to a territory where there is a risk that his human rights will not be respected ("foreign cases"). In considering such issues it may be of no or little relevance whether the individual in question is facing deportation or extradition. It would, however, be a mistake to assume that this question is of no relevance in a case such as the present. This is a domestic case. The

> family rights that are in issue are rights enjoyed in this country. The issue of proportionality involves weighing the interference with those rights against the relevant public interest. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing from this country an alien who has been convicted of a crime and who has served his sentence for it, or whose presence here is for some other reason not acceptable."

Lord Phillips then went on to review the Strasbourg jurisprudence followed by the U.K.'s domestic jurisprudence.

His review of the Strasbourg jurisprudence ranged across the ECtHR's decisions in *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439; *HG v. Switzerland* (Application No 24698/94) (unreported, E.Comm.HR, 6 September 1994); *Raidl v. Austria* (1995) 20 E.H.R.R. CD 114; *Launder* (cited above); *Chalal v. United Kingdom* (1996) 23 E.H.R.R. 413; *Boultif v. Switzerland* (2001) 33 E.H.R.R. 1179; *Üner v. The Netherlands* (2006) 45 E.H.R.R. 421 and *Saadi v. Italy* (2009) 49 E.H.R.R. 30.

In terms of relevant domestic jurisprudence his review covered *R (Ullah) v. Special Adjudicator; Do v. Immigration Appeal Tribunal* [2004] 2 A.C. 323; *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368; *R (Bermingham) v. Director of the Serious Fraud Office* (cited above); *Huang v. Secretary of State for the Home Department* (cited above); *AG (Eritrea) v. Secretary of State for the Home Department* [2008] 2 All E.R. 28; *Ruiz v. Central Criminal Court (No 2) Madrid* (i.e., *Ruiz* (otherwise *Jaso*), cited above); *Tajik v Director of Public Prosecutions and Government of the United States of America* (cited above) and, finally, *R (Wellington) v. Secretary of State for the Home Department* [2009] 1 A.C. 335 .

In considering the approach of the Divisional High Court against whose decision the defendant (*Norris*) was appealing, Lord Phillips noted that Laws L.J., who had given judgment for the Divisional Court, had followed the approach adopted by that Court in *Ruiz* (otherwise Jaso) and *Tajik*. Laws L.J. had stated:

> "21 … the learning, here and in Strasbourg, shows that the public interest in giving effect to bilateral extradition arrangements possesses especially pressing force because of its potency (a) in the fight against increasingly globalised crime, (b) in the denial of safe havens for criminals, and (c) in the general benefits of concrete co-operation between States in an important common cause. The gravity of the particular extradition crime may affect the weight to be attached to these factors, but because they are of a strategic or overarching nature, the public interest in extradition will always be very substantial. Accordingly the claim of a prospective extraditee to resist his extradition on article 8 grounds must, if it is to succeed, possess still greater force. That is why there must be 'striking and unusual facts' (*Ruiz*), and 'in practice a high threshold has to be reached' (*Tajik*).
>
> 22. That is how the balance between the public interest and the individual's right, inherent in the whole of the Convention, is to be struck where an article 8 claim is raised in an extradition case. Their Lordships in Huang disapproved the application of a test of 'exceptionality' as the means of striking the balance; though it is perhaps not without interest that the European Commission of Human Rights stated in *Launder v United Kingdom* (1997) 25 EHRR CD 67 that 'it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life.' The formulations in *Ruiz* and *Tajik* show that what was sought, incorrectly, to be gathered in a test of 'exceptionality' is correctly reflected in a recognition of the force of the public interest in giving effect to a properly founded extradition request: a recognition, that is to say, of the relevant article 8(2) considerations (which in my judgment find concrete form in the three public benefits I have set out at para 21)."

Counsel for the defendant had submitted that this reasoning embodied three fundamental errors:

i) Whilst purporting to abjure any test of exceptionality, in effect it applied just such a test.

ii) It subordinated a fact-sensitive assessment of the interest in extradition in the individual case to a categorical assumption about the importance of that interest generally.

iii) It relied upon a sentence from the Commission's decision in *Launder* when this had never been approved or followed by the Strasbourg Court and was inconsistent with the Court's approach in article 8 deportation cases.

In Lord Phillips's view it was a fundamental premise of counsel for the defendant's submissions that, when considering the impact of article 8, the Court should adopt a similar approach in an extradition case as that to be adopted in a case of deportation or expulsion. He agreed with counsel that there can be no absolute rule that any interference with article 8 rights as a consequence of extradition will be proportionate. However, he stated, the public interest in extradition nonetheless weighs very heavily indeed. In his view it was certainly not right to equate extradition with expulsion or deportation in this context. He then stated (at para. 52):

> "52. It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity. It is instructive to consider the approach of the Convention to dealing with criminals or suspected criminals in the domestic context. Article 5 includes in the exceptions to the right to liberty (i) the arrest of a suspect, (ii) his detention, where necessary, pending trial, and (iii) his detention while serving his sentence if convicted. Such detention will necessarily interfere drastically with family

> and private life. In theory a question of proportionality could arise under article 8(2). In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment: see *R (P) v Secretary of State of the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002, para 79, for discussion of such circumstances. Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate."

Lord Phillips rejected counsel for the defendant's suggestion that it is wrong for the court, when approaching proportionality, to apply a "categorical assumption" about the importance of extradition in general, on the basis that such an assumption is an essential element in the task of weighing, on the one hand, the public interest in extradition against, on the other hand, its effects on individual human rights. He opined that this is not to say that the latter can never prevail. It does mean, however, that the interference with human rights will have to be extremely serious if the public interest is to be outweighed. He then continued:

> "56. 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. That, no doubt, is what the Commission had in mind in Launder (1997) 25 EHRR CD 67, 73 when it stated that it was only in exceptional circumstances that extradition would be an unjustified or disproportionate interference with the right to respect for family life. I can see no reason why the district judge should not, when considering a challenge to extradition founded on article 8, explain his rejection of such a challenge, where appropriate, by remarking that there was nothing out of the ordinary or exceptional in the consequences that extradition would have for the family life of the person resisting extradition. "Exceptional circumstances" is a phrase that says little about the nature of the circumstances. 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. A judge should not be criticised if, as part of

> his process of reasoning, he considers how, if at all, the nature and extent of the impact of extradition on family life would differ from the normal consequences of extradition.
>
> 57. These considerations are reflected in the judgment of Laws LJ in this case and the attack made on that judgment by [counsel for the defendant] is not justified."

Lord Phillips then considered what general approach to human rights should be adopted at the extradition hearing, and offered the following advisory remarks. He suggested that before considering any objections to extradition, the extradition judge has to consider whether the statutory requirements for extradition have been satisfied. The judge then has to consider a considerable number of possible statutory barriers to extradition. It is only after he has done this that the judge has to consider whether extradition will be compatible with the defendant's rights under the ECHR. This is a fact-specific exercise, and the judge must have regard to the relevant features of the individual case. It is at this point that it is legitimate for the judge to consider whether there are any relevant features that are unusually or exceptionally compelling. In the absence of such features, the consideration is likely to be relatively brief. If, however, 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.

Lord Phillips stated that in such a situation the gravity, or lack of gravity, of the offence may be material. Explaining this, he stated that while usually the nature of the offence will have no bearing on the extradition decision, it was a different matter where an issue of proportionality arises in the human rights context. The importance of giving effect to extradition arrangements will always be a significant factor, regardless of the details of the particular offence. 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 a disproportionate interference with human rights. Rejecting an extradition request may mean that a criminal never stands trial for his crime. The significance of this will depend upon the gravity of the offence. The learned Supreme Court Judge stated that this “obvious” fact has been recognised at Strasbourg, and referred to the reasoning of the ECtHR in *Soering* 11 E.H.R.R. 439 and the express reference to "the seriousness of the crime" in *Raidl* 20 E.H.R.R. CD 114, 123 as supporting his view that the gravity of the crime in respect of which extradition is sought is capable of being a material factor.

Lord Phillips then opined that when considering the impact of extradition on family life, this question does not fall to be considered simply from the viewpoint of the extraditee. He noted that in *Beoku-Betts v Secretary of State for the Home Department* [2009] A.C. 115 the House of Lords in the immigration context had 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 regarded as a victim. Lord Phillips considered that this is equally the position in the context of extradition. He added:

> “65. 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 …”

Having then considered in detail the evidence in the case before him, and having sought to apply the principles that he had outlined to the facts of the case, Lord Phillips concluded (at para. 82):

> "82. One has to consider the effect on the public interest in the prevention of crime if any defendant with family ties and dependencies such as those which bind Mr Norris and his wife was thereby rendered immune from being extradited to be tried for serious wrongdoing. The answer is that the public interest would be seriously damaged. It is for this reason that only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves. This is not such a case. Unhappily the delay that has been caused by Mr Norris' efforts to avoid extradition to the United States has increased the severity of the consequences of that extradition for his family life. But those consequences do not undo the justification that exists for that interference."

In a postscript to his judgment Lord Phillips later added that on the eve of delivering judgment in the case the court had received the report of the admissibility decision in *King v United Kingdom* [2010] E.C.H.R. 164. He stated:

> "85. This decision does not alter my view that it is more helpful, when considering proportionality, to consider whether the consequences of interference with article 8 rights are exceptionally serious rather than simply whether the circumstances are exceptional. Either test is, however, likely to produce the same result and the decision demonstrates the futility of attempting to found an appeal on the basis that there has been inappropriate use of a test of exceptionality.
>
> 86. The court also cited *Soering* 11 EHRR 439 in support of the proposition that the considerations of whether prosecution exists as an alternative to extradition may have a bearing on whether extradition would be in violation of a Convention right. I remain of the view that rarely, if ever, is this possibility likely in practice to tilt the scales against extradition and it certainly does not do so in this case."

Lord Hope of Craighead agreed with Lord Phillips that exceptionality is not a legal test, stating:

> "89…I think that it would be a mistake to use this rather loose expression as setting a threshold which must be surmounted before it can be held in any case that the article 8 right would be violated."

and that:

> "I do not think that there are any 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."

He added:

> "91. … I agree with Lord Phillips that the reality is that it is only if some exceptionally compelling feature, or combination of features, is present that the interference with the article 8 right that results from extradition will fail to meet the test of proportionality. 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. As against that, those aspects of the article 8 right which must necessarily be interfered with in every case where criminal proceedings are brought will carry very little, if any, weight; *Massey v United Kingdom* (Application No 14399/02, (unreported) given 8 April 2003, p 12. Separation by the person from his family life in this country and the distress and disruption that this causes, the extent of which is bound to vary widely from case to case, will be inevitable. The area for debate is likely to be narrow. What is the extra compelling element that marks the given case out from the generality? Does it carry enough weight to overcome the public interest in giving effect to the request?"

Lord Hope held that in view of the strong public interest in giving effect to the extradition request it was not possible to say that Mr Norris's extradition would be disproportionate.

Lord Brown of Eaton-Under-Heywood also agreed with Lord Phillips, and speaking of the decision in *Huang v. Secretary of State for the Home Department* he said:

> "97 … .We rejected an exceptionality test since exceptionality as such can never be a helpful touchstone against which to judge whether in any particular case the interests of a lawful immigration policy are outweighed by the immigrant's (and his family's) rights to private and/or family life. But even in this, non-extradition, context

we contemplated article 8 succeeding only in "a very small minority" of cases. The legal test is proportionality, not exceptionality, but in immigration cases the court will seldom find removal disproportionate and, in extradition cases, more rarely still."

The judgment of Lord Mance is also instructive and paragraphs 106 – 109 inclusive of the report bear quoting from at some length. Lord Mance stated:

"106. Under article 8, the ultimate question is whether Mr and Mrs Norris's interests in the continuation of their present private and family life in the United Kingdom are outweighed by a necessity, in a democratic society and for the prevention of disorder or crime, for Mr Norris to be extradited in order to face trial in the United States. Whether extradition is necessary depends upon whether it is proportionate to the legitimate interest served by extradition in his case or, as the European Court of Human Rights said in *Dickson* 46 EHRR 927 para 71, 'whether a fair balance [is] struck between the competing public and private interests involved'. The first step in any such enquiry must, in this context also, be to identify and examine all the relevant facts in the particular case. The nature and seriousness of the alleged offence will be relevant to the strength of the case in favour of extradition: see e.g. *Raidl v Austria* (1995) 20 EHRR CD114 and *King v United Kingdom* (Application No. 9742/07) (both extradition cases) in which complaints were held inadmissible. Laws LJ examined this aspect in the Divisional Court [2009] Lloyd's Rep FC 475, paras. 28-29 and concluded that 'the obstruction of justice charges, taken at their face value, are very grave indeed'. Lord Phillips … after re-examining the position in his paras. 69-72 reaches the same conclusion, and so do I. Another relevant factor may sometimes be whether a trial would be possible in the United Kingdom, but I agree with Lord Phillips (paras. 66-67) that, while one should not prejudge the facts of particular cases, this is in practice likely to be relevant (if it can be at all) only in otherwise marginal cases. Mr and Mrs Norris's personal circumstances, the nature of their private and family life and the likely effect of extradition upon it and each of them will all be of primary importance. I need not repeat here the detailed account of these matters contained in the judgment of Laws LJ in the Divisional Court, paras. 30-37 and of Lord Phillips PSC, paras. 73-80. In weighing up such personal factors against other factors, it is of course also relevant that extradition is by its nature very likely to have adverse consequences for the private or family life within the jurisdiction of the person being extradited. The mere

existence of some adverse consequences will not be a sufficient counterweight, where there is a strong public interest in extradition.

107. The principal question of law raised by Mr Sumption centres upon the district judge's and Laws LJ's use of phrases referring to a need for a ‘high threshold’ or for ‘striking and unusual facts’ before the claim of a prospective extraditee to resist extradition under article 8 would in practice succeed. However, Laws LJ prefaced his reference to such phrases with an explanation of the force of the public interest in extradition. This meant, he stated, that any claim to resist extradition on article 8 grounds ‘must, if it is to succeed, possess still greater force’: para. 21. Provided that it is recognised that the force of the public interest in extradition must itself be weighed according to the particular circumstances, I see no objection to this last statement. In a case involving obstruction of justice charges of a gravity such as the present, the public interest in extradition is self-evidently very substantial. It has to be weighed against other relevant factors, including the delay and above all the impact on Mr and Mrs Norris's private and family life. 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.

108. There is a possible risk about formulations which suggest in general terms that any person seeking to avoid extradition under article 8 must cross a ‘high threshold’ or establish ‘striking and unusual facts’ or ‘exceptional circumstances’. They may be read as suggesting that the public interest in extradition is the same in every case (in other words, involves a threshold of a constant height, whereas in fact it depends on the nature of the alleged offence involved) and also that the person resisting extradition carries some form of legal onus to overcome that threshold, whereas in fact what are in play are two competing interests, the public and the private, which have to be weighed against each other, as required by the case-law under the Convention as well as by s.87 of the Extradition Act 2003. It can be expected that the number of potential extraditees who can successfully invoke article 8 to resist extradition will be a very small minority of all those extradited, but that expectation must not be converted into an a priori assumption or into a part of the relevant legal test.

109. A further potential problem about such formulations is that they may tend to divert attention from consideration of the potential impact of extradition on the

> particular persons involved and their private and family life towards a search for factors (particularly external factors) which can be regarded as out of the run of the mill. Different people have different ages, different private and family lives and different susceptibilities. They may react and suffer in different ways to the threat of and stress engendered by potential extradition in respect of the same offence or type of offence. And some of the circumstances which might influence a court to consider that extradition would unduly interfere with private or family life can 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 dependant upon the care performed by the former."

After then proceeding to conduct his own review of ECtHR jurisprudence, including the decisions in *Launder v. United Kingdom* (1997) 25 E.H.R.R. CD 67 ; *King v. United Kingdom* [2010] E.C.H.R. 164; *Dickson v. United Kingdom* 46 E.H.R.R. 927; *McCann v. United Kingdom* (2008) 47 E.H.R.R. 40; and *S v. United Kingdom* (2008) 48 E.H.R.R. 1169, Lord Mance stated (at paras 114 - 115):

> "114. The preferable course is, in my view, to approach the exercise required by article 8 by (a) identifying the relevant facts and on that basis assessing the force of, and then weighing against each other, the considerations pointing in the particular case for and against extradition, and (b) when addressing the nature of the considerations which might outweigh the general public interest in extradition to face trial for a serious offence, doing so in terms which relate to the exceptional seriousness of the consequences which would have to flow from the anticipated interference with private and family life in the particular case. But this is very far from saying that any adjudicative exercise which refers to a need in practice for 'exceptional circumstances' or 'striking and unusual facts' in the context of a particular application for extradition is axiomatically flawed. Still less can it be a ground of objection if the expectation that only a small minority of potential extraditees will in practice be able successfully to rely on article 8 to resist extradition proves statistically to be the case as a result of the decisions reached over a period and over the whole range of such cases.

> 115. What matters in any event is whether, as a result of whatever formulation has been adopted, the adjudicative exercise has been slanted or distorted in a manner which undermines its outcome in any particular case. In the present case, on the facts set out by Laws LJ and Lord Phillips and for the reasons given in relation to those facts by Lord Phillips PSC in para 82 and by Lord Hope of Craighead DPSC in para 93, I am left in no doubt that the balance between public and private interests comes down clearly in favour of Mr Norris's extradition, as serving a pressing social need and being proportionate to the legitimate aim pursued, or, in conclusion, as reflecting an appropriate weighing of the public and private interests engaged, despite the grief and interference with his and his wife's private and family life that extradition will undoubtedly cause."

Lord Collins of Mapesbury and Lord Kerr of Tonaghmore JSC, respectively, also agreed that the appeal should be dismissed.

Following the decision in *Norris*, a number of courts in the U.K. appeared to misinterpret the effect of that decision in several respects. The first was the manifestation of an ostensible belief that in *Norris* the U.K. Supreme Court had endorsed the idea that article 8 considerations should carry less weight in extradition cases than in immigration cases. Secondly, it was considered at least in some quarters that, in so far as a consideration of the article 8 rights of affected children were concerned, *Norris* required modification in the light of the approach advocated in the by the U.K. Supreme Court in the slightly later decision *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166, which (per the judgment of Lady Hale) had been to the effect that:

> "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. They can, of course, be outweighed by the cumulative effect of other considerations. …"

In regard to the latter, the point requires to be made that the *Norris* case was not in any way concerned with the article 8 rights of children. It was solely concerned with the article 8 rights of two elderly adults. Notwithstanding that, and perhaps to some extent as a consequence of that, the principles set forth in *Norris* were perceived to require possible modification in the light of *ZH (Tanzania)* for extradition cases involving the article 8 rights of children.

The misunderstanding, and concerns, referred to above are best illustrated by the judgments of Laws L.J. in *R (H.H.) & (P.H.) v. the Deputy Prosecutor of the Italian Republic, Genoa (Italian Judicial Authority) & Ors* [2011] EWHC 1145 (Admin), and of Silber J. in *B v. The District Courts in Trutnov and Liberec (Czech Judicial Authorities)* [2011] EWHC 963 (Admin).

In *R (H.H.) & (P.H.) v. the Deputy Prosecutor of the Italian Republic, Genoa (Italian Judicial Authority) & Ors* the Italian authorities sought the extradition of both the mother (H.H) and father (P.H) of three children for drugs offences. A district judge ordered the extradition of both parents and they appealed to a Divisional High Court. One of the issues concerned whether the right to respect for family life of the appellants, and particularly of their children, guaranteed by article 8 of the ECHR would be violated by their extradition. The focus of the article 8 claim was the plight of H's three young children in the event that their parents were extradited. It was claimed that extraditing both parents would be disproportionate since that would effectively render the children *de facto* orphans and result in them being adopted or placed in care.

The case was heard by a Divisional Court of the Queen's Bench Division. Giving the judgment on behalf of the Court, Laws L.J. reviewed the evidence which was undisputed and stark. It was to the effect that there was no guarantee that the children, if adopted or fostered, or if one or more were adopted and the other or others fostered, would be kept together. Moreover, separation from both parents would have a profound effect on the children's physical and emotional health and might lead to multiple problems for the children in the future.

In considering the article 8 issue, Laws L.J. stated at para. 49 of his judgment that:-

> **"**49**.** The question here is not the resolution of a disputed factual issue but the correct application of legal principle. In particular, I must consider what if any is the impact of the decision of the Supreme Court in *ZH (Tanzania)* [2011] UKSC 4; [2011] 2WLR 148 upon its earlier judgment in *Norris v USA* [2010] UKSC 9; [2010] 2WLR 572".

Having reviewed the judgments in *Norris* in great detail, Laws L.J. then turned to a consideration of the decision in *ZH*, and said the following at paras. 55 *et seq* of his judgment:-

> **"**55**.** *ZH (Tanzania)* was not an extradition case. The appellant, a failed asylum-seeker, faced removal from this country to Tanzania. She had two children, aged 12 and 9 at the relevant time, who were British citizens. They had lived here with their mother all their lives, mostly at the same address. She was estranged from their father though he remained in contact with the children. She had an 'appalling' immigration history, having put forward fraudulent claims for asylum. At length, however, the Secretary of State conceded that it would be disproportionate to remove the appellant, but was 'understandably concerned about the general principles which

the Border Agency and appellate authorities should apply' (Baroness Hale, paragraph 13). The specific question for the court's consideration was formulated by Lady Hale at paragraph 1:

> '[I]n what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?'

56. At paragraph 23 Lady Hale observed:

> 'For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC [sc. the United Nations Convention on the Rights of the Child 1989]:
>
> > "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."
>
> This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.' "

Lady Hale indicated (paragraph 25) that the Strasbourg court expects national authorities 'to apply article 3(1) of UNCRC and treat the best interests of a child as 'a primary consideration' ". She proceeded (paragraph 26) to cite Australian authority in line with this, and emphasised (paragraphs 30 ff) the "particular importance"

of nationality "in assessing the best interests of any child". The core of her reasoning, if I may say so, is to be found in paragraph 33:

> "We now have a much greater understanding of the importance of these 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. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that 'there really is only room for one view' (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.'

57. Lord Brown and Lord Mance agreed with Lady Hale. Lord Hope and Lord Kerr gave concurring judgments. Lord Kerr said this:

> '46. It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a 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. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.' "

Responding to a submission by counsel on behalf of the children to the effect that the reasoning in *ZH (Tanzania)* applies with no less force to an extradition case such as the one before him, and also to a submission by counsel on behalf of the wife to the effect that the *Norris* principles must be regarded as having been modified by *ZH (Tanzania),* Laws L.J. stated at paras. 59 to 63 of his judgment that:-

> **"**59 I consider it impossible to suppose that the court in *ZH* intended to depart from any of the reasoning in *Norris.* There is no reference whatever in the former case to the latter, nor indeed to extradition itself. And as I have said, the court in *Norris* sat nine Justices. The decision in *Norris* must in my judgment be taken as determinative of the law relating to Article 8 claims by prospective extraditees, no less since *ZH* than before. That is not to say, however, that *ZH* has no impact upon the application of the principles in *Norris.* The proposition that "the best interests of the child shall be a primary consideration" (UNCRC Article 3(1)) is of general application. But the indefinite article – "*a* primary consideration" – is significant. As Lady Hale stated in *ZH* (paragraph 25), "'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'".
>
> 60. Accordingly, while the best interests of affected children are "a primary consideration" in extradition cases, they cannot generally override the public interest in effective extradition procedures. There has to be an "exceptionally compelling feature" (*Norris* paragraphs 56, 91), giving rise to "the gravest effects of interference with family life" (paragraph 82). That is not *ipso facto* supplied by an extradition's adverse consequences for the extraditee's children. In fairness I did not understand Mr Keith or Mr Wise to submit otherwise.
>
> 61. The search for what may in truth amount to such an exceptionally compelling feature is, I think, illuminated by these two following considerations. First, it is clear that Lord Phillips in *Norris* did not regard extradition on the one hand and expulsion or deportation on the other as being in the same case: see paragraph 60. The implication is that if an extradition is to be condemned as disproportionate, the factor or factors relied on to that end must be substantially more pressing than in a deportation case.

62. The second consideration, which tends to explain the first, consists in the differences between the nature of the public interest in extradition and that in expulsion or deportation. Mr Hardy submitted that expulsion and deportation are matters only of domestic policy, whereas extradition promotes a universal public benefit. This latter aspect reflects what was said by Lord Phillips at paragraph 52 in *Norris* (I have already set it out): "It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity." I would venture also to cite this passage from my own judgment in *Norris* in this court (quoted by Lord Phillips at paragraph 48):

> '21… [T]he learning, here and in Strasbourg, shows that the public interest in giving effect to bilateral extradition arrangements possesses especially pressing force because of its potency (a) in the fight against increasingly globalised crime, (b) in the denial of safe havens for criminals, and (c) in the general benefits of concrete co-operation between States in an important common cause.'

These citations describe the importance of the extradition process. But they do not articulate a qualitative difference between deportation and extradition such as might explain why, if it be so, it takes a more pressing Article 8 case to override the latter than the former. Mr Hardy's contrast between what is domestic and what is international (or universal) will not on its own suffice.

63**.** In my judgment the answer is suggested by the following contrasting features of immigration and extradition policy. Good immigration policy (it will generally be recognised) is not all one way; that is to say, it will by no means always be fulfilled by the expulsion of the alien in question. The striking of reasonable balances is an inherent feature of the policy itself, certainly as it is reflected in the current Immigration Rules promulgated by the Secretary of State. But this is not true of the extradition regime. The public interest in extradition is *systematically* served by the extradition's being carried into effect, subject to the proper procedures. Where that does not happen, it is not because the striking of reasonable balances is an inherent feature of the policy. It is because, and only because, there exists in the particular case an 'exceptionally compelling feature' giving rise to 'the gravest effects of interference with family life', which is quite a different matter. As Lord Hope said in *Norris* (paragraph 91) '[t]he public interest in giving effect to a request for extradition

> is a constant factor'; and he referred (*ibid.*) to 'the extra compelling element that marks the given case out from the generality' ".

In *B v. The District Courts in Trutnov and Liberec (Czech Judicial Authorities)*, another article 8 case arising in the extradition context, and involving children, Silber J. focused with particularity on the remarks of Lord Phillips in *Norris* to the effect that:

> "The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing from this country an alien who has been convicted of a crime and who has served his sentence for it, or whose presence here is for some other reason not acceptable"

and that:-

> "...It is certainly not right to equate extradition with expulsion or deportation in this context".

Silber J then remarked at paras. 55 and 56 of his judgment that:

> "55. It is clear that the approach of the courts to article 8 rights has to be radically different in extradition cases from what it is 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. This is fortified by the Council Framework Decision of 13 June 2002, which led to the Act being passed. The purpose of the Framework Decision is to impose on Member States, such as the United Kingdom an obligation under article 1(2) to execute any EAW on the basis of mutual obligations.
>
> 56. This factor relating to the obligation of the State to return fugitives from justice is not present in deportation cases or immigration cases. Therefore decisions on article 8 rights in those areas are of no real relevance in extradition cases where the need to extradite fugitives from justices almost invariably out weighs the article 8 rights of the person sought to be extradited. This leads to the inevitable conclusion that *ZH* does not alter the existing law in relation to article 8 claims barring extradition orders to the effect that unlike in cases of deportation and challenges to removal by those who have no right to remain here, the circumstances in which it

> would not be proportionate to remove a person subject to an extradition request for Article 8 reasons would be rare because of the high threshold set in *Norris* as I have explained in paragraphs 52 to 54 above".

The U.K. Supreme Court was subsequently afforded an opportunity to revisit and clarify the principles applicable to how article 8 type issues should be addressed in extradition cases, including cases where the party or parties facing surrender have a child or children who would be affected by any such decision. The opportunity presented itself in the context of an appeal against the decision of the Divisional High Court in *R(HH) & (PH) v. the Deputy Prosecutor of the Italian Republic, Genoa*. A second case *R(F-K) v. Polish Judicial Authority*, involving similar legal issues, was heard at the same time and the Supreme Court's judgments [2013] 1 A.C. 338 in these conjoined cases were delivered on the 20th of June, 2012.

In both *R(HH) & (PH)* and in *R(F-K)*, respectively, an identical question had been certified by the Administrative Court, namely:

> "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 leading judgment was delivered by Lady Hale. She first of all reviewed the judgments of the Supreme Court in *Norris v. United States of America (No 2)* and concluded (at para 8):

> "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."

Lady Hale then moved to a consideration of *ZH (Tanzania) v. Secretary of State for the Home Department*. This was an expulsion case. The facts were that 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.

Pointing out that she herself had given the leading judgment, with which all the other members of the Court had agreed, Lady Hale stated that 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. However, in *Neulinger v Switzerland* (2010) 54 E.H.R.R. 1087, 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 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."

In her judgment in *R(H.H.) & (PH)* and in *R(F-K)* Lady Hale, referring to her judgment in *ZH (Tanzania)*, stated:

> "11. I pointed out [in] [2011] 2 A.C. 166, para.25, 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" '..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."

Lady Hale then described how Lord Hope and Lord Kerr had made somewhat similar, though differently worded, remarks, concluding (at para. 15):

> "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."

The learned Supreme Court judge then proceeded to rehearse at some length submissions made by or on behalf of various interested parties including the appellants, the children concerned, and a number of interveners (JUSTICE and the Coram Children's Legal Centre), before continuing as follows (paras. 27 – 34 inclusive):

> "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 [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 CJ points out (para 123), 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] 2 AC 167, just as it was later disapproved in

extradition cases in *Norris* [2010] 2 AC 487. Hence, as Lord Hope of Craigshead DPSC at para 89observed, "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"..

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 JSC, 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 JSC, at para 152. Exceptionality is a prediction, just as it was in *R (Razgar) v Secretary of State for the Home Department* [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 DPSC in *Norris*."

It is appropriate to remark at this point that none of the other Supreme Court judges involved in the conjoined cases of R (H.H.) & (PH) and R(F-K) disagreed in any significant manner with Lady Hale's approach at the level of principle, although a number of them issued judgments focusing more particularly on certain of the issues raised by the case. The Court will proceed to also review these other judgments, presently. However, before doing so it should be stated that when it came to the application of the agreed principles by the learned Supreme Court judges to the facts of the case the consensus that existed at the level of principle was not wholly reflected in the result. The Court was unanimous that it should refuse to surrender F.-K. on article 8 grounds. It was also unanimous that it should surrender H.H. and reject the objection to her surrender raised on article 8 grounds. As regards, P.H., however, Lady Hale concluded that in the interests of the affected children, and in particular the

youngest child Z it would be a disproportionate measure to surrender him. However, the other six members of the seven judge bench disagreed with Lady Hale and ruled that P.H. should be surrendered.

It is not intended to consider the detailed facts of these cases and how each individual judge sought to balance the competing considerations in the case. There is, I believe, little benefit in doing so in a judgment such as this, because each case of this type must be assessed by careful examination of its individual facts, and the facts of every case will be different.

Before proceeding to review certain remarks in the judgments of Lady Hale's colleagues, I propose to refer to, and approve of, certain further remarks of Lady Hale with regard to procedures and required evidence in an article 8 case where the evidence of affected children is being relied upon. Lady Hale stated in regard to that:

> "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."

The Court should add that while every case will have to be assessed on its own facts, it is unlikely that this Court would feel the need to seek a report from the HSE in this jurisdiction save in cases where the effect of a surrender order would be to remove a child or children's sole or primary carer so as to raise the spectre of that child or children possibly having to be taken into care under s. 18 of the Child Care Act 1991.

Lady Hale also considered in paras. 85 and 86 of her judgment the possibility of a court seeking the children's views, and of separate legal representation for children, in extradition proceedings. This Court does not intend to express any view at this time on these issues as they have not been argued or debated before me and do not arise for consideration in this case. Suffice it to say that the law in England (and possibly other parts of the U.K.) is different to the law here in as much as the provisions of the United Nations Convention on the Rights of the Child have been incorporated as part of that jurisdiction's domestic law, allowing direct reliance on the Convention in proceedings affecting children. That is not the position here. However, the position is not straight forward as Article 24 of the Charter of Fundamental Rights

of the European Union, which does have application in Irish Law, is expressly stated in the “Explanations” document accompanying the Charter to be based on the Convention on the Rights of the Child.

Moving then to the other judgments, Lord Hope agreed with Lady Hale 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. He stated that 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. However, he remained of the view which he had expressed in *Norris*, (at 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. He endorsed Lady Hale’s view that this involves asking oneself the right question and in an orderly manner, following the example of the Strasbourg court.

He then continued:

> “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 … two powerful and conflicting interests.”

In his judgment Lord Mance agreed that each case falls for consideration on its own facts, but that there may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion. He stated:

"97. … One difference between extradition and deportation or expulsion is that the former process is usually founded on mutual international obligations : Baroness Hale JSC, para 31 and Lord Judge CJ, 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."

He concluded (at para. 101) that:

"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] 2 AC 166, as explained by Baroness Hale JSC 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."

Lord Judge, in one of the more substantial judgments, said the following (at paras. 119 – 121 and 123 to 125):

"119. *ZH (Tanzania)* was not concerned with and did not address extradition. Neither the decision in *Norris*, nor the judgment of Lord Phillips PSC, 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…

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."

Then, following a detailed review of U.K. sentencing law and guidelines concerning the weight to be given to the interests of children in the sentencing process in domestic criminal matters, he concluded by stating (at paras. 131 – 132):

"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)."

The judgment of Lord Kerr also contains a number of important and helpful observations. He stated (at paras. 141 to 146):

"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] 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 (Tanzania) v Secretary of State for the Home Department*) [2011] 2 AC 166 about extradition but I agree with Baroness Hale of Richmond JSC 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 JSC 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. Baroness Hale JSC (in para 14 above) has correctly described my statement in para 46 of *ZH (Tanzania) v Secretary of State for the Home Department* [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. …

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."

Finally, we come to Lord Wilson's judgment, in which the learned Supreme Court judge observed (at paras. 153 - 154):

"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 United Kingdom*, (2010) 51 EHRR SE 97, 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 of Tonaghmore JSC in the *Norris* case [2010] 2 AC 487, 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] 2 AC 166, at para 33, Baroness Hale of Richmond said,:

> "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 …"

He later went on to observe (at para. 161):

"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 [2010] 2 AC 487, cited above, there are helpful observations by Lord Phillips PSC in para 56, by Lord Hope of Craighead DPSC in para 89 and by Lord Mance PSC 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 JSC 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 JSC 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 11 appeals to the Divisional Court cited in para 22 of Baroness Hale JSC's judgment, the judges fell, as suggested, into the error of applying a test of exceptional circumstances."

That concludes this Court's rather lengthy review of the jurisprudence it considers relevant on article 8, save for one matter.

Before seeking to distil a series of legal principles to be applied in this case, and intended to guide its approach to these difficult cases generally, it is necessary to refer to some helpful and important remarks of McKechnie J. contained within his recently delivered judgment in the Irish Supreme Court case of *Minister for Justice and Equality v Ostrowski* [2013] IESC 24 (Unreported, Supreme Court, McKechnie J., 15th May, 2013). These were arguably *obiter dictum* in that the central issue in that case concerned whether an executing judicial authority could consider the proportionality of a proposed surrender other than in the context of fundamental rights considerations. The Supreme Court's answer in relation to that was in the negative. Nevertheless, the judgment of McKechnie J. addresses at some length his views concerning the correct way in which a Court should approach issues such as an s.37 objection based upon article 8 of the ECHR, and those views are regarded by this Court as being of considerable assistance.

In his judgment in *Ostrowski,* McKechnie J. stated (at paras. 50 – 63 inclusive):

> "**Competing Interests: Public/Individual:**
>
> 50. Before addressing such interests, it may be of value … to say something about the method of approach involved in such assessment and how the relevant factors should be considered. At the outset it should be noted that when the court comes to consider the proportionality element of its assessment (if that should arise), it is not engaged in the traditional or historical exercise of deciding a *lis* between the parties: this because, there is no question of the extraditee having to discharge any onus of proof in a legal sense, although of course he does carry an evidential burden, so as to engage with the asserted rights in the first instance. What the court must seek to do is to strike a fair balance between the competing interests at issue, namely, the right of the affected person, as assessed through his personal circumstances on the one hand and the interests of the community on the other. The former, which relate to the severity and consequences of the alleged interference, are almost always exclusively personal, whilst the latter, are always exclusively public. Both will call for a careful assessment, being fact specific, at the surrender stage. The importance of the individual in this exercise however, can justifiably be emphasised as his or her circumstances are liable to great variation whereas those of the State much less. There cannot therefore be any substitute for a detailed appraisal of the personal and family circumstances of the person in question and of the likely impact which a surrender order may have on their continuing existence; for it must never be overlooked that rights of prime significance are at issue. Those circumstances must be explored, if necessary by detailed analysis, for in each case the assessment process is fact specific.
>
> 51. It can be said, rightly, that this approach suffers from a sense of generality. Therefore, if a predetermined test could be devised, being one capable of resolving the issue, I would see merit in this as greater certainty would ensue. However, without unbalancing the very exercise demanded, it would be a high risk challenge to construct a formula which would be as responsive as the task demands. Given what is involved, namely an interference with a right correctly and for good reason described as fundamental, the enjoyment of which is highly personal to the individual and his circumstances, the evaluative approach in my view, is the preferred one. As was said in *EB (Kosovo) v. Secretary of State for the Home Department* [2009] 1 A.C. 1159

("*Kosovo*"), there is no 'hard-edged or bright-line' rule, fit for purpose in this regard (para.12). Therefore, I am satisfied that such an approach at least for now cannot be avoided.

52. A further word is this context: in conducting such an appraisal, some have suggested that an incremental approach is to be preferred (Baroness Hale in *HH*) as in this way there is little scope for the wrong question or series of questions to be raised: which of course if asked are more likely to lead to the wrong answer. Others (Lord Mance in *HH*) have questioned any rigid line of enquiry, as an individual answer to any given question may distort the ultimate or overall conclusion, which of course would be self-defeating. For my part, provided all of the relevant circumstances are addressed and some element of cross reference is made, so as to test the positioning and weight of each factor and the soundness of the ultimate conclusion, I would not have a preference for one approach over the other. The presenting circumstances of each case, as assessed by the judge, will determine the lead in to this enquiry and will also dictate the level of consciousness of the overall review. Subject to that however, the essential point to emphasise is the fluid and composite quality of the exercise, with factors being adjusted, if necessary, to reflect its ongoing and perhaps changing nature.

Public Interest: How it is Measured:

53. There is no general duty in international law by which a state can be compelled to extradite from its territory a person within it. Such a requirement stems from obligations freely undertaken, either through bilateral or multilateral treaties or as in this case, by membership of a collective structure, under which mutual rights and obligations are created. In this context there is without pause or thought, a high level public interest in the implementation of the EAW process. It is of vital concern to every citizen, his fellow citizen and the society of which they are a part, that public order is maintained, the most vital element of which is the prevention and detection of crime and where committed, a state's ability to respond. It is therefore essential for the orderly running of a democratic society, which at a key level includes, the protection of fundamental rights, freedoms and security for all and for their property, that fugitives should be brought to trial for serious offences, that those convicted should serve their sentences, that no sanctuary of immunity should exist for such persons and that the public, not only nationally but also internationally, is aware of the state's commitment to honour its obligations in this regard. The existence, maintenance and support of a process based on international reciprocity which

implements these principles, is therefore of fundamental value to society. It follows accordingly that these matters, in the evaluative process under discussion, must be properly recognised and duly rated in the assessment required.

54. Inherent within the balancing exercise of which I speak, is the attachment of weight and the assignment of importance to identified factors which the court is permitted to consider. How is this to be done? *Norris*, although an 'extradition case' involving a Category 2 territory and therefore outside the Framework Decision, can nonetheless be considered as relevant as the statutory provision in question, the issues raised and the manner of their disposition, apply equally to a surrender request made by a Category 1 country (English Extradition Act 2003). Norris was wanted by the State of Pennsylvania to stand trial on one anti-trust charge and three charges of obstructing the course of justice. His ground of resistance to the order sought, being that of interest to us, was based on his Art.8 rights, which included his ill health and a mutual dependency on each other which he and his wife enjoyed over very many years. To correctly position the standing of the community in the extradition process Lord Philips, whilst rejecting the existence of any absolute rule that interference with family rights will always be justified, nonetheless was prepared to apply a 'categorical assumption' (para.49) about the importance of extradition which in his view 'weighs very heavily indeed' (para.51) in any contested application. Only if 'some quite exceptionally compelling feature, or combination of features' (para.56) were present, would interference with such rights be otherwise than proportionate. It was therefore quite accurate to say that only when the consequences of such disruption are 'exceptionally serious' (para.56) will Art.8 rights outweigh the importance of extradition. Whilst some differences in approach and perhaps phraseology can be noted in the other judgments as delivered, all of their Lordships agreed in general with Lord Philips and were supportive of his view. For example Lord Hope (para.91) said that the public interest is one to which 'powerful consideration' should be given and is one which carries "great weight" in any grading of its importance. Lord Hope also suggested that the public interest is, 'a constant factor' and should be so recognised (para.91). Lord Mance (para.105) likewise said such interest was a 'powerful one'. Others used similar expressions. Although invited to do so, the United Kingdom Supreme Court in *HH* declined to modify *Norris*.

55. The situation in the United Kingdom therefore, is that the public interest in extradition proceedings is a weighty and thoughtful one and as a result, it is only in

the rarest of cases that an asserted interference with family rights will outweigh such interest. It may also be said to be a ‘constant factor’ in any such proceedings.

56. For a number of reasons I would be inclined to approach this issue in a somewhat less rigid and less prescriptive manner. Firstly, I agree that by virtue of the matters identified the public interest is a ‘constant’ one, but only at the horizontal level. I accept that such interest is invariable in the sense that it is a permanent feature of such cases, but not that its value is incapable of change. The interest, whilst ever present, will vary on the vertical scale, depending on the seriousness of the given crime(s). It could hardly be doubted but that the graver the crime, the greater the interest. Petty shoplifting is not the same as a gallery theft or vault raid. However, whilst the opposite effect, namely ‘the lesser the crime the lesser the interest’ may not follow in corresponding proportion, nevertheless, even that reducing interest also has a ‘constant’ to it, in the sense described. Consequently, where on the spectrum the subject offence may sit, is an aspect of each case which must also be explored as part of the process. In addition, other matters such as delay may become relevant. Secondly, to adopt an approach based on assumptions, either set at a *prima facie* level or indeed even expressed more tentatively than that, may have the unintended effect of curtailing the fullness of the exercise required and of routinely disadvantaging a respondent. Thirdly, to suggest that the public interest in extradition is ‘systematically’ served by the making of a surrender order (para.26 *supra*) is close to suggesting a foreclosure on the issue, a view I cannot agree with. I therefore do not favour any fixed or specific attribution being assigned to the importance of public interest in this context. Every case on both sides of the assessment will have its individual set of values and must be so viewed.

57. Having said that however and whilst fully respecting the autonomy of the exercise which I mention, it can also confidently be said that, given the centrality of the role which an efficient and functioning surrender system plays in the preservation of society in which fundamental rights are protected, the public interest in such a process, will almost always attract a rating at the higher end of importance provided, the evaluative process is properly conducted. Such a positioning of course may require adjustment in either direction so as to reflect material factors in any given case, but even allowing for this, the ‘generality’ of the point made in my view remains valid.

Individual's Interest: How it is Valued:

58. The other interest, competing with that last described, stems from the rights attaching to the individual, as such, and in this case to his involvement with others as part of a family group. It is an exercise in obviousness to state that any extradition process is most likely to result in arrest, probably or at least possibly in detention, and on a successful application, in one's forced expulsion from the State. Therefore, such consequences, apart from degree, are unavoidable, being those which are inherent in the regime itself and without which the process could not be implemented. Article 5 of the Convention, which confers on every person a right to liberty and security of person, makes specific provision for a number of exceptions to such right, which includes that stated at 1(f), namely, 'the lawful arrest or detention of a person … against whom action is being taken with a view to deportation or extradition.' The Art.8 qualification of the rights respected in para.1 of that Article, includes a reference to the '…prevention of disorder or crime…' and '…the protection of the rights and freedoms of others.' (article 8(2)). Both of those rights and several others, together with their exercise, are therefore conditional. Consequently, the Convention itself recognises the necessity for intervention with the exercise of such rights in certain situations, including extradition. Accordingly, it would seem to follow that factors which, as a matter of inevitability directly result from all extradition orders, cannot attract great value. Certainly, it would be exceedingly difficult to establish that such factors, in and of themselves and by their existence alone, could constitute a disproportionate interference with for example, family rights and thereby outweigh the public interest in extradition. If such was the case, the public interest would routinely be nullified. Consequently, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the affected person.

59. What is likely to be of far more significance are the injurious effects and harmful consequences which the public action would have for that individual and others properly identified with him. A generality of pleading is likely to carry little weight in this regard. What the court will search for and explore is the real and personal extent of the repercussions which the act complained of, will have for the persons affected.

60. In an endeavour to address this quite complex interplay of interests, certain English cases have suggested that before an interference with family rights can defeat an application for surrender, the intended extraditee must meet a 'high threshold',

establish ‘exceptional circumstances’, or identify ‘striking and unusual features’, peculiar to him. Lord Bingham in *Huang* pointed out that “exceptionality” is not a legal test (para.20). I respectfully agree and add only that the same point holds good in most areas of law. In any event, the standard set by Art.8 is not one of exceptionality but one of proportionality. In addition, any approach so driven has the clear but erroneous implication that there may be a responsibility on the affected person to establish such matters, presumably to the probable level, which as previously pointed out (para.50 *supra*), is not the case. To suggest or to imply that a fruitless search for ‘unusual facts or circumstances’ concludes the matter, must I think, be incorrect. If such were so, then a great number of Art.8 cases would have no merit to evaluate or purpose in evaluating. A quick survey of some of the case law involving family rights, will show that the underlying facts relied upon will closely parallel those of many other families or family units, whether in an Art.8 situation or otherwise. Children live with their mother, who frequently may be a single parent: children and mother may rely on a husband, partner or the father as the sole breadwinner; a disabled parent may be totally dependent on a family carer; none of these examples, of which there are many others could hardly be described as unusual or as uncommon experiences of life, in this or in any time, or in this or in any Member State. And yet a severance or disruption of any one such relationship could have devastating consequences for those affected. Accordingly, if the balancing approach be correct, such an exercise clearly disfavours the creation of any rigid or specified yardstick against which an Art.8 infringement should be measured.

61. Notwithstanding what I have just stated however, it is important to note that the Strasbourg Court as well as the Commission, have also looked at this issue and in many cases have used the language of ‘exceptionality’ or that closely reminiscent of it, in the present context (*Dickson*). In *Soering* (para.2), the court, on the Art.6 complaint, did not exclude the possibility that an issue might ‘exceptionally’ arise where extradition could be refused if the risk of a flagrant denial of a fair trial could be established: the Commission in *Launder* (*Launder v. United Kingdom* [1997] E.C.H.R. 106), at para.3, when finding an alleged Art.8 violation as manifestly ill-founded said that ‘it is only in exceptional circumstances’ that extradition of a person on a serious offence would be held ‘to be an unjustified or disproportionate interference’ with his Art.8 rights. It should be noted that *Soering*’s assertion related to what may occur in the requesting state if returned, as did *Launder*. However, despite that point of distinction, it is clear that howsoever described or approached a successful reliance on Art.8 will not be easy. Indeed, I have not been able to identify

a single case from the Strasbourg Court in which it was said that extradition would be an interference with Art.8 rights, which were enjoyed in the requested State. That in itself is a powerful reflection of the positioning of the public interest in this process.

62. The importance of the observation last made is also very evident from the case of *Minister for Justice, Equality and Law Reform v. Gheorghe* [2009] I.E.S.C. 76 where the respondent sought to oppose his surrender inter alia on Art.8 grounds. The High Court rejected this submission '*in limine*' as did the Supreme Court: Fennelly J. at para. 48 said,

> 'It is a regrettable but inescapable incident of extradition in general and, as in this case, surrender pursuant to the system of the European arrest warrant, that persons sought for prosecution in another state will very often suffer disruption of their personal and family life … No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffer disruption, even severe disruption of family relationships.'

The disposal of that argument in such a manner clearly reflects in explicit detail the difficulty which a respondent meets on any Art.8 defence.

63. In summary, where resistance is offered by virtue of a Convention or Constitution right, the court must conduct a fact-specific enquiry into all relevant matters so that a fair balance can be struck between the rights of the public and those of the person in question. Such an exercise is not governed by any predetermined approach or by pre-set formula: it is for the trial judge to decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise. As part of the process, each of the competing interests must be measured. If appropriately conducted, the interests of the public, underpinned as they are by weighty considerations such as freedom and security, will virtually always merit a value of significance whereas those attaching to an individual will be more variable. The greater the impact to the person, the greater the weight. Consequences, inherent in the process itself, without more, will attract a much lesser value than consequences with real and substantial effect on the individual."

Following this Court's consideration of the domestic and foreign jurisprudence reviewed above, certain principles have been distilled by it for

application, in this case and in future cases where an article 8 based objection to surrender is raised, where it is required to assess the proportionality of a proposed extradition measure. These principles are adopted and approved either as being uncontroversial where that is so, alternatively as representing this Court's determination, and the preferment of one position over the other, where controversy exists. The principles which it will apply in the present case, and by means of which it intends to be guided in future article 8 cases, are as follows:

1. The test imposed by article 8(2) is not whether extradition is on balance desirable but whether it is necessary in a democratic society;

2. There is no presumption against the application of article 8 in extradition cases and no requirement that exceptional circumstances must be demonstrated before article 8 grounds can succeed;

3. The test is one of proportionality, not exceptionality;

4. Where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;

5 In conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against

the level of respect to be afforded generally to the private and family life of persons;

6 Rather, the assessment must be individual and particular to the requested person and family concerned. The correct approach is to balance the public interest in the extradition of the particular requested person against the damage which would be done to the private life of that person and his or her family in the event of the requested person being surrendered;

7. In the required balancing exercise the public interest must be properly recognized and duly rated;

8. The public interest is a constant factor in the horizontal sense, i.e., it is a factor of which due account must be taken in every case;

9. However, the public interest is a variable factor in the vertical sense, i.e., the weight to be attached to it, though never insignificant, may vary depending on the circumstances of the case;

10. No fixed or specific attribution should be assigned to the importance of the public interest in extradition and it is unwise to approach any evaluation of the degree of weight to be attached to it on the basis of assumptions. The precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case

specific assessment. That said, the public interest in extradition will in most cases be afforded significant weight.

11. The gravity of the crime is relevant to the assessment of the weight to be attached to the public interest. The graver the crime, the greater the public interest. However, the opposite effect, namely 'the lesser the crime the lesser the interest' may not follow in corresponding proportion. Where on the spectrum the subject offence may sit, is an aspect of each case which must also be explored as part of the process.

12. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing an alien who has been convicted of a crime and who has served his sentence for it, or whose presence in the country is for some other reason not acceptable. This does not mean, however, that the Court is required to adopt a different approach to article 8 rights depending on whether a case is an extradition case or an expulsion case. The approach should be the same, but the weight to be afforded to the public interest will not necessarily be the same in each case.

13. Delay may be taken into account in assessing the weight to be attached to the public interest in extradition;

14. In so far as it is necessary to weigh in the balance the rights of potentially affected individuals on the one hand, with the public

interest in the extradition of the requested person, on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a proportionate measure both in terms of the legitimate aim or objective being pursued and the pressing social need which it is suggested renders such interference necessary.

15. It is self evident that a proposed surrender on foot of an extradition request will, if carried into effect, result in the requested person being arrested, being possibly detained in custody in this State for a period pending transfer to the requesting state, and being forcibly expelled from the State. In addition, he/she may have to face a trial (and may possibly be further detained pending such trial) and/or may have to serve a sentence in the requesting State. Such factors, in and of themselves, will rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the affected person.

16. Article 8 does not guarantee the right to a private or family life. Rather it guarantees the right to respect for one's private or family life. That right can only be breached if a proposed measure would operate to so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful

consequences for an affected individual, disproportionate to both legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and breach the affected individual's rights under Article 8.

17. It will be necessary for any Court concerned with the proportionality of a proposed extradition measure to examine with great care in a fact specific enquiry how the requested person, and relevant members of that person's family, would be affected by it, and in particular to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person.

18. Such an exercise ought not to be governed by any predetermined approach or by pre-set formula: it is for the Court seized of the issue to decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise.

19. The demonstration of exceptional circumstances is not required to sustain an article 8 type objection because in some cases the existence of commonplace or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the

consequences of the proposed extradition measure for the potentially affected persons or persons, rather than on the circumstances giving rise to those consequences.

20. Where the article 8 rights of a child or children are engaged by a proposed extradition measure the best interests of the child or children concerned must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance.

21. If children's interests are to be properly taken into account by an extradition court, it will require to have detailed information about them, and about the family as a whole, covering with all considerations material to or bearing upon their welfare, both present and future. Primary responsibility for the adduction of the necessary evidence rests upon the party raising article 8 rights in support of an objection to their surrender.

22. In an appropriate case, where it is satisfied that there are special features requiring further investigation to establish how the welfare of a child or children might be affected by a proposed extradition measure, and/or as to what the best interests of the child or children in question might require, an extradition court can, of its own motion, seek further evidence.

The Court's Decision on the Article 8 issue

The Court has carefully considered the evidence relevant to the article 8 objection in this case.

The offences which are the subject of the warrant are very serious offences in the Court's view, and there is therefore a correspondingly significant public interest in the respondent's extradition. Moreover, the offences were committed relatively recently. There is no evidence of any significant delay in what must have been a complex police investigation, or by the investigating magistrate Judge Grain, or since the European arrest warrant was issued, such as might operate to reduce the weight otherwise to be afforded to the public interest in the extradition of the respondent for these offences.

The respondent places particular reliance on a number of factors as being potentially injurious, prejudicial or harmful to her, her partner and her children, in the event of her extradition, at a level over and above the disruption, grief and inconvenience to be expected as a usual and normal consequence of an extradition order.

She points out that she was originally a Nigerian citizen. However, she has long been settled in Ireland and, having initially been granted permission to reside in the State, has recently been naturalised and is now a citizen of Ireland.

She is married since 17th March, 2001. She came to Ireland on 19th November, 2001 and her husband followed her in January, 2002. Her husband is a Nigerian citizen, however he has a pending application for naturalisation and hopes to become a citizen of Ireland.

The family lives in Dublin and the husband is employed as a bus driver with Dublin Bus. They own their own home.

The couple have three children, all of school-going age, namely a boy aged 12yrs and 6 months, a girl aged 9 years, and a second boy aged 4 years. All three children were born in Ireland and are therefore Irish citizens. The children are all well settled in school, and there is no suggestion that they are doing other than well.

The respondent complains that it is proposed to extradite her to a country of which she is not a citizen and in which she has never resided. Moreover, because of her origins, ethnicity and cultural differences it will be harder for her to cope with all that extradition entails compared to an Irish or French person. She relies heavily on the roots that she has put down in this country, and contends that it will be particularly hard for her husband and children in the event that she is sent to France. She contends that her husband will be unable to follow her to France, either for the purpose of visting her there, and bringing the children to visit her there, or to reside there so as to be close to her while she is awaiting trial (whether she be remanded in pre-trial detention or on bail), and/or while she is serving any sentence in the event that she is convicted. She is pessimistic, the court accepts probably with good reason, about being granted bail while in pre-trial detention. However, be all of that as it may, the particular problem on which she places great emphasis is the fact that her husband, unless and until he receives a positive response to his application for Irish citizenship, will have potential visa problems that may preclude him from entering France.

The Court has carefully considered the circumstances of the respondent, and also those of her husband and the three children concerned. It has sought to apply the principles which it has indicated it would apply and has subjected the circumstances

of this family to a rigorous and careful examination. In weighing the competing considerations in this case the Court has had particular regard to the welfare of the children and has paid due regard to the need to take account of their best interests as a primary consideration. However, and notwithstanding that, the Court has concluded that neither the private interests of the respondent, not those of the respondent's husband, nor those of the children, nor those of the family members cumulatively, outweigh the very strong public interest in this particular respondent's extradition.

The Court must therefore reject the s. 37 objection in this case, in circumstances where it has not been persuaded that it would represent a disproportionate measure to extradite her.

The S.21A Objection

The relevant statutory provision

S.21A of the Act of 2003 provides:-

"(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.

(2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved".

The net point at issue

The points of objection pleaded, although not withdrawn, have to some extent been overtaken by events. At this point in time the issue in relation to the s. 21A objection is a net one. It is accepted by both sides that a decision has by this stage been taken to both charge and try the respondent with the two offences that are the subject of the European arrest warrant. However, at the time at which the European arrest warrant was issued, *i.e*. on the 19th of July, 2012, the *juge d'instruction*, Judge Grain, had not made a *mise en examen* type order. Counsel for the applicant has indicated that in the circumstances her client accepts that a decision to charge and try the respondent had not been taken as of that date. However, additional information dated the 5th of March, 2013, to be read in conjunction with a document entitled "Order for Partial Discharge, Partial Requalification and Committal for Trial before the Correctional Court" dated the 24th of January, 2013, (relating to a large number of defendants, including the respondent) establishes that a *mise en examen* order has since been made in respect of the respondent, as recently as the 24th of January, 2013. The applicant contends that that is sufficient for the purposes of s.21A.

Counsel for the respondent argues that his client's s. 21A objection should be upheld because, he contends, the relevant date for the purposes of s. 21A is the date of issue of the warrant. In support of this the respondent relies upon the following statement, ostensibly to that effect, in the judgment of O'Donnell J. in *Minister for Justice, Equality and Law Reform v Olsson* [2011] 1 I.R.384 (at para. 33, p. 399):

> "The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested

> person when it is satisfied that *no* decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges **at the time the warrant is issued**. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution."(emphasis added)

It was further urged that the acceptance by the applicant that a *mise en examen* order was not made until the 24th of January, 2013 serves to rebut the s.21A(2) presumption.

Moreover, as O'Donnell J. further stated in his judgment in *Olsson* (at para. 36, p.401):

> "….even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence."

In the circumstances, the respondent also contends that the accepted fact that a *mise en examen* order was not made until 24th January, 2013 constitutes evidence of sufficient cogency to establish that as of the 19th of July, 2012 no decision had in fact been taken to charge and try the respondent with the offences the subject matter of the European arrest warrant.

The submissions on behalf of the respondent in fact go further. Counsel submits that, as of the date of the issue of the warrant, all that existed was evidence that his client may have been involved in the commission of offences by certain persons named in the domestic warrant and against whom it is acknowledged there was an inquiry in progress. However, it is clear, he says, that there was at that time no

investigation focusing specifically on his client. In support of this he points specifically to the domestic warrant dated the 18th of June 2012 which states, *inter alia*:

> "We, Bertrand GRAIN, Examining Magistrate at the High Court in Lyon (Rhone, France),
>
> in view of the inquiry in progress against (fourteen named persons not including the respondent, T.E.), in the case relating to counts of: AGGRAVATED PROCURING AND/OR LIVING OFF IMMORAL EARNINGS WHILST OPERATING AS AN ORGANIZED CRIMINAL GANG; TRAFFICKING IN HUMAN BEINGS WHILST OPERATING AS AN ORGANIZED CRIMINAL GANG; CRIMINAL CONSPIRACY FOR THE PURPOSES OF PREPARING TO COMMIT A CRIME; ROBBERY WHILST OPERATING AS AN ORGANIZED GANG; LAUNDERING OF THE PROCEEDS OF CRIME WHILST OPERATING AS AN ORGANIZED CRIMINAL GANG;
>
> in view of the applications made by the State Prosecutor on 14"' June 2012;
>
> in view of Articles 122, 123, 131 and following of the French Code of Criminal Procedure;
>
> order and command any and all police officers, law enforcement officers and members of the police services, acting in compliance with the law, to seek out and to bring before us or before the Custody Judge in the place of her arrest the person herein identified, having where necessary first taken that person to the prison in the place of our bench or to the prison in the place of her arrest:
>
> **T.E.**
> **born on xx xxxx xxxx in Nigeria**
> **of Nigerian citizenship**
> **thought to be residing at xxx, xxxxx, Dublin xx, Republic of Ireland**
> in respect of whom there exists serious and corroborating evidence as to the commission by her of the following offences:"
> [Laundering *etc.* and Criminal Conspiracy *etc*.]

In Counsel's submission, this document is evidence of the absence of an intention to prosecute the respondent as of the date of the warrant. He has further submitted that, in those circumstances, s. 10 of the Act of 2003 was simply not engaged as of that point in time; and that none of the preconditions contained in s. 10, and specifically the requirement in s.10(a) that there should have been an intention by the issuing state to bring proceedings against the requested person for an offence to which the European arrest warrant relates, existed.

Counsel for the respondent submits that the applicant therefore has a twofold problem. First, he must satisfy the Court that the issuing state had an intention to prosecute his client as of the date of the warrant, and it is submitted that the applicant is unable to do so. Secondly, and in any event, in circumstances where it is contended that the Court has before it evidence of a cogent nature suggesting that that which is to be presumed by virtue of s. 21A(2) of the Act of 2003 is not in fact the case, the applicant must satisfy the Court that a decision both to charge and also try the respondent warrant existed as of the date of the warrant, and in the respondent's submission the applicant cannot do that.

Counsel for the applicant, on the other hand, argues that it is sufficient if the relevant decisions are taken at any time before the Court is asked to make a surrender order under s. 16, and contends that, as timing was not an issue under consideration by the Supreme Court in *Olsson*, the statement in the judgment of O'Donnell J. suggesting the contrary represents an *obiter dictum*, with the consequence that it is not binding on this Court.

Counsel for the applicant makes the point that the requirement in s.10(a) of the Act of 2003 is not to be conflated with, or presumed to be the same thing as, the

requirement in section 21A(1). They are not the same requirements. The s. 10(a) requirement derives directly from article 1 of the Framework Decision and is a precondition for the valid issuance of a European arrest warrant. Section 10 (as variously amended) deals with the obligation to surrender on foot of a warrant received in the State. It is framed in the following terms:

> "Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person — …
>
> (a) … ,
>
> (b) …,
>
> (c) …, or
>
> (d) …
>
> that person shall, subject to and in accordance with the provisions of this Act be arrested and surrendered to the issuing state."

(In the course of the amendment process, the word "or" which had appeared at the end of precondition (a) was inexplicably dropped, and there is no "or" between preconditions (b) and (c). However the Court does not consider that this is of any significance as it is clear from a consideration of the section in its own stead, and from its place within the Act of 2003(as amended) taken as a whole, and interpreting it in conformity with the Framework Decision, that (a), (b), (c) and (d) were intended by the legislature to be alternatives.

It was urged by counsel for the applicant that the effect of s. 10 is that a warrant received in the State that on the face of it does not satisfy one of the four

preconditions set out in s. 10(a) to s.10(d) of the Act of 2003 is not to be regarded as valid, and cannot be acted upon.

It was submitted that s. 21A(1) on the other hand, is not concerned with any question of validity or compliance with requirements of the Framework Decision that the Act of 2003 was intended to transpose. It reflects a separate and add-on requirement of the Irish State based upon a reservation made by the State at the time of signing up to the Framework Decision. It was submitted that the focus of s. 21A(1) is completely different to that of s. 10. Section 21A(1) of the Act of 2003 is concerned with the act of surrender. It creates a bar to surrender where "a decision has not been made to charge the person with, and try him or her for, [the offence(s) to which the warrant relate(s)] in the issuing state." It was urged that the relevant time is therefore the point at which an order for surrender is being considered by the executing Court; and that as long as the Court can be satisfied at that point in time that a decision has been made to charge the requested person with, and to try him or her for, the offence(s) to which the warrant relate(s) in the issuing state, it can proceed to make a s. 16(1) order (subject, of course, to being concurrently satisfied that the other essential requirements of the Act of 2003 as amended are also met).

In response to this counsel for the respondent makes a number of points. First, he points out that s. 10 and s.21A(1) are both engaged when a Court is considering surrender, and in particular that it is only in circumstances where one of the four s. 10 preconditions has been satisfied that the requested person "shall, subject to and in accordance with the provisions of this Act be arrested **and surrendered** to the issuing state" (emphasis added by the Court). He points to the fact that the present tense is

used both in the language of s.10 (which speaks of "where a judicial authority **issues** a European arrest warrant"), and also in the language of s. 21A(1) (which speaks of "where a European arrest warrant **is issued** in the issuing state"), and he attaches much significance to this.

Perhaps, more significantly, the important point is made in the written submissions filed on behalf of the respondent, which was amplified and developed further in oral argument before the Court, that:

> "So far as the applicant may contend that the European Arrest Warrant complied with the provisions of section 10 of the Act at the time of the respondent's arrest, but that s. 21A would, at that time, have operated to prevent her surrender, it is submitted that the applicant asked this Court to endorse a warrant for the arrest of a citizen on a contingent basis. Indeed, on this approach, the applicant could seek the adjournment of its application pursuant to section 16 of the Act in order to await developments in the requesting Member State.
>
> This would amount, in substance, to a form of preventive detention of persons who, having been originally the subject of a warrant for the purposes of the investigation of a crime, and thus who could not be surrendered at the time of their arrest, being detained unless and until the requesting State took a subsequent decision to place them on trial.
>
> It is submitted that such a construction is not supported by the text of the relevant legislation. Moreover such a construction is almost certainly incompatible with the provisions of the Constitution of Ireland."

In support of the latter proposition counsel for the respondent relied upon *Lynch & Whelan v. Ireland* [2008] 2 I.R. 142 as well as the line of other authorities deprecating any notion of lawful preventative detention including *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501; *Ryan v. Director of Public*

Prosecutions [1989] I.R. 399 ; *The People (Director of Public Prosecutions) v. Bambrick* [1996] 1 I.R. 265 and this Court's judgment in *Minister for Justice and Equality v Nolan* [2012] IEHC 249 (Unreported, High Court, Edwards J., 24th May, 2012).

The Court's Decision

The Court does not agree with counsel for the respondent that the evidence discloses that the issuing state had no intention to prosecute the respondent at the time that the warrant was issued, and that the warrant must therefore be regarded as being invalid for failure to satisfy one of the four pre-conditions set out in s. 10 of the Act of 2003. It seems to the Court that the very existence of Judge Grain's domestic arrest warrant in respect of the respondent, and in the terms in which it is drafted, shows that precisely because there existed "serious and corroborating evidence as to the commission by her" of the offences mentioned in the warrant, it evinces an intention on the part of the issuing state to prosecute her in the sense intending to issue proceedings against her for the offences in question.

However, that does not dispose of the matter. It is still necessary to consider s.21A and the more precise, and conjunctive, requirements of s. 21A(1). In this instance the Court agrees with counsel for the respondent that the agreed factual position, namely that the *juge d'instruction*, Judge Grain, had not made a *mise en examen* type order as of the 19th of July 2012, and that he only did so on the 23rd of January, 2013, serves at the very least to rebut the s.21A(2) presumption. Moreover, it is clear that the applicant is unable to adduce or point to any other evidence to show that, whatever about a decision to charge the respondent, a decision had been made to

try her, as of the date of issuance of the European arrest warrant. Accordingly, the respondent cannot be surrendered unless the applicant is right in his contention that the relevant time for the purposes of s.21A(1) is the point at which the executing judicial authority is actually considering making a surrender order, rather than the date on which the European arrest warrant was issued.

The Court has carefully considered the submissions on both sides, and having applied to the s.21A provisions the well established and uncontroversial rules concerning statutory interpretation, it has concluded that the correct interpretation of s. 21A is that contended for by the respondent, and that the relevant date by which the decision referred to in s. 21A(1) requires to have been made is the date upon which the European arrest warrant was issued. This is consistent with the language of the s.21A(1) & (2) provisions in themselves, and also with their place within the scheme of the Act of 2003 (as amended).

Further, the Court agrees with counsel for the respondent that, notwithstanding the background to the enactment of s. 21A based, as it is, upon an express reservation to the Framework Decision, s. 21A cannot be considered in isolation.

Although it is an add-on, in the sense of not being contemplated by the Framework Decision as one of the optional grounds for non-surrender included within Article 4 of that instrument, it is still to be viewed as an integral part of that system of rendition based upon the European arrest warrant to which Ireland has subscribed (albeit subject to an express reservation), and given effect to in modified form in the European Arrest Warrant Act 2003 (as amended by the Criminal Justice (Terrorist

Offences) Act 2005, and in particular s. 79 of that Act). The system of rendition now provided for in domestic statute law, of which s. 21A is a component, contains a specific prohibition on surrender where to do so "would be inconsistent with any provision of the Constitution of Ireland". This prohibition finds expression in s. 37(1)(b) of the Act of 2003, which in turn reflects the acknowledgment contained within recital 12 to the Framework Decision that "[t]his Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."

It seems to this Court that in the circumstances it is inconceivable that the Oireachtas, in enacting s.21A of the Act of 2003 in the terms in which it has done so, could have intended to create a situation whereby a person's liberty might be constrained, either through a remand in custody, or in a lesser but nonetheless significant way upon a regime of bail, other than as part of a process leading to the requested person's trial by a court of law. If, as is effectively contended by the applicant, the liberty of a person who enjoys the presumption of innocence could be constrained on a wholly contingent basis, in circumstances where no decision had been taken to charge him/her and put him/her on trial, pending a surrender hearing at some future point in time, and on the basis that in the interim the issuing state might yet make the required decision to charge and try that person, it would amount to preventative detention. Any regime which permits preventative detention is not a regime which is consistent with the provisions of the Constitution. However, s.21A is presumed to be constitutional and if, applying the double construction rule, it is capable of being reasonably construed in a manner which does not permit

preventative detention, and which is consistent with the Constitution, then that is the construction that must be adopted. That construction contended for by the respondent does not permit preventative detention and is consistent with the Constitution.

Moreover, quite apart from any narrow question of constitutionality, the construction contended for by the applicant could never have been intended by the Oireachtas in circumstances where to adopt it would allow for the creation within our own jurisdiction of the very mischief which it was feared might otherwise arise, and the avoidance of which the reservation to the Framework Decision underpinning s. 21A was intended to address. That mischief is the notion that in the case of a person presumed innocent, the liberty of that person should not be restrained, nor should any attempt be made to forcibly remove him/her from the state and to hand him/her over to another State, other than in support of a process that will end in a trial where the person will have an opportunity of defending himself/herself and seeking vindication of his/her good name. Restraint of liberty for the purposes of a criminal investigation or interrogation, where there is no certainty that the person concerned will ever face trial, is regarded in this country as being fundamentally objectionable and, to the extent that it is tolerated at all in this country (*e.g.*, detention under s. 4 of the Criminal Justice Act 1984 or under s. 30 of the Offences Against the State Act 1939) it is only tolerated for very brief periods and in very tightly controlled circumstances with appropriate safeguards designed to uphold such other fundamental rights of the subject person as do not require to be immediately and necessarily abrogated in the legitimate public interest.

For these reasons, the Court is satisfied that the relevant time for the purposes of s. 21A is the point at which the European arrest warrant is issued. The two decisions of which the Court must be satisfied for the purposes of s. 21A must both be in place at that point in time. For the purposes of this case the date we are concerned with is the 19th of July, 2012. It is common case that, whatever about the existence of a decision to charge the respondent on that date (it is unnecessary in the circumstances of the case to address this definitively), there was certainly no decision to try her on that date. In the circumstances the Court must uphold the s. 21A objection.

Conclusion:

The Court is obliged by the terms of s. 21A of the Act of 2003 to refuse to surrender the respondent.