IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL

FROM HER MAJESTY'S HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT) (ENGLAND AND WALES)

UKSC/2011/0128 & 0129

Neutral citation below: [2011] EWHC 1145 (Admin)

BETWEEN:

THE QUEEN (ON THE APPLICATION OF)
(1) HH
(2) PH

Appellants

v

DEPUTY PROSECUTOR OF THE ITALIAN REPUBLIC, GENOA

Respondent

(1) THE OFFICIAL SOLICITOR
(2) JUSTICE
(3) CORAM CHILDREN'S LEGAL CENTRE

Interveners

CASE FOR THE INTERVENER JUSTICE

Introduction

1. On 15 November 2011, JUSTICE was granted permission to intervene in these proceedings by way of written and oral submissions. JUSTICE is an independent human rights and law reform organisation and is the British section of the International Commission of Jurists. JUSTICE has a longstanding interest in extradition law. It made detailed submissions to the Home Office Review of the UK's Extradition Arrangements (2011) and intervened in ***Norris v United States of America (No. 1)***.

2. JUSTICE seeks to assist the Court in respect of the core issue in this case[1], namely:

> *"…Where, in proceedings under the Extradition Act 2003, the Article 8 rights of children of the defendant or defendants are engaged how should their rights 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 USA (No. 2) [2010] 2 AC 487 in the light of ZH (Tanzania) [2011] 2 WLR 148…"*

1. Certified point of law of general public importance: SFI at §10. JUSTICE also addresses the related issues in the SFI, in particular Issues 1, 3 and 4.

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Overview

3. Self-evidently when a parent of a dependent child is extradited, the family life of the child is likely to suffer very significantly – all the more so when both parents are extradited. JUSTICE's central submission is that ***Norris v Government of USA (No. 2)*** [2010] 2 AC 487, SC ("Norris") must be clarified, or if necessary modified, in the light of ***ZH (Tanzania) v Secretary of State for the Home Dept.*** [2011] 2 AC 166, SC ("ZH") to ensure that the distinct Article 8 rights of each child affected by extradition are properly safeguarded. Consequently, JUSTICE submits that the overarching principle set out in ***Norris***, which requires extradition to result in "*exceptionally serious consequences*" or an *"exceptionally compelling feature"* giving rise to *"the gravest effects of interference with family life"* before it will be considered to be a disproportionate interference with Article 8, needs clarification or modification in its application to children's rights as distinct from those of the requested person.

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4. JUSTICE's Printed Case is structured as follows:

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(I) General extradition principles relevant to these appeals
(II) A need to clarify or modify *Norris* following *ZH?*
(III) Extradition and expulsion: the correct approach
(IV) The relevance of the Article 8 rights of children in domestic criminal proceedings
(V) The effect in practice of *Norris* (unmodified by *ZH*)
(VI) Conclusion

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(I) General extradition principles relevant to these appeals

5. A court considering a request for extradition must act compatibly with Convention rights by section 6 of the Human Rights Act 1998[2]. The Extradition Act 2003 (the "2003 Act") expressly requires a court considering a request for extradition to decide at that point in time whether extradition would be compatible with the requested person's Convention rights[3]. Section 21(1) (and the materially equivalent section 87(1) under Part 2 of the 2003 Act) mandates that duty – and thereby creates a 'human rights bar' to extradition[4]. Sections 21(2)-(3) emphasise that there is no discretion involved[5].

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6. The Convention is not *in principle* an obstacle to extradition. Indeed, it expressly permits extradition and detention pending extradition: Article 5(1)(f). It is clear therefore that the Convention envisages cooperation between contracting states in relation to extradition arrangements, provided that extradition does not thereby violate any Convention rights.

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2. *R (Kashamu) v Governor of Brixton Prison* [2002] QB 887 at §32 - approved in *Fuller v Attorney General of Belize* [2011] UKPC 23 at §37 *per* Lord Phillips.
3. That was not position under the Extradition Act 1989 – because an order for committal did not amount to an order for extradition. The compatibility of extradition with the Convention was for the Secretary of State to determine. See e.g. *R (St John) v Governor of Brixton Prison* [2002] QB 613, 624.
4. See e.g. JCHR 15th Report of 2010-12, *The Human Rights Implications of UK Extradition Policy* (HL 156, HC 767) at p18.
5. See also *Fuller v Attorney General of Belize* [2011] UKPC 23 at §24 *per* Lord Phillips.

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7. It is well established that extradition, involving either the threat of prosecution or execution of a concluded judgment, may amount to a justified interference under Article 8(2) if it is "in accordance with the law" and "necessary in a democratic society": see e.g. ***Launder v United Kingdom*** (1997) 25 EHRR CD 67, at §3; ***King v United Kingdom*** (2010) (App. 9742/07) Jan 26, at §29.

8. In extradition proceedings before domestic courts, the interference with Article 8 rights is ordinarily justified, for the purposes of Article 8(2), within the rubric of the legitimate aim of **B** "preventing disorder or crime", by reference to the broad public interest in ensuring that extradition arrangements are effective and observed. It is against these undoubtedly strong interests that courts must consider the consequence of the interference to determine whether extradition would be proportionate.

9. Thus in ***Jaso v Central Criminal Court No. 2, Madrid*** [2008] 1 WLR 2798, DC, Dyson LJ observed at §57 that:

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> "*…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…*" (emphasis added).[6]

10. Against that background, the Supreme Court in ***Norris*** held that: (i) the public interest in extradition is a factor that weighs very heavily in every case[7], (ii) extradition must in reality cause "*exceptionally serious consequences*" before it will be capable of being held to **D** be disproportionate for the purposes of Article 8[8], (iii) there is no absolute rule that any interference with Article 8 as a consequence of extradition will be proportionate[9], (iv) in considering the question of proportionality, the seriousness of the alleged/actual crime is capable of being a material factor[10], (v) "*when considering the impact of extradition on family life, this question does not fall to be considered simply from the viewpoint of the extraditee*"[11].

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11. Both the 2003 Act and the Convention are silent as to the importance of the compatibility of extradition with the Article 8 Convention rights of a child affected by the extradition of a family member. However, section 6 of the Human Rights Act is clear that the court cannot act incompatibly with a Convention Right, which must include the Article 8 rights of each child affected by the extradition of a family member. It has been decisively held in the immigration context that the Article 8 rights of all family members affected by surrender must be separately considered: see ***Beoku-Betts v Secretary of State for the Home Department*** [2009] 1 AC 115, HL, applied in ***ZH*** at §§14-16.

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6. See, to similar effect, *Symeou v Public Prosecutor's Office Patras, Greece* [2009] 1 WLR 2384, DC, at §67.
7. §§51-55, 63, 91, 96, 105-107, 127, 132-137; adopting case law under Article 3 emanating from Strasbourg (*Soering v United Kingdom* (1989) 11 EHRR 439, §89) and the House of Lords (*R (Wellington) v Secretary of State for the Home Department* [2009] AC 335, HL).
8. §§55-56, 62, 82, 85, 91, 95, 107, 114 & 136.
9. §§51 & 87.
10. §§32, 63, 91 & 106.
11. §§32, 64-65 & 109.

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12. In none of the extradition cases under the 2003 Act concerning Article 8 preceding ***Norris*** was it explicitly emphasised[12] that children affected by extradition have independent Article 8 rights, together with enhanced rights in international law, which need anxious scrutiny to ensure compliance with Article 8. It is only since the decision of the Supreme Court in ***Norris*** that these independent rights have been considered in extradition proceedings. Lord Phillips held in ***Norris*** at §64 that:

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> *"…After considering the Strasbourg jurisprudence the House [in Beoku-Betts] 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. I consider that this is equally the position in the context of extradition…"*

13. ***Norris*** itself was, however, not concerned on its facts with the effect of extradition on dependent children. The application of that principle was thus not explored.

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(II) A need to clarify or modify *Norris* following *ZH?*

14. The failure to give adequate consideration and due weight to the rights of children in immigration proceedings resulted in the successful appeal in ***ZH***. JUSTICE submits that ***ZH*** applies and extends beyond the immigration law context. The Supreme Court in ***ZH*** interpreted Article 8 ECHR in accordance with Article 3 of United Nations Convention on the Rights of the Child 1989 ("CRC"), which provides that:

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> "*…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…"* (emphasis added)

15. The CRC is the most comprehensive treaty agreement recording children's rights and is the most widely ratified treaty, with all EU member states being signatories, though not the United States of America. In conjunction with its two Optional Protocols, it contains a comprehensive set of legally binding international standards for the promotion and protection of children's rights. Articles 3(1), 9, 12 and 18 all articulate, in different ways material to these appeals, the fundamental principle of the primacy of the rights of the child. The UN Committee on the Rights of the Child has also provided guidance on the interpretation of these rights. Every legislative, administrative and judicial body or institution is required to apply the primacy principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.[13] The CRC obliges States parties to assure that those responsible for these actions hear the child: as stipulated in Article 12. The best interests of the child, established in consultation with

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12. Pre-*Norris* cases in which the impact upon dependent children were considered in the context of Article 8 included *Nanarova v District Court in Usti Nad Labem Czech Republic* [2009] EWHC 2710 (Admin) and *R (Balog) v Judicial Authority of the Slovak Republic* [2009] EWHC 2567 (Admin). The Magistrates' Court and High Court had shown themselves to be alive to these issues in *RW v Provincial Court of Katowice, Poland* [2008] EWHC 2744 (Admin).

13. General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5 (27 November 2003), at §12.

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the child, is not the only factor to be considered. It is, however, of crucial importance, as are the views of the child.[14]

16. Baroness Hale noted in ***ZH*** (at §3) that Article 3 CRC was a binding obligation in international law and observed that:

> *"…In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations…"* (at §33).

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17. Lord Hope concurred with Baroness Hale and, at §44, held that:

> *"…There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. ... the starting point, [is] to assess whether their best interests are outweighed by the strength of any other considerations…"* (emphasis added)

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18. Lord Hope added, at §44, with particular relevance to a situation where children may have been deliberately conceived in order to try to prevent their parent's removal:

> *"…It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible…"*

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19. Lord Kerr also agreed with Baroness Hale and concluded that:

> *"…It is a universal theme of the various international and domestic instruments to which Baroness Hale JSC 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…"* (§46) (emphasis added)

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20. ***ZH*** applies equally to the situation (akin to the present case) where children are left behind when their parents are deported as it does to when the children are forced to leave: see ***R (BN) v Secretary of State for the Home Dept***. [2011] EWHC 2367 (Admin) *per* Stadlen J at §123.

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14. General Comment No. 12, *The Right of the Child to be Heard,* CRC/C/GC/12 (20 July 2009), at §70.

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21. Although ***ZH*** was an immigration case, the reasoning in ***ZH*** was not wholly immigration-specific. Whilst the Court relied in part upon the statutory duty to have regard to the need to safeguard and promote the welfare of children (in s.55 of the Borders, Citizenship & Immigration Act 2009) and the UK's removal in 2008 of its reservation to the CRC, the reasoning in ***ZH*** flowed predominantly from the need to interpret domestic law and the Convention compatibly with the CRC.

22. There is no reservation in the CRC applicable to extradition and the now withdrawn reservation considered in ***ZH*** did not apply to extradition[15]. Moreover, Article 9.4 CRC (which does not purport to provide an exhaustive list of circumstances in which a child may be separated from its parent) plainly envisages that such separation may result from extradition, and that the best interests of the child apply at that moment (Article 9.1 CRC).

23. If further support is needed for the general application of the reasoning in ***ZH***:

    a. The domestic courts have often had regard to the CRC, despite its unincorporated status: ***R v Secretary of State for the Home Department, ex p Venables and Thompson*** [1998] AC 407, HL, at p499; ***R v G*** [2004] 1 AC 1034, HL, at §§53-54; ***R (Williamson) v Secretary of State for Education*** [2005] 2 AC 246, HL, at §§81-86; ***Smith v Secretary of State for Work and Pensions*** [2006] 1 WLR 2024, HL, at §77; ***Re D (A Child) (Abduction: Custody Rights)*** [2007] 1 AC 619, HL, at §58; ***Re B (Children) (Care Proceedings: Standard of Proof)*** [2009] 1 AC 11, HL, at §20; ***R (MXL) v Secretary of State for the Home Dept.*** [2010] EWHC 2397 (Admin), §§83-84;

    b. Specifically, the domestic courts have repeatedly emphasised the need to read the ECHR compatibly with the CRC: ***Dyer v Watson*** [2004] 1 AC 379, PC, at §§61 & 104-106; ***R (R) v Durham Constabulary*** [2005] 1 WLR 1184, HL, at §§26-28; ***R (S) v Secretary of State for the Home Dept.*** [2007] EWHC 1654 (Admin) at §41; ***R (E) v Governing Body of JFS*** [2010] 2 AC 728, SC, at §90.

    c. The Strasbourg court has frequently had regard to the CRC in interpreting Convention rights: see e.g. ***Neulinger v Switzerland*** (2010) 28 BHRC 706, GC, at §§131-135; ***Keegan v Ireland*** (1994) 18 EHRR 342 at §50; ***V v United Kingdom*** (2000) 30 EHRR 121 at §§76-77. In ***A v Secretary of State for the Home Dept. (No.2)*** [2006] 2 AC 221, Lord Bingham noted at §29 the wide range of international instruments which the European Court has invoked in its decisions. The Strasbourg Court recently re-affirmed its approach in ***Demir v Turkey*** (2009) 48 EHRR 54 at §§69-73. The Court also considered the CRC in the context of extradition in ***Harkins and Edwards v United Kingdom*** (2012) (Apps no 9146/07 and 32650/07) Jan 17.

15. UK's reservation (c) to CRC : "…The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time…". (Made on 15 Jan 1992, withdrawn on 18 Nov 2008).

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d. The broader need to interpret the Convention in harmony with international law obligations has also been emphasised by the ECtHR: ***Al-Adsani v United Kingdom*** (2002) 34 EHRR 11 at §55; reaffirmed by the Grand Chamber in ***Öcalan v. Turkey*** (2005) 41 EHRR 45, GC, at §163.[16]

e. There are many sources of international law, in addition to the CRC, which support the primacy (or equivalent) of the child's best interests. See, for example, the second principle of the United Nations Declaration on the Rights of the Child 1959; Articles 5(b) and 16.1(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; Articles 23-24 and General Comments 17 & 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966 (See ***Neulinger*** at §§49-56; ***ZH*** at §22).

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f. Of particular relevance to the EAW Framework Decision is the enshrining of the CRC in Article 24 of the Charter of Fundamental Rights[17]:

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> *"…(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity*
>
> *2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
>
> *3. Every child shall have the right to maintain on a regular basis a persona relationship and direct contact with both his or her parents, unless that is contrary to his or her interests…"*

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h. The CJEU has affirmed the primacy of the rights of the child under Article 24 of the Charter[18]. When applying any EU law, a balanced and reasonable assessment of all the child's interests involved should be carried out, which must be based on objective considerations relating to the actual person of the child and his or her social environment[19]. Likewise, CJEU has held that Article 7 of the Charter (equivalent to Article 8 ECHR):

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> "*…must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in article 24(2) of that Charter*…"[20]

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16. Leading academics on the CRC have also noted the courts' willingness to consider international instruments as an important source of guidance over standards to be reached by domestic law: e.g. Fortin, *Children's Rights and the Developing Law* (2009) 3rd ed., Cambridge at p9.

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17. Article 6(1) of the Treaty on European Union recognises the Charter as having '*the same legal value as the Treaties*'. The Charter is thus primary law, capable of direct effect in same way as other Treaty provisions, within the scope of its operation. See further *NS v SSHD* (2011) (C-411/10), Dec 21, CJEU.
18. See, for example, *Detiček v Sgueglia* (Case C-403/09 PPU) [2010] Fam 104, CJEU. The Court held that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right.
19. Ibid, at §§ at 53 to 60.
20. *Mc B v E* (Case C-400/10 PPU) [2011] Fam 364, CJEU, at §60.

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i. The Supreme Court has recently re-affirmed the rights of the child in an Article 8 context in ***Re E (Children) (Abduction: Custody Appeal)*** [2012] 1 AC 144, SC. The Court clarified ***Neulinger*** and held that Article 8 and the CRC can be read entirely compatibly with one another providing the child's best interests are at the forefront of the court's consideration (even if that is not expressly provided for in the international instrument in question – there it was the Hague Convention, in ***Norris*** it was the US/UK extradition treaty, here it is the Framework Decision (2002/584/JHA)).[21]

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24. JUSTICE submits that the safeguards and principles in international law which underline the need for the courts to give primary consideration to the child's best interests are equally significant and applicable in the context of extradition. There is no justification whatsoever for excluding extradition proceedings from their reach. Therefore, if there exists any residual tension between the approach adopted in ***Norris*** to extradition cases and that identified in ***ZH***, then the guidance in ***Norris*** ought properly to reflect (and if necessary to yield to) the extra protection which children enjoy under the CRC.

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Does any tension exist?

25. In the present case, Laws LJ considered the effect of ***ZH*** on ***Norris*** and concluded:

> "*…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*…" (§60).

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26. Laws LJ went on to attribute the need, in an extradition case, for a "substantially more pressing" "exceptionally compelling feature" than in a deportation case to (i) the important difference between expulsion and extradition (§61) and (ii) the different public interests attaching to extradition and deportation (§62). His reference to the potency of the public interest in extradition was derived from ***Norris*** and he concluded:

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> "*…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'…"* (§63) (emphasis in original).

Appendix 1, p35

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21. The *Re E* judgment post-dates Laws LJ's judgment in the present case.

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27. JUSTICE submits that Laws LJ:

    a. drew an excessively rigid distinction between expulsion and extradition and their associated public interests. Subsequent ECtHR case law demonstrates that approach to be wrong.

    b. did not "make it clear in emphatic terms" that the interests of child were "first" (*per* Lord Kerr and Baroness Hale in ***ZH***);

    c. to all intents and purposes applied a legal exceptionality threshold;

    d. wrongly elevated the integrity of the system of mutual recognition / extradition into the primary consideration;

    e. did not specifically consider, for example, whether it was in the best interests of each child to be adopted/fostered/put into care in the UK (and thereby effectively to have no contact with either parent);

    f. in his application of the law to the facts, was constrained by his interpretation of the governing legal principles and he did not thus undertake a detailed, fact-sensitive assessment in which he considered, for example, the language(s) spoken by each child, links of each child with UK, relative strength of links between each child and each parent.

    g. did not expressly disregard conception post-arrest (applying ***ZH*** at §44) – since that is no fault of the dependent children and cannot downgrade their Article 8 rights.

28. It is instructive to contrast Lord Kerr's reasoning in ***ZH*** (the best interests of the child is not merely a factor which goes into the balancing exercise) with the approach of Laws LJ in this case (the best interests of the child is generally not even a factor in the balancing exercise, since there is generally no such balancing exercise to be done, having regard to the overwhelming public interest in extradition; "…they cannot generally override the public interest in effective extradition…" (§60)).

29. Laws LJ's reasoning was tantamount to suggesting that the public interest in extradition overrides fundamental rights, save in exceptional circumstances. That is inconsistent with ***Fuller v The Attorney General of Belize*** [2011] UKPC 23 at §48 (decided after the Divisional Court's judgment in this case), in which the Board re-affirmed that the public interest in extradition is subjugate to fundamental rights. It was also contrary to Lord Hope's view in ***Norris*** (see below).

Is ZH incompatible with the Framework Decision?

30. Full and proper adherence to Article 8 ECHR is wholly consistent with the Framework Decision (and indeed all other extradition treaties). Article 1.3 and Recital 12 to the Framework Decision provide that the systematic carrying out of European Arrest Warrants does not modify states' obligations to respect fundamental rights. As the Commission observes:

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"…It is clear that the Council Framework Decision on the EAW … does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights…"; *"…protection of fundamental rights in particular must be central to the operation of the EAW system…"*[22]

31. JUSTICE submits that it is no answer to a full Article 8 enquiry to say that the Issuing State will have considered any child's Article 8 rights at the time when the request was made:

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a. First, that presupposes the existence of a proportionality check in the Issuing State, and it is recognised that such a check is not universally undertaken or applied consistently throughout the Union.[23]

b. Secondly, even if a proportionality check was undertaken at the point of issuance, there is no reason to suppose that it would have considered Article 8 issues at all, and certainly not the Article 8 rights of dependent children. The type of proportionality (triviality) assessment envisaged by the Commission and Council[24], are not akin to Article 8 assessments.

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c. Thirdly, circumstances may have changed significantly since the request was made – in this case, for example, Z was born after the accusation warrants were issued. It is difficult to envisage how the Issuing State would ever have sufficient information about the family situation of a requested person in another State at the time a warrant is issued.

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32. Nor can the UK court proceed upon the assumption that the Issuing State will be able to protect a child's Article 8 rights at the point of return. Extradition cases involving children's Article 8 rights are typically 'domestic cases' rather than 'foreign cases'. The 2003 Act and the Human Rights Act require the UK court to act compatibly with the Convention and to give proper and meaningful effect to those rights at the moment of removal. It cannot delegate protection of those rights to another court of a foreign state at some unspecified time after the point of surrender not least because the very act of surrender will lead to a violation of these rights. In ***MSS v. Belgium and Greece*** (2011) 53 EHRR 2, the ECtHR made clear that presumptions of equivalence cannot override national and international responsibilities to protect ECHR rights[25]. In this context, it is the very act of extradition, and the geographical separation of parent and child, that constitutes the gravamen of the Article 8 violation.

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22. See COM(2011) 175 final, "*Report from the Commission to the European Parliament and Council, on the implementation since 2007 of the Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States*", 11 April 2011 (at pp7-9).

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23. 2011*Ibid*, COM(2011) 175 final (at pp6-8). See further the revisions to the EAW Handbook at 17195/1/10, 17 December 2010, at §3, and Council, "*Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States"*, 8302/2/09, 28 May 2009, §3.9 / the Presidency "*follow-up report to the evaluation reports*", 15815/1/11, 18 November 2011, at §§2.28-2.30.
24. *Ibid*, COM(2011) 175 final.
25. Similarly, in *NS v SSHD* (2011) (C-411/10), Dec 21, CJEU, presumptions of compliance with fundamental rights can never be conclusive. Legal obligations to cooperate within the EU which are based on presumptions of trust must not be permitted to override Convention protection.

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(III) Extradition and expulsion: the correct approach

33. Laws LJ's analysis of the application of ***ZH*** was heavily coloured by a bright-line distinction between the public interest in extradition and the public interest in deportation cases and the related perceived difference in the effect of Article 8 in such proceedings.[26]

34. This distinction had first emerged in the jurisprudence of this court in ***R (Wellington) v Secretary of State for the Home Dept.*** [2009] 1 AC 335, HL. There, a majority of the House of Lords held that Article 3 applies in extradition cases in a modified or relativist manner because of the nature of the public interest in extradition, by reference to, amongst other matters, a distinction between extradition and other removal cases (see, §§22-31, 51, 57-58, 60-62. cf. §§40-41, 85-87). This distinction was then applied in ***Norris*** to Article 8 where Lord Phillips considered that:

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> "*…The public interest in extradition nonetheless weighs very heavily indeed. In Wellington the majority of the House of Lords held that the public interest in extradition carries special weight where article 3 is engaged in a foreign case. I am in no doubt that the same is true when considering the interference that extradition will cause in a domestic case to article 8 rights enjoyed within the jurisdiction of the requested State. It is certainly not right to equate extradition with expulsion or deportation in this context*…" (§51) (emphasis added)

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35. JUSTICE submits that such an approach is too stark in its distinction.

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36. First, it does not accord with the approach taken by this Court or Strasbourg. Lord Hope's analysis in ***Norris*** refers at §§89-90:

> "*…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. ... while the purpose of the two procedures [extradition and expulsion is] different, in the context of the possible engagement of fundamental rights under the Convention the Strasbourg court has not in its case law drawn a distinction between cases in the two categories. I would apply that approach to this case...*"

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37. As does Lord Bingham's opinion in ***R (Ullah) v Special Adjudicator*** [2004] 2 AC 323, HL, at §13 where he said that, while there were substantive differences between expulsion and extradition, the Strasbourg court had held the ***Soering*** principle to be potentially applicable in either situation. And it is contrary to Lord Steyn's opinion in ***Ullah*** at §33.

38. Most recently in ***Harkins and Edwards v United Kingdom*** (2012) (Apps no 9146/07 and 32650/07) Jan 17, the ECtHR has expressly considered the correct approach to Convention rights in extradition cases, and whether any proper distinction should be made between extradition and other forms of removal. The Court held that:

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26. A similar view had also previously been adopted by Silber J when considering the application of *ZH* in *B v District Court in Trutnov* [2011] EWHC 963 (Admin) at §55-56. By contrast, in *Kozlow v The Koszalin District court, Poland* [2011] EWHC 1110 (Admin) at §§5 & 13-19, the High Court applied *ZH*.

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APPENDIX

"…The Court begins by observing that the House of Lords in Wellington has identified a tension between Soering [extradition] and Chahal [deportation]… which calls for clarification of the proper approach to Article 3 in extradition cases. It also observes that the conclusions of the majority of the House of Lords in that case depended on three distinctions which, in their judgment, were to be found in this Court's case-law. The first was between extradition cases and other cases of removal from the territory of a Contracting State…For the first distinction, the Court considers that the question whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State. The Court's own case-law has shown that, in practice, there may be little difference between extradition and other removals. For example, extradition requests may be withdrawn and the Contracting State may nonetheless decide to proceed with removal from its territory…Equally, a State may decide to remove someone who faces criminal proceedings (or has already been convicted) in another State in the absence of an extradition request…Finally, there may be cases where someone has fled a State because he or she fears the implementation of a particular sentence that has already been passed upon him or her and is to be returned to that State, not under any extradition arrangement, but as a failed asylum seeker…The Court considers that it would not be appropriate for one test to be applied to each of these three cases but a different test to be applied to a case in which an extradition request is made and complied with…" (§§119-120) (emphasis added)

"…The Court therefore concludes that the Chahal ruling (as reaffirmed in Saadi) should be regarded as applying equally to extradition and other types of removal from the territory of a Contracting State…" (§128)

39. Whilst there are plainly substantive differences between the underlying purposes in expulsion and extradition cases, the recent Strasbourg case law indicates that the relevance of expulsion decisions involving Article 8 rights cannot be downgraded in the way suggested by Laws LJ. Insofar as there is tension between the approach of Lord Phillips and Lord Hope in ***Norris*** on the issue, JUSTICE submits that ***Harkins*** strongly supports that tension being resolved in favour of Lord Hope's approach.

40. Various non-*refoulement* provisions also treat extradition and expulsion in the same manner e.g. Article 19 of the EU Charter of Fundamental Rights; Article 3 of the UN Convention Against Torture; Article 7 of the ICCPR (as interpreted by HRC General Comment No. 20 at §9).

41. Accordingly, decisions such as ***AA v United Kingdom*** (2011) (App. No. 8000/08), Sep 20,[27] in which the ECtHR found a violation of Article 8 in a post-conviction expulsion case, are considerably more relevant than otherwise. The Court in ***AA***, at §56, set out a number of factors in assessing whether the expulsion of the applicant was "necessary in a democratic society" in accordance with Article 8(2), including:

27. Applying *Üner v The Netherlands* (2007) 45 EHRR 14, GC and *Boultif v Switzerland* (2001) 33 EHRR 50 – authorities which were also relied upon by the Supreme Court in *ZH*.

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a. the nature and seriousness of the offence committed by the applicant;
b. the length of the applicant's stay in the country from which he or she is to be expelled;
c. the time which has elapsed since the offence was committed and the applicant's conduct during that period;
d. the nationalities of the various persons concerned;
e. the applicant's family situation, such as the length of any marriage and other factors expressing the effectiveness of a couple's family life;

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f. whether there are children of the marriage, and if so, their age;
g. the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
h. <u>the best interests and well-being of any children</u>, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
i. the solidity of social, cultural and family ties with the host country and with the country of destination.

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42. Plainly, many of these factors (especially "the best interests of any affected child") are equally capable of being highly relevant to Article 8 rights in an extradition case involving child dependents and the assessment of whether extradition is "necessary in a democratic society". The Court reiterated that:

> *"…these criteria are meant to facilitate the application of Article 8 in expulsion cases by domestic courts and that the weight to be attached to the respective criteria <u>will inevitably vary according to the specific circumstances of each case</u>. Further, not all the criteria will be relevant in a particular case. It is in the first instance for the domestic courts to decide, in the context of the case before them, which are the relevant factors and what weight to accord to each factor. However, the State's margin of appreciation in this regard goes hand in hand with European supervision and the Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8…"* (at §57) (emphasis added).

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(IV) <u>The relevance of the Article 8 rights of children in domestic criminal proceedings</u>

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43. Related to Law LJ's conclusion that extradition cases involve a much greater pressing public interest than deportation cases is a comparison between the public interest in extradition and domestic criminal prosecutions. At §52, of ***Norris*** Lord Phillips considered that in a domestic context:

> "*…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…*".

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44. Lord Mance has specifically raised this issue in these appeals:

> *"…Is it immaterial that the parents absconded from Italy while on remand? Had they not absconded, the children would anyway be faced with the disaster which is now feared. And what would be the position in respect of children if their parents had committed serious drugs or other offences in this country? Would that have been a reason for not sending the parents to prison here? Would not the children then be exposed to an effective break of their relationship with the parents, and being taken into care…"*

Appendix 1, p40

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45. It is submitted that the comparison with domestic criminal law is informative but complex. In some contexts, the courts have held that Article 8 considerations concerning children can justify a prosecution not being brought at all: see e.g. ***R (E, S, and R) v DPP*** [2012] 1 Cr. App. R. 6, DC. *A fortiori* Article 8 considerations may be sufficient by themselves to prevent a custodial sentence from being imposed following a criminal prosecution. The interests of dependent children are not infrequently a very material consideration for domestic criminal courts in determining whether a suspended sentence may be appropriate.

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46. What emerges very clearly from ***R (P) v Secretary of State for the Home Dept***. [2001] 1 WLR 2002, CA, is the need for a sentencing court to consider carefully the effect of separation from mother and child. At §79 the Court held that:

> "*…If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound by section 6(1)* [of the Human Rights Act 1998] *to carry out the balancing exercise identified by Hale LJ in In re W & B (Children) at para 54, especially at sub-para (iii) (for which see para 65 above) before deciding that the seriousness of the offence justifies the separation of mother and child. <u>If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under section 6(1), ask for more</u>…"* (emphasis added)

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47. The importance of any affected child's rights during sentencing in domestic criminal proceedings was recently re-affirmed by the Court of Appeal in ***R v Bishop*** [2011] EWCA Crim 1446, at §9:

> "*…a sentencing judge should, consistently with Article 8 of the European Convention on Human Rights, have at the forefront of his or her mind the consequences for children if their sole carer is sent to prison and consider whether on balance the seriousness of the offence or offences justifies the separation of child and carer*…"[28]

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28. See also *R v Evelyn Arinze* [2010] EWCA Crim 1638 ; *R v Joanne Mills* [2002] 2 Cr App R (S) 52, CA, at §15 - in both appeals the sentences were reduced having regard to the interests of the children.

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48. A domestic sentencing court generally has more, and more nuanced, options available to it to militate against the severity of the Article 8 consequences of separating a child from its parent than is available to a court considering a request for extradition. So, for example, a breastfeeding mother may be able to take her baby into prison with her: see for example ***B v S*** [2009] 2 FLR 1005, CA[29]. By contrast, it may not be possible for a baby (even a breastfeeding one) to accompany its mother if she is being extradited. Indeed the existence, for example, of rule 39 interim measures in ***EB v United Kingdom*** (2011) (App. No. 63019/10), Feb 28 – which concerns the request for extradition of a breastfeeding mother to Poland on a conviction warrant for a sentence of 18 months imprisonment – highlights these issues and indicates that the existing UK approach to Article 8 in children cases may be in need of a more nuanced approach[30]. It is of note that the domestic court in ***EB***[31] had applied the guidance in ***Norris*** in reaching its conclusion that extradition of a breastfeeding mother did not violate engage Article 8.

49. The 'binary nature' of extradition (viz. the choice is typically simply between whether or not to extradite) as compared to the more varied options generally available to a domestic criminal court may have the result that a domestic custodial sentence will not violate Article 8 (e.g. because the baby can accompany the mother into prison or because it can be suspended) whereas extradition for the same/an equivalent offence would violate Article 8 (e.g. if the baby would be separated from the mother). Equally, continued contact (by means of prison visits[32] or day release) between a young child and its imprisoned parent may mean that a custodial sentence does not violate the child's Article 8 rights, whereas extradition (which would sever all such contact) for the same offence would violate Article 8.

50. Of course, there is no reason in principle why extradition decisions should necessarily be binary. Article 4(6) of the Framework Decision[33] permits an EU Member State to refuse to execute an EAW issued for the purposes of serving a sentence (a conviction EAW) if the UK as executing State agrees that the sentence will be served in the UK[34]. Article 5(3) makes similar provision for execution to be conditional with regards to EAWs issued for the

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29. See also *R (CD and AD) v Secretary of State for the Home Department*, [2003] 1 FLR 979, DC, where a decision to separate a mother and baby in prison (by removal of the mother from the prison's Baby Unit) was held to violate Article 8 as it did not have adequate regard to the best interests of the child. See further Macdonald, *Rights of the Child, Law & Practice* (2011) at §4.161 for consideration of the applicability of Article 3 CRC to prison authorities.
30. See also *Scozzari and Giunta v Italy* (2002) 35 EHRR 12. In *K v Finland (No 2)* (2003) 36 EHRR 18, the ECtHR held that a newborn child may be taken into public care at the moment of birth only in the most exceptional circumstances, and such drastic action calls for the most compelling reasons. Such a situation must be closely and constantly monitored, for as soon as the circumstances change the interference must cease and mother and child must be reunited. See further Macdonald, *Rights of the Child, Law & Practice* (2011) at §8.90.
31. *R (B) v Regional Court of Elbag* [2010] EWHC 2958 (Admin); judgment not publicly available.
32. "…Detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life...However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family…": *Moiseyev v Russia* (2011) 53 EHRR 9 at §246.
33. See Issue 5 of the SFI.
34. But only where where the requested person is staying in, or is a national or a resident of the executing Member State (as to the meaning of which, see *Criminal Proceedings against IB* (C-306/09) [2011] 1 WLR 2227, ECJ: *Criminal Proceedings against Wolzenburg* (C-123/08) [2010] 3 CMLR 33, CJEU, GC; *Criminal Proceedings against Kozlowski* (C-66/08) [2009] QB 307, ECJ, GC.

purposes of prosecution (accusation EAWs). But, as the UK courts have observed[35], the safeguards in Articles 4(6) & 5(3) have not been transposed into UK domestic law. An EAW may not be refused on this basis. The Joint Committee on Human Rights has recommended that the 2003 Act be amended to remedy this in order to "significantly reduce the impact ... on Article 8 rights".[36] However, as has been noted[37], in almost all cases, there exist bilateral Prisoner Transfer Agreements ("PTA"), here the Council Framework Decision 2008/909/JHA of 27 November 2008[38], that operate alongside extradition procedures. There is nothing in principle preventing an Issuing State providing a PTA guarantee so that the UK court does not refuse to execute an EAW in an accusation case which otherwise would require discharge under Article 8. Or, in a conviction case, adopting the PTA process as a mutually-agreed alternative to execution of an EAW. The position would be no different in a Part 2 case. In all cases, however, this would require the existence and mobilisation of bilateral PTA procedures, which require the concurrence of both governments and involve a timescale which is not often compatible with extradition proceedings.[39]

51. Deferral of extradition could be another option. Sentencing courts in this jurisdiction are specifically empowered to defer sentencing for six months if they consider it to be "in the interests of justice" to do so.[40] In contrast, extradition proceedings allow no such flexibility, as was noted by the District Judge in the present case, who explained that he was obliged to follow the step by step procedure under the 2003 Act. In doing so, there is little scope to defer extradition[41] and even less scope to make accommodating arrangements to mitigate any interference with the Article 8 rights of the child. Nevertheless, there is nothing to prevent a court from indicating that whilst Article 8 may currently prevent extradition, such a conclusion would be unlikely to apply in the future.

Appendix 1, p74 at §69

52. Despite the obvious relevance of considering analogous domestic criminal proceedings (in the Requesting or the Requested State[42]), it is notable that the public interest in extradition has been interpreted in the light of ***Norris*** to be so great that (even in a case involving four young children and relatively minor offences of dishonesty):

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35. See *Krajewski v Circuit Court of Torun, Poland* [2011] EWHC 1068 (Admin) at §§47-49; *Bierowka v Regional court in Wroclaw, Poland* [2011] EWHC 228 (Admin) at §§6-11; *La Torre v. Her Majesty's Advocate* [2006] ScotHC HCJAC 56 at §§80-91 & 103-104; *Goatley v Her Majesty's Advocate & another* [2006] HCJAC 55 at §§39-53.
36. JCHR 15th report of 2010-12 (above, fn 4) at §§181-182.
37. See the Home Office Review of the UK's Extradition Arrangements, 30 September 2011, at §§4.26-4.33 and 5.95-5.99.
38. *Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty* (the European Enforcement Order); to which the Repatriation of Prisoners Act 1984, as amended, gives effect as an "international arrangement" (additional consequential provisions to give effect to outstanding aspects of the Framework Decision are presently before Parliament in clauses 119-120 of the Legal Aid, Sentencing and Punishment of Offenders Bill). So far as EU Member States that have implemented it (including Italy), the Framework Decision replaced the Council of Europe Convention on the Transfer of Sentenced Persons 1983 and its additional Protocol.
39. Additional possible alternative measures, falling short of direct alternatives to extradition, are ventilated in the Home Office Review of the UK's Extradition Arrangements, 30 September 2011, at §§5.151-5.154.
40. S.1(3)(c) and s.1(4), Powers of Criminal Courts (Sentencing) Act 2000; s.278 and Sch. 23, Criminal Justice Act 2003.
41. Such scope as does exist is dependent upon the agreement of the Requesting State (see ss.35(4)(b), 36(3)(b), 47(3)(b), 49(3)(b) of the 2003 Act) and was never intended to apply here (see Article 23 of the Framework Decision). A defendant does not even have the right to make representations: see, for example, *Kasprzak v Warsaw Regional Court, Poland* [2011] EWHC 100 (Admin) at §§48-49. In any event, it is not a power that exists under Part 2 of the 2003 Act.
42. Which forum is the relevant comparator may depend, in part, upon whether the request in question is an accusation or conviction request.

> *"…it does not matter in an extradition case that an appellant would not or might not have received a custodial sentence in this country .... The critically important factor is the Framework Directive* [sic.]*, which militates strongly in favour of ordering extradition. The statements made in Norris ... stress the great importance attached to ensuring that arrest warrants from other countries with whom we have treaty obligations are respected and given proper weight…" (**B v District Court in Trutnov** [2011] EWHC 963 (Admin) per Silber J at §67).

(V) The effect in practice of *Norris* (unmodified by *ZH*)

53. Since ***Norris***, the significance attributed to the rights of the child in extradition proceedings has been left to courts to determine in the light of the broad principles expressed in ***Norris***. JUSTICE submits that an examination of how ***Norris*** has been applied in practice in extradition cases involving dependent children strongly re-enforces the need for further guidance/clarification. JUSTICE emphasises that it does not (and it would not be appropriate to) seek to submit that the cases analysed below were necessarily wrongly decided. But JUSTICE does contend that, absent any specific guidance in ***Norris*** relating to dependent children, the cases do demonstrate that ***Norris*** has been wrongly interpreted so as to impose an exceptionality test and that ***Norris*** has been applied so as to set a threshold which may in practice be unattainable.

54. In many post-***Norris*** cases it does not appear that the Article 8 rights of children are considered separately or genuinely approached as a primary consideration. Where extradition impacts upon a child, it is necessary to scrutinise closely the best interests of each affected child. Such an enquiry will be a critical (although not necessarily decisive) component in the assessment of the proportionality of the interference with Article 8 rights which extradition invariably constitutes. JUSTICE submits that post-***Norris*** Article 8 extradition cases reveal a widespread reluctance to perform any detailed assessment of the effect of extradition on each child and a failure to consider the child's best interests first. There undoubtedly exists a tension between a requested state's powerful obligations to extradite pursuant to international agreements, and its duty to protect the fundamental Convention rights of children affected by the extradition[43]. ***Norris*** provides no simple resolution to this tension, which is all the more acute in the light of the special importance that domestic and international law places upon safeguarding the rights of children.

55. JUSTICE accepts that the circumstances in which Article 8 considerations will outweigh the importance of extradition are likely to be comparatively rare. That cannot, however, be elevated into any form of legal presumption. Indeed the Court in ***Norris*** expressly disavowed any legal test of exceptionality. Lord Hope at §§89-90 held that:

> "*…I agree that exceptionality is not a legal test, and 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. ... that exceptionality is not a legal test [in immigration cases] can be applied to extradition cases too…*"

43. As Mitting J recently noted in *R (Reece-Davis) v Secretary of State for the Home Dept.* [2011] EWHC 561 (Admin) at §24, a similar tension remains in immigration cases post-*ZH*.

APPENDIX

56. And Lord Phillips observed that the phrase "*exceptional circumstances*" says little about the nature of the circumstances: §56. Indeed Lord Phillips preferred to use the description "*exceptionally serious consequences*" in order to ensure that the focus was squarely on the rights of the individual. As Lord Hope explained, an "*exceptional circumstances*" test "*risks diverting attention from a close examination of the circumstances of each case*." (§89).

57. Despite that concern, absent any specific guidance in ***Norris*** relating to dependent children, such an approach appears to have become prevalent post-***Norris*** and appears to have been adopted by Laws LJ in these appeals.

58. Of course, none of the above is tantamount to submitting that the mere fact of having a family will necessarily preclude extradition. JUSTICE accepts, and ***Norris*** rightly recognises, that such a conclusion would mean "*the public interest would be seriously damaged*". However, ***Norris*** did contemplate that "*…the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration…*". At §65, the Court considered a scenario where an extraditee is sought for an offence "*…of no great gravity*" when he had sole responsibility for an incapacitated family member. It was contemplated that such circumstances "*might well lead a judge to discharge the extradite…*".

59. However, since ***Norris***, that sole example appears to have been wrongly elevated into the only possible situation which could ever violate Article 8. See e.g. Respondent's Skeleton below:

Appendix 1, p630 at §87

> "*…In the light of Norris, it is argued that where the offences in question cannot be described as trivial then extradition will (almost always) be a proportionate interference with a defendant's Article 8 rights…*".

60. This understanding of ***Norris*** can be seen, for example, in ***C v The Circuit Court in Poznan, Poland*** [2010] EWHC 2262 (Admin) at §22:

> "……[the evidence] *is not such as to put this case into the exceptional category identified in Norris…The possibility identified by Lord Phillips that extradition would be disproportionate where there will be a severe suffering to a family, but the offence itself is relatively trivial, does not arise …*".

61. JUSTICE submits that a review of the post-***Norris*** authorities reveals two common themes:

    a. The emergence of an exceptionality test. Specifically, there is a strong assumption that the Article 8 rights of an affected child cannot alter the course of an extradition decision save where there exists some exceptional feature, over and above that ordinarily present in cases concerning dependent children (which has yet to be identified).

    b. A consequent failure properly to address the impact of extradition on the rights of affected children in any meaningful detail to ensure they are safeguarded. A threshold has evolved which may be all but unattainable in practice, whatever the circumstances.

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a. The emergence of an exceptionality test

62. There are many examples where Courts have expressed strong general reservations about the possible significance of the Article 8 rights of a child affecting a court's determination of the compatibility of extradition with Convention rights and have appeared to adopt an exceptionality threshold, precluding any proper assessment unless the facts demonstrate some exceptionally compelling feature, over and above that ordinarily present in cases concerning dependent children. For example:

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a. In ***Smuda v District Court of Poznan, Poland*** [2011] EWHC 2734 (Admin) (concerning an EAW issued to enforce 20 months outstanding from a 3½ year sentence, where the defendant had a child in ill-health), the Court held in relation to Article 8, in a nine-paragraph judgment, at §7: "*…in order…to prevent extradition the circumstances really need to be quite extreme … It is necessary to understand that the whole system of extradition from one country to another is now based on one country trusting the system of another country and in the absence of really clear problems extradition follows pretty automatically*…"

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b. In ***Irwinski v Regional Court in Bydgoszcz*** [2011] EWHC 1594 (Admin) (concerning an EAW issued to enforce an 18 month sentence dating from 2003, where the defendant had a one-year-old dependent child), the Court held (in a nine-paragraph judgment) at §8 that "…*The District Judge considered various possibilities, but whether or not those possibilities – for the girlfriend to return to Poland, for somebody to come to this country, or for use to be made of social services is this country – is, in one sense, neither here nor there*. *This is simply not a case which reaches the level of severity of interference such as to make extradition disproportionate…*"

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63. JUSTICE submits that this is the wrong starting point in relation to Article 8 and cannot have been the intended effect of ***Norris***. Lord Mance recognised that the risk of particular formulations concerning Article 8 in extradition cases involving a "*high threshold*" or needed "*striking and unusual facts*" may tend to suggest the public interest in every case is the same or that the person resisting extradition carries some form of legal onus to overcome that threshold:

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> "*…whereas in fact what are in play are two competing interests, the public and the private, which have to be weighed against each other…It can be expected that the number of potential extradites 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*…" (at §108)

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64. What appears to have happened on the ground since ***Norris*** is in fact a mirror of what occurred in the period between ***R (Razgar) v Secretary of State for the Home Department*** [2004] 2 AC 368, HL and ***Huang v Secretary of State for the Home Department*** [2007] 2 AC 167, HL in the immigration context – where Lord Bingham's observations in ***Razgar*** at §20 were wrongly interpreted by the lower courts as imposing a legal test of exceptionality, when in fact Lord Bingham was there merely expressing his expectation and not purporting to lay down any such requirement (see ***Huang*** at §20).

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b. Inadequate consideration of each child's position; an unattainable threshold?

65. Properly applied, the principles in ***Norris*** support an approach which involves a careful, highly fact-sensitive examination of the impact of extradition on each innocent dependent. ***Norris*** certainly cannot have intended to create a limiting hurdle set so high that it is in practice unreachable. Nevertheless, the case law post-***Norris*** suggests that this may indeed be the case. See, for example, the short selection of post-***Norris*** authorities detailed in the Annex to this Printed Case.

66. JUSTICE is aware of over 50 cases before the High Court post-***Norris*** in which the Article 8 rights of dependent children were in issue. So far as JUSTICE is aware, in no case have the rights of those children prevailed so as to prevent extradition[44]. In very few did the independent Article 8 rights of the children in question receive separate consideration at all. JUSTICE does not submit that any or all of those cases were necessarily wrongly decided. But the reasoning adopted (and considered above) does strongly suggest that there is an entrenched expectation that the Article 8 rights of an affected child simply cannot outweigh the public interest in extradition.

67. In part, this is because the lower courts appear to apply an exceptionality threshold and one which is so high as to be, in practice, consistently out of reach of those facing extradition. It is also apparent that the degree of enquiry into the effect of extradition on children is extremely variable. A perfunctory approach to establishing the effect of extradition on a child is only explicable if the threshold is deemed to be in all but the most exceptional circumstances out of reach. JUSTICE submits that such an approach is inadequate and risks exposing affected children to Article 8 violations. If the Court were to clarify or modify the guidance in ***Norris*** in the light of ***ZH***, that would have the immediate effect of addressing these real and recurrent problems.

(VI) Conclusion

68. For all the reasons above, JUSTICE submits that ***Norris*** requires clarification, or if necessary modification, following ***ZH*** so as to ensure that the best interests of each dependent child of each extraditee are a primary consideration. Nothing less will suffice to ensure that the Article 8 rights of dependent children of extraditees are indeed interpreted compatibly with the CRC. Clear guidance is also needed about the extent of enquiry which should be undertaken about the effect of extradition upon each affected child.

69. Such clarification/modification will not mean that the best interests of any particular child will necessarily prevail over the public interest in extradition. But it will help to ensure that the lower courts do not misinterpret or misapply the law, as appears to have occurred post-***Norris***.

44. See also counsel's observations in *B v District Court in Trutnov* [2011] EWHC 963 (Admin) at §57.

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70. Nothing in this modified/enhanced approach diminishes public confidence in the system of extradition. Indeed, the absence of proper proportionality assessment positively undermines public confidence in the system. Moreover, such an approach is entirely consistent with the effective protection of fundamental rights – a consideration to which even the strong public interest in extradition is ultimately subjugate.

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ALEX BAILIN QC

MARK SUMMERS

AARON WATKINS

Matrix

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9 February 2012

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