

JUSTICE PRESS RELEASE

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SUPREME COURT RULES THAT THE RIGHT TO FAMILY LIFE MUST BE PROPERLY ASSESSED IN EAW CASES

In a judgment given today the Supreme Court considered the interests of children of requested persons in joined appeals from European arrest warrant cases and confirmed that these must be carefully considered prior to executing a warrant. The Court reasserted principles it had earlier stated in the case of *Norris* (2010) concerning the right to a family life under article 8 ECHR. It found that lower courts have been failing to apply the test correctly:

In focussing on “some quite exceptionally compelling feature” (para 56 in Norris), they have fallen into the trap identified by Lord Mance, tending “to divert attention from consideration of the potential impact of extradition on the particular persons involved . . . towards a search for factors... which can be regarded as out of the run of the mill”...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 (per Lady Hale at [32])

Jodie Blackstock, Director of Criminal and EU Justice Policy at JUSTICE said:

The Court has underlined that extradition judges must assess human rights concerns in all EAW cases and in particular that the best interests of dependent children can require a refusal of surrender. It is encouraging that the justices applied the proportionality test we have long been saying is necessary in these cases.

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Notes to Editors

1. The case concerned two appeals, PH and HH concerning a request to Italy and FK to Poland. The case was also heard with BH and KAS concerning an extradition request to the United States for which the Court prepared a separate judgment.
2. JUSTICE intervened in the case as a third party. We were represented *pro bono* by Alex Bailin QC, Mark Summers and Aaron Watkins of Matrix Chambers and Peters and Peters LLP.
3. The court agreed that the damage to young children in a request from Poland for allegations of theft and fraud against their mother from over a decade ago would be wholly disproportionate to the public interest in extradition. However in the second case which concerned both parents in drug importation carrying lengthy custodial terms, all but Lady Hale were unanimous that the obligation to ensure effective extradition required their return; Bearing in mind that they had evaded justice having been caught red handed, and bearing in mind the seriousness of the offence, surrender of both parents was required despite the devastating impact upon their

children. Lady Hale would have returned the mother alone has having more culpability for the offence and because the father was the primary care giver to the children. In her judgment she considered that the Italian authorities could re issue the warrant when the children were older.

4. Their Lordships reflect upon the obligation to ensure compliance with the ECHR but also the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights, both of which require the best interests of the child to be a primary consideration. The Court acknowledged that the EU law on the EAW requires these fundamental rights to be upheld and therefore the decision is entirely in keeping with the EAW scheme.

Extracts from the Judgments:

Lady Hale

[T]here is the constant factor of the need to honour our obligations under the Framework Decision. But as these are subject to the need to respect fundamental rights, they do not absolve us of the duty to weigh the competing interests as required by article 8. [45]

Lord Hope

I remain of the view which I expressed in Norris, para 89 that it would be wrong to treat extradition cases as falling into a special category which diminishes the need to examine carefully the article 8 issues that the separation of the parents from the children will give rise to. As Lady Hale says in para 33, this involves asking oneself the right question and in an orderly manner, following the example of the Strasbourg court. [89]

Lord Mance

[I am] comforted by the hope that it may be possible for both parents to be returned speedily to the United Kingdom to serve here the balances of their sentences under Council Framework Decision 2008/909/JHA of 27 November 2008. The Court was informed that this Framework Decision has now been transposed into Italian law....[I]t is to be hoped that much speedier results can be achieved under the Framework Decision, the purpose of which is to limit the rupture of environmental and family links resulting from imprisonment abroad. [105]

Lord Judge

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. [124]

Lord Kerr

[J]ust because the interests that require to be protected are different in the two contexts [immigration and extradition], 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. [141]

Lord Wilson

So the court must survey the individual, or private, features of the case, namely the circumstances of the family on the one hand and of the offence (or alleged offence) on the other and, in the light also of the public interests on both sides to which I will refer in paras 156 and 167, must proceed to assess the proportionality of the interference [152]

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

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