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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **21/3/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISIONAL COURT

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BETWEEN:

POLAND

Applicant/Appellant;

-and-

KS

Defendant/Respondent.

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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HIGGINS LJ (giving the judgment of the Court)

[1] This is an appeal from the decision of His Honour Judge Kerr QC whereby he refused an application by the Issuing Judicial Authority of Poland (the IJA) for an order to extradite the respondent to Poland. On 31 December 2008 the IJA issued a European Arrest Warrant (EAW) for the arrest of the respondent on two charges contrary to the Polish Penal Code. The charges which carry maximum sentences of eight and two years respectively arise out of an incident on 30 August 2004 when the respondent who had been driving a lorry loaded with 75 parcels of Avon cosmetics reported to the authorities that he had been the victim of a robbery whereby the lorry and its contents were forcibly removed from his possession. It is alleged that the robbery was faked by the respondent and other persons. It is alleged that this was discovered in December 2006 during an investigation of other persons alleged to have been involved. A local arrest warrant was issued in July 2008 and the EAW on 31 December 2008.

[2] The respondent left Poland in 2006 and came to Northern Ireland. His then girlfriend and their young son, S, joined him a short time later. His whereabouts

were unknown to the Polish authorities until 2012. He was arrested on foot of the EAW on 12 July 2012. An initial hearing took place on 13 July 2012. The extradition hearing was adjourned to allow proceedings in the Magistrate's Court to be concluded and the respondent was released on bail on stringent conditions. The respondent's then girlfriend returned to Poland leaving their young son with the respondent. The respondent then met another Polish lady in Northern Ireland and they have lived together with his son as a family unit for a number of years. By all accounts this lady has assumed a responsible parenting role in respect of S who is now aged eight years of age having been born on 28 September 2005.

[3] The extradition hearing took place on 10 January 2014 and on 15 January 2014 the learned judge gave a considered judgment dismissing the request for the respondent's extradition. The request was resisted on two grounds. Firstly due to the passage of time and secondly that extradition would not be compatible with Article 8 of the ECHR (family rights). The judge concluded that the passage of time point was best considered within the second ground and no issue is taken with that conclusion. The judge then considered whether extradition would be compatible with Article 8 ECHR and concluded that it would not and discharged the respondent. The IJA appeals against the decision that extradition would not be compatible with the respondent's rights under Article 8 ECHR.

[4] The case made by the respondent was based primarily on a thirteen page report from a Clinical Psychologist. The report was based on an interview with the respondent, his girlfriend and S in December 2013. The Psychologist referred to the respondents' girlfriend as S's step-mother, which term I shall adopt. She takes him to and collects him from school each day and once per week takes him to see his aunt (the father's sister) who lives and works there. The father's brother lives in Newtownabbey and works with his brother in Bangor. Their mother is aged 52 and resides in Poland but has visited Northern Ireland. The Psychologist was informed that S's mother started taking drugs and then became involved in prostitution. The couple separated and she went to Dublin and then Germany and is believed now to be back in Poland. She has not seen S since he was three and a half years of age. He did not recognise her photograph and his step-mother is his mother. In the course of the interview a Family Relations Test was conducted with S in the absence of his father and step-mother. The Beck Youth Inventory is designed to measure emotional well-being. S's scores on measures of anxiety, depression and anger were all average. His score on a measure of self-esteem was 'Much Lower than Average', the lowest score. The Psychologist noted that due to the respondent's employment S spent more time with his step-mother than with his father and that she carries out most of the parenting though the bond between father and son was positive and strong. The Psychologist considered the impact on S if his father was returned to Poland. She concluded –

> "It is therefore likely, that if [the father] does not continue with their usual routine S will lose the

> closeness he has to his only available biological parent. The relationship will begin to deteriorate if the routine is disrupted and will diminish over time. As it seems S has already been abandoned by his mother , the loss of his father is likely to mean that S's already fragile self-esteem will diminish, and his situation will have to be managed very carefully, otherwise he is likely to suffer low mood and/or anxiety and he may be angry if he feels abandoned.
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> S does not have a relationship with his biological mother, and although he has an excellent relationship with [his step-mother], without [his father] she will not be able to meet all of S's emotional needs. Having lost one of the most important figures in his life, the loss of his father and only remaining biological parent, is likely to be significant for S and [his step-mother] cannot replace [his father] in S's life."

On the basis of this report the learned judge commented –

> "There is no doubt in my mind, on the evidence, the extradition of the Requested Person would have a significant and lasting effect on this son's life. Were the family to move to Poland the disruption to a child who has in fact lived all his life in Northern Ireland would be severe. If only the Requested Person moved over to Poland whilst the offences are being investigated and potentially prosecuted then there is likely to be no contact with the detrimental facts which are described by [the psychologist]."

[5] The judge then referred to H(H) & PH v Deputy Prosecutor of the Italian Republic, Genoa, and F-K v Polish Judicial Authority [2012] UKSC 25 (HH and F-K) and various passages from the judgments in that case as well as from Norris v Government of the United States of America (No 2) [2010] 2 AC 487 SC(E). He then concluded –

> "I therefore have to consider the effect of that test in this case and I must give due weight to the important public interest there is in the extradition of offenders. I take into account the following features. The offences themselves were committed in 2004. They came to light in 2007 and a warrant was issued in 2008, that is a period of in excess now of 5 years.

> During the time that this young child has lived, he lived effectively all his life in Northern Ireland both his father is here, he has no natural mother although he does have a carer who is obviously a very caring person according to [the psychologist] and with whom he bonds well. The opinion that I have before me from [the psychologist] is that there would be, what I can only describe as, a devastating effect to the future of this young man if his father was extradited to Poland. I have read very carefully the facts in this case and attempt to act in proportionate (sic) to the various rights of the parties concerned. In my view it would be disproportionate in this case to expect him to go back to Poland and face the charges in this case and accordingly I refuse the extradition request in this case."

[6] In view of the limited period of time involved and the particular circumstances relating to the manner in which the alleged offence came to light as well as the date when the Requested Person left Poland it was entirely appropriate for the Judge to conclude that the issue relating to the passage of time would best be considered in the context of the Article 8 issue. Thus the only question in this appeal was whether the judge had reached the correct decision in relation to Article 8 which provides –

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

[7] Thus the issue resolves itself into the question whether it is necessary in the interests of the prevention of crime to extradite the Requested Person to the country of the Issuing Judicial Authority, namely Poland. This involves a balancing exercise between the Requested Person's Article 8 rights in respect of his son and the prevention of crime through the extradition of a person, the subject of an EAW, in accordance with the international Treaty obligations of the United Kingdom. The importance of adherence to these Treaty obligations should not be underestimated

and extradition should only be refused if to do so would be a disproportionate response to the domestic circumstances. In most cases extradition would be likely.

[8] In Norris v Government of the United States of America (No 2) [2010] 2 AC 487 the IJA sought the extradition of the defendant on charges of obstruction of justice through witness tampering and interference with evidence ancillary to allegations relating to a price-fixing cartel. The defendant and his wife were 65 and 64 years of age at the time and in poor health both physically and mentally. It was submitted that the effect of extradition on his wife's depressive illness made interference with their rights under Article 8 disproportionate to the public interest in his extradition on the charges subsidiary to the main cartel charge. This argument was rejected by the District Judge and an appeal to a Divisional Court was dismissed. On appeal to the Supreme Court the principal issue was whether a person seeking to resist extradition was required to demonstrate exceptional circumstances. In dismissing the appeal Lord Phillips of Worth Matravers, giving the lead judgment of the court, said that it would only be the gravest effects of interference with family life which would render extradition to stand trial for serious offences disproportionate to the public interest in the prevention of crime. He found this was not such a case. The other members of the court agreed with his judgment and acknowledged the serious public interest in extradition. Lord Hope in agreeing with Lord Phillips said that the reality was that it would be only if some exceptionally compelling feature was present that interference with Article 8 which resulted from extradition would fail to meet the test of proportionality. While agreeing with Lord Phillips, Lord Kerr, in rejecting the invitation by counsel for the Secretary of State to countenance an exceptionality test, said at paragraph 136 that it was "entirely possible to recognise that article 8 claims are only likely to overcome the imperative of extradition in the rarest of cases, without adopting any test of exceptionality…. The essential point is that such is the importance of preserving an effective system of extradition it will in almost every circumstances outweigh any article 8 argument".

[9] The issue came before the Supreme Court again in HH and F-K, which concerned two separate cases. The first involved a husband and wife of British nationality with three children charged in Italy with importing large quantities of cannabis from Morocco and allied offences. They fled to England with the three children in breach of bail conditions. There the wife suffered a physical and mental collapse which rendered her incapable of caring for herself or the children and the husband became the children's primary carer. In their absence they were convicted of the offences and lengthy prison sentences were imposed. The district judge ordered the extradition of both parents. Their appeals against these decisions were dismissed. The second case involved a husband and wife who left Poland with three children and settled in the United Kingdom where two further children were born. In 2006 and 2007 EAWs were issued by the Polish authorities seeking the surrender of the wife in respect of offences alleged to have been committed between five and nine years previously. The district judge having received reports as to the

psychological damage and devastating sense of loss likely to be suffered by the younger children and the severe effect it would have on her husband and the older children, the husband being incapable of caring for the children through ill-health, as well as the overall period of delay, concluded that her extradition was compatible with Convention rights and ordered her extradition. Her appeal was dismissed. On appeal to the Supreme Court the appeals of the husband and wife in the first case were dismissed and the appeal of the wife in the second case was allowed. At the forefront of the appeal was the application of the Norris principles and the fact that in Norris the Court did not have to consider the special position of children (see the certified question at paragraph 106 of the judgment of Lord Judge CJ). As Baroness Hale stated these two cases gave the court the 'opportunity to fill that gap'. The issue relating to the application of the Norris principles centred round whether there should be a different approach to Article 8 issues depending on whether the case involved the extradition of a suspect or the removal of foreign national from the jurisdiction. In answering that question Baroness Hale said at paragraph 30 –

> " … 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 used. 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."

[10] Lord Judge CJ in his judgment between paragraphs 111 and 132 clarified how the Norris principles should be applied in extradition cases involving a Requested Person with a dependent child or children. He commenced at paragraph 111 by acknowledging that it was accepted in Norris that on occasions in extradition cases that Article 8 rights may prevail but that the "judgments are unequivocal about the importance of giving full weight to the public interest in well-founded extradition proceedings" (paragraph 111). He identified in each judgment the passages in which the judges expressed the view that the occasions when Article 8 rights would prevail would be rare. At paragraph 112 he stated that these observations provide the clearest authoritative indication of the approach to be taken in extradition cases where Article 8 was engaged. He noted also the cases mentioned in Norris in which

children were concerned and the observations of several of the members of the court about the best interests of children, for example Lord Kerr JSC.

> "117 Lord Kerr JSC spoke of a 'primacy of importance' to be accorded to the best interests of a child, which although not a factor of 'limitless importance' was said to 'rank higher than any other'. They should normally 'dictate the outcome of cases such as the present'."

[11] Lord Judge CJ went on to highlight the important objectives in extradition and the differences which might arise between extradition and deportation cases and the fact that Norris had been subject to 'a deal of misunderstanding'. Because of that misunderstanding it is worth setting out in some detail what he said about the approach to be adopted in extradition cases involving children and Article 8.

> "121 As explained in Norris extradition is concerned with international co-operation in the prevention and prosecution of crime. The objectives served by the process require international co-operation for the prosecution of crimes and the removal of sanctuaries or safe havens for those who have committed or are suspected of having committed criminal offences abroad. The private and family rights of the victims of criminal offences committed abroad will themselves have been damaged by offences like rape and wounding, theft and robbery and child abduction, as well as drug-trafficking and fraud. That consideration is absent from the immigration context.
>
> 122 Consistently with this analysis, section 55 of the Borders, Citizenship and Immigration Act 2009 made specific provision which imposed an obligation on the Secretary of State to make arrangements to ensure that the welfare of children in the United Kingdom should be safeguarded and promoted in the context of immigration, asylum or nationality processes without identical responsibilities being enacted in the context of the exercise of the extradition process. And, as already noted, to date at any rate, the European Court of Human Rights has treated immigration and extradition as distinct concepts, while in the context of immigration control, enumerating guiding principles of equal importance to the balancing exercise.

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

124 The impact of ZH (Tanzania) and the valuable submissions made to this court founded on it in the context of the extradition process, is to highlight that Norris has been subject to a deal of misunderstanding. Norris did not decide that the article 8 rights of the family of the proposed extraditee can never "prevail" unless an "exceptionality" test is satisfied. What it suggested was that when article 8 rights were properly examined in the extradition context, the proportionality assessment would be overwhelmingly likely to be resolved in favour of extradition. This description of the likely results of the extradition process appears to have been adopted as a forensic shorthand for the test. Just because courts fully appreciate that children who are subjected to long term separation from their parent or parents will almost without exception suffer as a result, the application of a stark "exceptionality" test may, even if unconsciously, diminish the weight to be given to the interests of the children. The prohibited thought processes run along readily identified lines: as separation from their parent or parents inevitably causes damage to virtually every child, what is "exceptional" about the situation of the children involved in this particular case, and what would be exceptional about the extradition of their parent or parents? Accordingly the decision in ZH (Tanzania) provided a helpful opportunity for the application of

> Norris to be re-evaluated, and the principles identified in the judgments to be better understood. In the end, however, the issue remains proportionality in the particular circumstances in which the extradition decision has to be made when the interests of dependent children are simultaneously engaged.
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> 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."

[12] In paragraphs 126 – 129 he reiterated the well accepted principle in sentencing in criminal courts whereby a defendant's responsibility as carer for dependent children is often a potential mitigatory factor to be taken into account by the sentencing judge. However he noted the reality that in most instances it does not prevent the imposition of a custodial sentence, though it may reduce its length. It is an established truism that a defendant's family invariably suffer as a result of his crimes. He continued -

"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)."

[13] Baroness Hale at paragraph 8 stated that the following conclusions can be drawn 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.
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> (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."

[14] As Lord Judge CJ stated the test remains one of proportionality where Article 8 rights are engaged. There is an imperative in international co-operation in the prevention of crime and hence in extradition between contractually obligated states. Virtually all extradition cases involve some passage of time. The length of that

passage of time and the reasons for it will always be relevant, as will the seriousness or otherwise of the crime alleged. Extradition of a parent (like a prison sentence) will invariably interfere with the Article 8 rights of the parent and child. It is only where the interference will have consequences which are exceptionally severe, that the public interest in extradition will be outweighed by the Article 8 rights. This requires clear identification of the interference and the consequences of it and a balance struck as to whether those identified consequences are not justified by the extradition of the Requested Person for the alleged particular crime, taking into account the passage of time.

[15] Undoubtedly separation from his father will be difficult for S, particularly in the absence of his birth mother. However the presence of and the relationship with his step-mother should not be underestimated. If S remains in Northern Ireland he can be cared for, as now, by his step-mother. His aunt and uncle are both in Northern Ireland. If he returns to Poland his step-mother may accompany him. There he has at least a paternal grandmother. The issue the Psychologist commented on was the disruption of his usual routine with his father which would degrade his relationship with his father and diminish his self-esteem. The Psychologist commented that this situation would require careful management to avoid low mood, anxiety or anger. The judge referred to this as having a devastating effect. This was not a term used by the Psychologist though the judge was entitled to form his view of the effect. Interestingly in HH Baroness Hale stated at paragraph 1 that in that case 'no-one seriously disputed that the impact upon the younger children of the removal of their primary carers and attachment figures will be devastating'. In the case of P-K, the sole carer, extradition was refused. In the case of HH and POH the extradition of both parents and carers was ordered.

[16] We have carefully considered S's circumstances and the possible effect of separation from his father upon him. It could not be described as devastating nor as a consequence of the interference with his family life would it be exceptionally severe. It would probably be no different from that endured by a boy of similar age who was separated from his only biological parent upon a custodial sentence being imposed upon him in this jurisdiction. The offences in the EAW are serious offences. Much of the passage of time was due to the alleged false report of a robbery and the Requested Person being beyond the jurisdiction of the Polish authorities. Such delay as may be attributed to the Polish authorities, a much shorter period than the other delays, is not such as would warrant discharge of the EAW. Despite the careful consideration given to the extradition request by the judge, we have no doubt that the public interest in extradition in fulfilment of Treaty obligations and in furtherance of the objective that persons accused of crimes should be brought to trial and if convicted serve an appropriate sentence, greatly outweigh the consequences for S and his father of separation in the context of the family dynamics in this particular case. The judge ought to have decided that question differently, namely that extradition would be compatible with Article 8 ECHR. If he had decided that question, (the relevant question for the purposes of Section 21(1) and 29(5) of the

Extradition Act 2003) in the way he ought to have done he would not have been required to order the Requested Person's discharge.

[17] Therefore the appeal is allowed and the order discharging the Requested Person is quashed. We remit the case to the judge below with a direction to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.