

# THE PROPORTIONATE APPLICATION OF ARTICLE 8 OF THE ECHR ON EXECUTION OF A REQUEST FOR SURRENDER OF A PERSON WITH CHILDREN

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**ABSTRACT:** The paper will consider the appropriate and proportionate application of the United Nations Convention on the Rights of the Child and the European Convention on Human Rights when primary decision makers determine extradition where the requested person is the sole or primary carer of children or both parents are sought to be extradited. The paper will consider the interests that are affected and how these interests may be adequately protected while seeking to balance the interests of the state in securing prosecution of the person on the most appropriate forum for trial and seeking to avoid either the creation of safe havens or the evasion of prosecution by those whose extradition is sought.

In a recent extradition case between the UK and Australia, where both parents were sought the Australian authorities guaranteed to transport the child with her parents at their expense and ensure she was able to be cared for by other family members with social work support in Australia. The wider issue is the appropriate and proportionate balance of meeting international obligations to ensure prosecution with the personal rights under the European Convention on Human Rights and the United Nations Convention.

## **Introduction.**

The evaluation of the European Arrest Warrant<sup>2</sup> reported that despite encouragement to practitioners to issue proportionate EAWs, by amendment to the EAW Handbook<sup>3</sup>, this had failed to materialise in practice. The report observed this “confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of

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<sup>2</sup> COM (2011) 175 Final 11 April 2011

<sup>3</sup> Council 8436/2/10COPEN p3

persons sought in respect of often very minor offences.”<sup>4</sup> It also reported that there was general agreement amongst the member States that a proportionality check is necessary to prevent EAWs being issued for offences which ....are not serious enough to justify the measures and cooperation which the execution of an EAW requires”<sup>5</sup> The Commission called for issuing judicial authorities to apply a proportionality check even where prosecution was mandatory.

It is also interesting to observe that all Member States have in one form or another incorporated human rights considerations into their domestic transposition of the EAW Framework decision into national law.

The issue of proportionality in the context of Article 8 family life was brought into sharp focus in a series of cases in the United Kingdom which were all brought together for consideration by the Supreme Court of the United Kingdom.<sup>6</sup>

The Extradition Act 2003 requires that extradition (under the EAW, Convention or treaty) must be compatible with the requested person’s rights under the European Convention on Human Rights.<sup>7</sup>

## **Facts**

In *HH*, both parents were sought for extradition on conviction European arrest warrants. The couple were married in 1996 and their 3 children were 11, 8, 3 (conceived post arrest on the warrant). They fled to the UK in breach of bail and were convicted in their absence. The mother was sentenced to 14 years imprisonment: 9 years, 6 months and 21 days to serve; the father had been sentenced to 8 years and four months to serve (possibility of reduction to 4 years and 22 days). The extradition order for both was upheld. In *F-K*, the extradition of the mother alone was sought on an accusation warrant. She and her husband were married since 1991 and had 5 children 21, 17, 13, 8 and 3 years and 10 months. There were 2 accusation warrants: (1) for misappropriation of clothing worth £4307; (2) (a) for falsifying customs documents in relation to an imported car between 17 November 1997 and 24 January 1999; (b) for seven instances of fraud involving a total equivalent to £1160 between

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<sup>4</sup> COM (2011) 175 Final 11 April 2011 at paragraph 5.

<sup>5</sup> COM (2011) 175 Final 11 April 2011 at paragraph 5.

<sup>6</sup> *HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K (FC) v Polish Judicial Authority* [2012] UKSC 25 at [33].

<sup>7</sup> Extradition Act 2003 s21 and 87

19 May and 12 June 2000; and (c) for a further instance of a similar fraud, on 21 June 2000. The court observed these were trivial offences and there was an absence of prosecutorial discretion in Poland. F-K was found to be a fugitive from justice having fled Poland to evade prosecution. Her husband was deemed incapable of looking after the children, although he had given up work he was deemed his physical mobility and possible deterioration in mental health may be an issue. The mother F-K was discharged. In *BH and KAS*, the extradition of both parents was sought to face trial in the United States for the importation of proscribed chemicals they knew to be used in the manufacture of methamphetamine. They had six children aged between 14 and 1 year old. The court upheld the order to extradite.

### APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights has observed that:

‘Mindful of the importance of extradition arrangements between states in the fight against crime (and in particular crime with an international or cross-border dimension), the court considers that it will only be in exceptional circumstances that an applicant’s private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition... If the applicant were [eventually] sentenced to imprisonment [... with the consequent impact on the rest of his family,] his extradition cannot be said to be ‘disproportionate to the legitimate aim served.’<sup>8</sup>

### Article 8

Article 8 of the European Convention on Human Rights provides that:

‘(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

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<sup>8</sup> *King v United Kingdom* (App No 9742/07) (26 January 2010, unreported), ECtHR. See also *Ahmad v United Kingdom* (App No 24027/07) (2010) 51 EHRR SE6, ECtHR at [252]: ‘it will only be in exceptional circumstances that an applicant’s private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition ...’.

Article 8 is not an absolute right but may be qualified and derogated from, subject to meeting the terms of the article, if the act complained of is in accordance with the law, is for a legitimate aim, and is necessary in a democratic society.

The European Commission on Human Rights has held that:

‘... it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to an unjustified or disproportionate interference with the right to respect for family life’<sup>9</sup>.

### **When may article 8 be engaged in surrender under the European Arrest Warrant?**

Article 8 of the European Convention on Human Rights may be engaged ‘in cases of a real risk of a flagrant violation of the guarantee of family or private life’<sup>10</sup>

The courts in the United Kingdom have recognised that the family unit needs to be considered as a whole, while each family member can be regarded as an innocent victim and that the relative, individual and collective rights under article 8 of the European Convention on Human Rights need to be considered:

‘When considering the impact of extradition on family life, this question does not fall to be considered simply from the viewpoint of the extraditee... . This issue was considered by the House of Lords in the immigration context in *Beoku-Betts v Secretary of State for the Home Department*. After considering the Strasbourg jurisprudence the House 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’<sup>11</sup>

In *R (on the application of Ullah) v Special Adjudicator*, Baroness Hale identified that the court of the Member State which made the final decision on surrender/extradition/expulsion must act in “a way which is compatible with the Convention rights.”<sup>12</sup>

The Extradition Act 2003 which implements the European Arrest Warrant Framework Decision into UK domestic law provides at section 21 the judge must decide if surrender is

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<sup>9</sup> *Lauder v United Kingdom* (App No 27279/95) (1997) 25 EHRR CD 67, [1997] ECHR 106 at p 84.

<sup>10</sup> *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26 at [47], [2004] 2 AC 323, [2004] 3 All ER 785

<sup>11</sup> *Norris v Government of the United States of America* [2010] UKSC 9 at [64], [2010] 2 AC 487, [2010] 2 All ER 267 (Court of 9 Justices) referring to *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] AC 115.

<sup>12</sup> [2004] UKHL 26 at [24], [2004] 2 AC 323, [2004] 3 All ER 785

consistent with the requested person's convention rights. The court is therefore bound, if asked, to consider the compatibility of surrender/extradition with the requested person's article 8 right to family life and the proportionality of the decision to order surrender with the requested person's family life as established in the United Kingdom.

### **Burden of proof.**

The requested person must establish

1. that surrender/extradition engages his article 8 right to family life,
2. that ordering surrender/extradition will result in a prima facie breach of that article
3. that surrender/extradition would be disproportionate to the legitimate aim sought to be achieved by his removal

If the requested person establishes a prima facie case, the executing authority whether the Crown Office in Scotland, the Crown Prosecution Service in England or the Director of Public Prosecutions in Northern Ireland, who act on behalf of the issuing judicial authority will seek information to rebut the argument advanced by the defence. Failure by the executing authority to offer such evidence may result in the court refusing the request for surrender/extradition.

This approach accords with that of the European Court of Human Rights where the court observed:

'Mindful of the importance of extradition arrangements between states in the fight against crime (and in particular crime with an international or cross-border dimension), the court considers that it will only be in exceptional circumstances that an applicant's private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition... If the applicant were [eventually] sentenced to imprisonment [... with the consequent impact on the rest of his family,] his extradition cannot be said to be 'disproportionate to the legitimate aim served'<sup>13</sup>

### **APPROACH OF THE COURTS**

### **BALANCING CONSIDERATIONS WHEN QUESTION OF ENGAGEMENT OF ARTICLE 8 ARISES**

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<sup>13</sup> King v United Kingdom (App No 9742/07) (26 January 2010, unreported), ECtHR. See also Ahmad v United Kingdom (App No 24027/07) (2010) 51 EHRR SE6, ECtHR at [252]: 'it will only be in exceptional circumstances that an applicant's private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition ...

The Supreme Court has recognised that article 8 rights are likely to be engaged when surrender/extradition is to be ordered:

“Separation by the person from his family life in this country and the distress and disruption that this causes, the extent of which is bound to vary widely from case to case, will be inevitable. The area for debate is likely to be narrow. What is the extra compelling element that marks the given case out from the generality? Does it carry enough weight to overcome the public interest in giving effect to the request?”<sup>14</sup>

However, as the court recognised there requires a significant aspect to the interference with the right before the court will find surrender/extradition disproportionate as the public interest in ensuring those accused of crime face trial in the jurisdiction where the trial will take place or serve the period of imprisonment imposed or to be imposed.

This issue has been most acutely considered where surrender/extradition will involve the separation of both parents or the sole carer from a child or children.

The Supreme Court observed ‘only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves’. It also recognised that the United Kingdom was bound to observe its treaty obligations<sup>15</sup>.

The Supreme Court revised the approach to be adopted when a violation of article 8 rights is engaged where the rights of children are also engaged<sup>16</sup>.

In answering the question whether extradition is compatible with Convention rights, the ‘court would be advised to adopt the same structured approach to an article 8 case as would be applied by the Strasbourg Court’. Firstly, it should ask whether there is or will there be an interference with the right to respect for private and family life. Second, it should ask 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) of the Convention, and third it should ask if the interference is necessary in a democratic society in the sense of being a proportionate response to that legitimate aim. The court observed that:

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<sup>14</sup>[2010] UKSC 9 at [91], [2010] 2 AC 487, [2010] 2 All ER 267, per Lord Hope of Craighead

<sup>15</sup>Norris v Government of the United States of America [2010] UKSC 9 at [82], [2010] 2 AC 487, [2010] 2 All ER 267.

<sup>16</sup>BH and KAS or H v Lord Advocate [2012] UKSC 24; and HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K (FC) v Polish Judicial Authority [2012] UKSC 25.

‘In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale’.

**APPROACH TO BE TAKEN BY THE COURTS WHERE CHILDREN FORM PART OF THE REQUESTED PERSON’S FAMILY UNIT**

While separation from family is a natural consequence of extradition, if extradition is ordered, it is the degree of the impact of separation that needs to be examined<sup>17</sup>. The establishment of ‘the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves’ but ‘... it will only be in the rarest of cases’ that article 8 of the European Convention on Human Rights will be capable of being successfully invoked<sup>18</sup>.

In determining whether a requested person’s article 8 rights have been breached, it is necessary to take into account the effect of his proposed removal on all the members of his family unit, and whether or not the removal would interfere disproportionately with the family unit has to be looked at by reference to the family unit as a whole and the impact of removal upon each member<sup>19</sup>.

The Lord Chief Justice noted:

‘... 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 ... Ultimately what is required is a proportionate judicial assessment of sometimes conflicting public interests’<sup>20</sup> Those considerations may include the gravity of the offence and the period that has elapsed from the date of offence until arrest as far as it relates to the family circumstances at the time the court must consider the request for surrender.

The Supreme Court has refined the approach in Norris and has found that where the article 8 rights of family members would be violated by extradition, that while ‘there is the constant

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<sup>17</sup> Norris v Government of the United States of America [2010] UKSC 9 at [87], [2010] 2 AC 487, [2010] 2 All ER 267 (Court of 9 Justices).

<sup>18</sup> [2010] UKSC 9 [95], [2010] 2 AC 487, [2010] 2 All ER 267, per Lord Brown.

<sup>19</sup> Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, [2009] AC 115. While Beoku-Betts involved removal in an immigration case, this approach was endorsed to apply equally in the context of extradition: Norris v Government of the United States of America [2010] UKSC 9 at [64], [2010] 2 AC 487.

<sup>20</sup> [2012] UKSC 25 at [124], [125], per Lord Judge.

factor of the need to honour our obligations under the Framework Decision ... 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"<sup>21</sup>

The Supreme Court agreed that the judge deciding whether surrender/extradition is proportionate is required to have in mind the rights and interests of the child in determining the proportionality of extradition balanced against her rights.

As Lord Wilson observed:

‘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..., must proceed to assess the proportionality of the interference’<sup>22</sup>.

Lord Mance said that the interests of children “must always be at the forefront of any decision-maker’s mind” and “A child’s best interests must themselves be evaluated”<sup>23</sup>

The Supreme Court gave some guidance on the circumstances which might give rise to a successful claim that removal would have a disproportionate effect on family members.

### THE COURT’S GUIDANCE FOR FUTURE CASES

The United Nations Convention on the Rights of the Child Article 3 provides:

“1. 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.”

The main issue for the Court was whether in extradition cases where removal of the sole carer or parents of a child or children where to do so would have an impact on that child or children, whether their interests were the primary consideration, as required by UN Convention, or were to be taken into account and considered in the wider balance of issues

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<sup>21</sup> HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K (FC) v Polish Judicial Authority [2012] UKSC 25 at [45].

<sup>22</sup> [2012] UKSC 25 at [152]

<sup>23</sup> [2012] UKSC 25 at [98]



within the scope of proportionality under Article 8 of the European Convention on Human Rights.

Baroness Hale formulated an approach to be adopted when the judge must determine the proportionality of extradition balanced against the competing best interests of the child. In doing so she indicated:

- (1) that article 8 must be interpreted in a way that the best interests of children are a primary consideration;
- (2) that children need a family life as adults do not;
- (3) that careful attention should be paid to what will happen if a child's sole or primary carer is extradited;
- (4) while a child has right to a family life, there is a strong public interest in ensuring the children are brought up properly and that is sometimes served by separating parent from child; and
- (5) as the effect upon the child's interests is always likely to be more severe than the effect upon an adult's, the court may have to consider whether there is any way in which the public interest in extradition can be met without doing such harm to the child<sup>24</sup>.

Baroness Hale then advanced both the information the court ought to have and the mechanism to be deployed to recover that to ensure proper account is taken of the interests of the child. The court needs to know:

- (a) whether there are dependent children;
- (b) whether the parents' removal will be harmful to their interests;
- (c) what steps can be taken to mitigate this;
- (d) if there are any special features that require further investigation.

In the case of head (d), this is likely to arise where both parents or the primary or sole carer is sought for extradition where the court will have to have information about:

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<sup>24</sup> HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K (FC) v Polish Judicial Authority [2012] UKSC 25 at [33]

- (i) the likely effect upon the individual child or children involved if the extradition is to proceed;
- (ii) about the arrangements which will be made for their care while the parent is away;
- (iii) about the availability of measures to limit the effects of separation in the requesting state,
- (iv) such as mother and baby units,
- (v) house arrest as an alternative to prison,
- (vi) prison visits, telephone calls and face-time over the telephone or internet; and
- (vii) about the availability of alternative measures, such as prosecution here or early repatriation<sup>25</sup>.

Baroness Hale concluded:

'The important thing is that everyone, the parties and their representatives, but also the courts, is alive to the need to obtain the information necessary in order to have regard to the best interests of the children as a primary consideration, and to take steps accordingly'<sup>26</sup>.

## OTHER INSTANCES OF APPLICATION OF ARTICLE 8

### Surrender Ordered where compatible with the Convention

1. *B v District Court in Trutnov; District Court in Liberec (Two Czech Judicial Authorities)* [2011] EWHC 963 (Admin).

Where a single mother of four children was sought to be extradited to serve twenty months imprisonment in respect of two Part 1 warrants, where her estranged husband was in a position to care for the children in her absence extradition was compatible with convention rights.

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<sup>25</sup> [2012] UKSC 25 at [83].

<sup>26</sup> [2012] UKSC 25 at [86].

2. *R (on the application of Strkacova) v Public Prosecution Office Chemnitz, Germany* [2011] EWHC 2387 (Admin).

The requested person was the sole carer of her seriously ill father, who would require to receive alternative care which would be difficult and unpleasant for him. Surrender ordered.

3. *Rosiak v Regional Court in Legnica, Poland* [2011] EWHC 2127 (Admin)

The requested person had been hardworking, had not come to the attention of the police in the United Kingdom and regretted what he had done; that he had been placed under considerable stress by the proceedings, and feared that he may lose touch with his family in the United Kingdom if he were extradited. Surrender ordered.

4. *Radvilavicious v District Court of Alytus, Lithuania* [2011] EWHC 1795 (Admin)

The requested person's partner due to give birth to their child. Surrender ordered.

5. *AC v Poland* [2012] EWHC 3201 (Admin)

C had been convicted of burglary following a guilty plea and sentenced to 10 months' imprisonment suspended, even though she was only 17 years old. The total value of the goods stolen in the burglary was about £110 to £130. During the suspension period C committed a similar offence and the execution of the sentence was activated, she was further sentenced to six months' imprisonment suspended for a probation period of five years and successfully completed that probation period. She was summoned to prison but the execution of the sentence was deferred. In the meantime C came to England and her children followed her shortly thereafter. Four years later a European arrest warrant was issued and C was arrested. C applied for a deferral of the sentence on the basis that imprisonment would cause extreme difficulties for her family. C stated that deferral would allow her to make arrangements to ensure that her five children were properly taken care of while she served her sentence and that she would apply for a temporary custody order so that her sister could look after them.

The judge who imposed the original sentence would have known that C had young children. It was clear that the judge who activated the sentence and the judge who refused to stay the sentence also took into account the interests of the children. The court had to

proceed on the basis that there was a high level of mutual confidence between Member States as set out in the Framework Decision and therefore had to respect the decisions. The court accepted that C's children would be severely disadvantaged by their, their primary carer, being extradited to Poland with no opportunity of seeing her during her period of imprisonment. She was a fugitive from justice. Surrender ordered.

6. *JP v District Court at Usti and Labem, Czech Republic ; JE-H and IE-H v the Government of Australia* [2012] EWHC 2603 (Admin)

JP was a national of the Czech Republic. She was the primary carer of five children: three children aged 14, 12 and 8 from a previous relationship and two aged 7 and 4. On 7 April 2004 she was convicted of one offence of theft which related to theft from shops between 6 April 2003 and 11 January 2004. The items stolen were of low value such as a baby jacket, perfume, deodorant, shampoo, crayons, and the like. The total value was under £200. She was sentenced to 10 months imprisonment which was suspended. On 17 June 2005 she had another child, P. It appears she served a period of 50 days detention in the Czech Republic during 2005 for an unrelated offence. The Court accepted there would be an impact on the children if their mother was surrendered and that her partner would be unable to work if he took over care of them. The Court upheld the decision to surrender.

JE-H and IE-H were Australian citizens who were sought to face trial of fraud in the region of \$ Aus 600,000. They had a child aged almost 2. The mother was the primary carer for the child. There was no family member in Australia who could look after the child. The Australian Government submitted evidence to the effect that:

- (a) "The State would pay for the cost of transporting the family together to Australia and any maintenance costs for R while in Australia should circumstances require it.
- (b) Once extradition was ordered, the police would give notice to the Family and Community Services so that they could put in place options for the care of R; an undertaking was given that in the unlikely event that R would need to be cared for by others than the E-H family, the State had made arrangements for the care of R on her arrival in Australia until there were more preferable options."

The Court held that extradition was not disproportionate.

## Surrender Refused as Disproportionate to Convention Rights

### 7. Government of Lithuania v AI [2011] EWHC 2299 (Admin)

The requested person was a woman who was wanted for extradition to serve fourteen months imprisonment but who had been induced to travel to the United Kingdom and had been forced into prostitution. She had served five of the fourteen months sentence in a prison in the United Kingdom during the extradition procedure, had offered specific assistance to United Kingdom law enforcement authorities on people trafficking and was expected to continue to assist in that. The Lithuanian authorities had not fully addressed the concerns raised by the judge for her protection in prison to avoid retribution and to secure her silence and she was being treated for significant trauma. The court, however, stressed the nature of the 'very particularly important personal circumstances' that made this an 'exceptional and compelling case such that the interests of justice in extradition ... are clearly outweighed by the serious difficulties which would be experienced by her and the harm to the interest of justice'

### 8. Nikitins v Prosecutor General's Office Latvia [2012] EWHC 2621 (Admin)

Latvia sought N's extradition to face an accusation of attempted theft of four radiators, valued at £60-80 each, from an unoccupied apartment. He had at least one previous theft conviction. He was arrested in the United Kingdom on a European arrest warrant and was remanded in custody pending removal. He was released on bail after approximately two months due largely to the deteriorating mental state of his heavily pregnant wife, as social services had advised that she might not have been competent to care for the child upon its birth.

Although N was not the primary carer, there was a real risk of a very serious disruption to the life of his wife and, more importantly, through the disruption of her position as mother, to the life of the very young child who needed her mother. No expert evidence was required for that. Set against that was the public interest in the extradition related to the offence. The value of the property was quite small. Surrender refused as disproportionate.

9. *Fridenberga v Public Prosecutor, Prosecutor General's Office for the Republic of Latvia* [2013] EWHC 317

The appellant's surrender was sought for trial for possession of 3.12 grams of amphetamine with intent to supply alleged to be committed in 2008 for which a sentence of at least 5 years and no more than 12 years could be imposed. She had been in custody for 10 months and the court found that in the United Kingdom, a similar offence would be unlikely to attract a custodial sentence. The court found that "important that the requesting States consider the question whether in all the circumstances it is proportionate to require a return for whatever offence is alleged, or indeed sometimes, in relation to convictions, where a short sentence is all that is left to serve." The court found surrender disproportionate.

10. *Welke v The Provincial Court of Bydgoszcz Poland* [2013] EWHC 320

The appellant's surrender was sought for trial for offences of "acting in an organised criminal group of an armed character involved in the supply of a considerable quantity of marijuana, amphetamine and ecstasy pills" allegedly committed in 2001. The Court found surrender was disproportionate (1) his wife suffered depression, suicidal thoughts and in constant pain through a permanent spinal injury (2) his 14 year old son and 7 year old daughter were diagnosed as suffering post traumatic stress disorder or a similar condition and for them to be "uprooted and go back to Poland ...would be an exceedingly hard position." (3) there was delay on the part of the Polish authorities in issuing the EAW of around 2 years, where they must have known he was in the United Kingdom"

11. *Pawel Gruszecki v Circuit Court in Gliwice Poland* [2013] EWHC 1920 (Admin)

The fugitive had 4 months and 26 days of his sentence to serve which was only 26 days beyond the statutory minimum period for an extradition offence to be established. He claimed that due to his partner being pregnant and her being financially depend on him that combined with the short period to be served, extradition would be disproportionate with reference to article 8. The judge found this a marginal case and observed "The period left to be served, even at 4 months and 26 days, is close to the period which would be the cut-off point for the warrant. It is to be allied with the fact that the appellant has a pregnant partner who is likely to be giving birth at a time when he may

be absent, and also unable to offer such support as he intends to over the remaining months of the pregnancy. But I reach that conclusion with no enthusiasm and it is a very marginal decision because I take a very dim view of someone absconding and then, if you like, getting away with it.”

## CASE LAW OF THE EUROPEAN COURT OF JUSTICE

### MINISTERUL PUBLIC - PARCETUL DE PE LÂNGĂ CURTEA DE APEL CONSTANŢA V CIPRIAN VASILE RADU<sup>27</sup>

In her opinion, the Advocate General offered the view that human rights should be a consideration by the executing court in the decision on extradition under the European Arrest Warrant.

The Romanian authorities referred several questions to the Court the most important of which were:

“1. Must the interference on the part of the State executing a European arrest warrant with the rights and guarantees laid down in Article 5(1) of [the Convention] and in Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], satisfy the requirements of necessity in a democratic society and of proportionality in relation to the objective actually pursued?

2. Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [EU] law, by reason of a failure to observe all the cumulative conditions under Article 5(1) of [the Convention] and Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention]?”

The Advocate General answered these questions as follows:

“1. The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the

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<sup>27</sup> Case C396/11:OPINION OF ADVOCATE GENERAL Sharpston delivered on 18 October 2012 (1)

obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection.

2. The competent judicial authority of the State executing a European arrest warrant cannot refuse the request for surrender on the ground that the State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed the Framework Decision without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law.”

The Advocate General appears to accept that the preamble of the Framework Decision which recognises the application of human rights, combined with the fact that all Member States domestic transposition of the European Arrest Warrant framework decision requires the decision maker at some stage to take account of the fugitive’s convention rights should be observed. There is no scope in the framework decision for consideration of proportionality in particular under article 8 of the Convention. Many practitioners saw in the Advocate General’s decision a recognition that in appropriate cases, which would be rare, that such a consideration may be taken. A number of Governments intervened in the case and offered a view on the approach adopted at national level in relation to the application of human rights.

The Advocate General’s opinion was not followed by the Grand Chamber. The court held that extradition may only be refused when one of the mandatory or optional grounds of non execution of the European Arrest Warrant as specified in Articles 3, 4, 4a of the framework decision are invoked or the conditional grounds set out in Article 5.<sup>28</sup>

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<sup>28</sup> C-396/11 : judgment of the Grand Chamber of the European Court of Justice: 29 January 2013. This decisions follows the decisions of the court in C-388/08 PPU *Leymann and Pustovarov* [2008] ECR I-8993, paragraph 51, and Case C-261/09 *Mantello* [2010] ECR I-11477, paragraph 37



## CONCLUSION

Every case must be considered on its own facts, the tests to be met by the appellant remain at a very high level and those cases where proportionality will be a successful bar to surrender from the United Kingdom will remain rare. However, these cases demonstrate a willingness on the part of the Courts in the United Kingdom to adopt a "an approach which is relatively flexible" to ensure rights are not breached. The act of surrender by its nature engages Article 8. The Courts are concerned with the engagement of those rights across the spectrum of all family members but have more recent shown that part of that consideration of proportionality is, as has been observed that while the public interest weighs heavily in favour of people accused of crimes being brought to trial in the appropriate jurisdiction, the observance of international obligations and the avoidance of the creation of safe havens, "the weight to be attached varies according to the the nature an seriousness of the crime or crimes involved. Delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon family and private life." These issues raise interesting questions around the reconciliation of the observance of mutual trust with the duty of the primary decision maker to observe and give effect to convention rights.