Hilary Term
[2010] UKSC 9
On appeal from: [2009] EWHC 995 (Admin)

JUDGMENT

Norris (Appellant) *v* Government of United States of America (Respondent)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Brown
Lord Mance
Lord Judge
Lord Collins
Lord Kerr

JUDGMENT GIVEN ON

24 February 2010

Heard on 30 November and 1 December 2009

Appellant
Jonathan Sumption QC
Martin Chamberlain

(Instructed by White & Case LLP)

Respondent
David Perry QC
Louis Mably

(Instructed by Crown Prosecution Service)

Intervener
Richard Hermer QC
Joseph Middleton
Alex Gask
(Instructed by Liberty)

LORD PHILLIPS, with whom all the members of the court agree

Introduction

1. A judge who is holding an extradition hearing pursuant to the Extradition Act 2003 ("the 2003 Act") is required to consider whether the extradition of the person against whom the order is sought would be compatible with that person's human rights under the Human Rights Act 1998. If not, that person must be discharged. The issues of principle raised by this appeal relate to the approach that should be adopted in carrying out this exercise where extradition will interfere with that person's right to respect for his private and family life under article 8 of the European Convention on Human Rights ("the Convention").

2. Once I have identified these principles, I shall apply those that are relevant to the case of the appellant, Mr Norris. His extradition is sought by the respondent, the United States Government ("the Government"), in order that he may be tried on an indictment charging him with obstruction of justice. His case is that when the consequences of extradition to the article 8 rights that he and his wife enjoy in this country are weighed against the public interest in his extradition for what is no more than an ancillary offence, the interference that this would cause with those rights cannot be justified. This case was rejected by District Judge Evans and by the Divisional Court, consisting of Laws LJ and Openshaw J. I shall say no more about the facts until I have dealt with the issues of principle.

The 2003 Act

3. The 2003 Act created a new extradition regime that was intended to simplify the process. Under the new regime considerations that were for the Secretary of State are transferred to the court, and these include the compatibility of extradition with Convention rights. Part 1 of the 2003 Act deals with extradition to "Category 1 territories". These are, in effect, members of the European Union which operate the European Arrest Warrant. Part 2 deals with extradition to Category 2 territories that have been designated by order of the Secretary of State. The United States is a category 2 territory. Under both Part 1 and Part 2 procedures the appropriate judge has to carry out an extradition hearing at which he considers whether there exists any of the prescribed statutory bars to extradition. These include incompatibility with Convention rights. Section 21 in Part 1 and section 87 in Part 2 provide in identical terms that the judge "must decide whether the

person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998". If yes, an order for extradition must follow. If no, the person must be discharged.

4. General provision is made in both Part 1 and Part 2 for circumstances that may well involve interferences with Convention rights. Section 13 in Part 1 and section 81 in Part 2 bar extradition by reason of "extraneous considerations" which might result in discrimination or an unfair trial, in violation of the Convention. Section 14 in Part 1 and section 82 in Part 2 provide that extradition is barred by the passage of time if, but only if, this would make extradition appear unjust or oppressive. Section 91 in Part 2 precludes extradition where it appears to the judge that the physical or mental condition of the person whose extradition is sought is such that it would be unjust or oppressive to extradite him. It is not alleged that any of these provisions applies in the case of Mr Norris.

Extradition treaties

5. Public international law does not impose a general duty upon countries to accede to requests for extradition. Obligations to extradite arise out of bilateral treaties. Nonetheless a number of Conventions have been concluded that impose on states an obligation to extradite or prosecute in respect of certain offences or which limit the grounds upon which a state can refuse to extradite. These reflect increasing international cooperation in the fight against crime.

6. The relevant treaty in the present case is the Extradition Treaty of 1972 between the United Kingdom and the United States, for this applies in the case of any extradition proceedings in which the extradition documents were submitted before 26 April 2007. On that date a new treaty, the Extradition Treaty of 2003 (Cm 5821) came into force. The extradition documents in this case were submitted in January 2005.

7. The 1972 Treaty imposes, subject to specified exceptions, mutual obligations to extradite in respect of offences which carry a sentence of at least 12 months imprisonment in each jurisdiction. Article V (2) of the 1972 Treaty provides that extradition may be refused on any ground which is specified by the law of the requested party. Thus the United Kingdom will not be in breach of its treaty obligations if, by reason of section 87 of the 2003 Act, extradition is refused on human rights grounds.

Common ground

8. Article 8 of the Convention provides:

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

9. The following matters are common ground:

i) In this case, as in most extradition cases, extradition of Mr Norris from this country will interfere with his exercise in this country of his right to respect for his private and family life.

ii) This interference will be in accordance with the law.

iii) The critical issue in this case is whether this interference is "necessary in a democratic society…for the prevention of disorder or crime".

iv) Resolving this issue involves a test of proportionality. The interference must fulfil a "pressing social need". It must also be proportionate to the "legitimate aim" relied upon to justify the interference.

10. The Government contends that the legitimate aim, or pressing social need, is the honouring of extradition arrangements (an important aspect of the prevention of crime), that this aim weighs heavily in the scales and that the circumstances in which interference with article 8 rights will not be proportionate to it will be exceptional.

11. Mr Sumption QC for Mr Norris does not challenge this assertion. He accepts that it will only be in exceptional circumstances that extradition will be refused on the ground that it involves a disproportionate interference with article 8 rights. He submits, however, that this fact cannot be translated into a legal principle. The court cannot impose on a person challenging extradition a threshold requirement of demonstrating that his case is exceptional. He submits that this is what the Divisional Court did.

The primary issue of principle

12. The primary issue of principle is whether the court can properly require a person resisting extradition on article 8 grounds to demonstrate exceptional circumstances. Mr Sumption contends that the Divisional Court erred in doing just this. His argument is precisely expressed in the following two paragraphs of his written case:

> "19. [The Divisional Court's] essential error was that they sought to balance the principle of international cooperation in enforcing the criminal law, against the respect due to the private and family life of accused persons. Concluding that the former was the more potent interest, they held as a matter of law that the latter could prevail only on facts which were 'striking or unusual' or which reached a 'high threshold'. Hence the question which they certified as being of general public importance:
>
> > 'Is the public interest in honouring extradition treaties such as to require, in any extradition case, that an appellant must show 'striking and unusual facts' or reach 'a high threshold' if his article 8 claim is to succeed?'
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> The effect is to create a strong presumption against the application of article 8 in extradition cases, and to require exceptional circumstances before any objection to extradition on article 8 grounds can succeed, a proposition which has been rejected by the House of Lords, following a substantial body of case law in the European Court of Human Rights.

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

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

Subsidiary issues of principle

14. A number of subsidiary issues of principle in relation to the application of the test of proportionality in an extradition case became apparent in the course of argument. These are as follows:

i) Is the gravity of the crime in respect of which extradition is sought a relevant factor? Mr Sumption submits that it is and that this weighs in favour of Mr Norris for, so he submits, the extradition crime in this case is not a grave one. Mr Perry joins issue with this last contention, but submits that the gravity of the extradition crime is of no relevance. The obligation to extradite only arises in respect of offences which attract at least 12 months' imprisonment. Subject to that it matters not whether the person whose extradition is sought is a thief or a mass murderer.

ii) Do you consider the interference in respect for family rights solely from the viewpoint of the person whose extradition is sought ("the extraditee"), or also from the viewpoint of other members of his family who are affected? Mr Perry submits the former, so that we should consider only the effect of extradition on Mr Norris. Mr

Sumption submits the latter, and places particular emphasis on the effect that Mr Norris' extradition will have upon his wife.

iii) Is it relevant to consider whether it would be possible to prosecute the extraditee in the requested state? It has become common to urge this possibility as a factor that weighs against extradition. It is not suggested that Mr Norris could be prosecuted in this jurisdiction for obstructing justice in the United States, so this issue is of no interest to Mr Sumption. Mr Perry none the less urges us to make it clear that the possibility of prosecution in the requested state is an irrelevance.

Preliminary observations

15. Before embarking on an analysis of the jurisprudence I would make these preliminary observations. The jurisprudence often deals with deportation and extradition without distinguishing between the two. In one context this is understandable. Usually human rights issues relate to the treatment of an individual within the jurisdiction of the State whose conduct is under attack ("domestic cases"). Issues have, however, arisen as to whether, and in what circumstances, the Convention can be infringed by despatching a person to a territory where there is a risk that his human rights will not be respected ("foreign cases"). In considering such issues it may be of no or little relevance whether the individual in question is facing deportation or extradition. It would, however, be a mistake to assume that this question is of no relevance in a case such as the present. This is a domestic case. The family rights that are in issue are rights enjoyed in this country. The issue of proportionality involves weighing the interference with those rights against the relevant public interest. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing from this country an alien who has been convicted of a crime and who has served his sentence for it, or whose presence here is for some other reason not acceptable. This is a matter to which I shall return after considering the relevant jurisprudence.

The Strasbourg jurisprudence

16. I propose to follow the development of the Strasbourg jurisprudence in relation to deportation and extradition with particular reference to the issues raised on this appeal. The starting point is *Soering v United Kingdom* (1989) 11 EHRR 439. This was the first case in which the Strasbourg Court recognised that the Convention could be infringed by sending a person to a country where Convention rights would be violated. It was an extradition case. The issue was whether the

United Kingdom would be in breach of the Convention if it extradited the applicant to Virginia to stand trial for capital murder. The evidence was that, if he was convicted, the applicant would face up to eight years on death row. This, he contended, would be inhuman and degrading treatment.

17. The Court accepted this argument. It first made this observation in relation to the fact that article 1 of the Convention requires each contracting state to secure the Convention rights for those "within their jurisdiction".

> "86. . . . Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of article 3 in particular."

18. The Court went on to conclude, however:

> "88 . . . It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of article 3, would plainly be contrary to the spirit and intendment of the article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that article.

> 91 In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."

19. In paras 110 and 111 the Court considered an argument advanced on behalf of Soering that it was relevant that, instead of extraditing him to Virginia, he could be deported to his own country, Germany, where he could be tried without the risk of the death penalty or death row conditions. The United Kingdom Government urged that no such distinction should be drawn. The Court held, nonetheless:

> "However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case.
>
> . . .
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> A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration." (paras 110, 111)

20. At para 113 the Court dealt with a submission that extradition would also infringe the applicant's article 6 rights because he would not be able to obtain legal assistance in Virginia. The Court held:

> "The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society.

> The Court does not exclude that an issue might *exceptionally* be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk. ” (emphasis added)

21. In *HG v Switzerland* (Application No 24698/94) (unreported) given 6 September 1994 the Commission considered the admissibility of a complaint by a Turkish national that extradition from Switzerland to Turkey to serve a sentence imposed for kidnapping and raping a 14 year old girl would infringe article 3 because of Turkish prison conditions, article 6 because his trial in Turkey had not been fair and article 8 because extradition would interfere with respect for his family life in Switzerland. The Commission held in para 2 that expulsion or extradition might *"in exceptional circumstances"* involve a violation of fundamental rights because of the serious fear of treatment contrary to article 2 or 3 in the requesting country. It further held that an issue might *"exceptionally"* be raised under article 6 where a fugitive had suffered or risked suffering "a flagrant denial of a fair trial" in the requesting state (emphases added). The Commission held that, on the facts, this was not such a case. It went on to reject the admissibility of the article 8 claim on the facts.

22. In *Raidl v Austria* (1995) 20 EHRR CD 114 the Commission once again considered the admissibility of a claim that extradition to Russia on suspicion of murder had infringed the applicant's Convention rights. After finding ill-founded a complaint based on article 3 the Commission went on to consider the applicant's complaint that extradition had interfered with her married life in Austria, thereby violating her article 8 rights. The Commission held at p 123:

> "…the interference with the applicant's family life was proportionate to the legitimate aim pursued, *given the seriousness of the crime, of which the applicant was suspected* even before she contracted marriage in Austria." (emphasis added)

23. In *Launder v United Kingdom* (1997) 25 EHRR CD 67 the Commission considered the admissibility of a complaint that the United Kingdom would violate articles 2, 3, 5, 6 and 8 if it extradited him to the Hong Kong Special Administrative Region. In finding the application manifestly ill-founded the Commission said this in relation to article 8, at para 3:

> "The Commission considers that *it is only in exceptional circumstances* that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life." (emphasis added)

24. In *Chahal v United* Kingdom (1996) 23 EHRR 413 the United Kingdom had detained Mr Chahal for some six years on the ground that they were taking action against him with a view to his deportation, this being a justification for interference with the article 5 Convention right to liberty by virtue of article 5(1)(f). The Government wished to deport him to India because he was suspected of involvement in terrorism. The Court held that, because of the danger of torture or inhuman or degrading treatment that he would face if deported, his deportation would violate article 3. It rejected the contention of the UK Government that the fact that he posed a risk to the security of the United Kingdom had any relevance to the assessment of this question. Mr Chahal and his wife and two children, who joined in his application, also contended that his deportation would violate their article 8 rights to respect for their family life in the United Kingdom. The Court held that it had no need to decide this hypothetical question.

25. The principles to be applied when considering the proportionality of deportation that would interfere with article 8 family rights were first enunciated by the Court in *Boultif v Switzerland* (2001) 33 EHRR 1179. The applicant, an Algerian, had married a Swiss citizen and established a home in Switzerland. He then committed a robbery for which he received a two year prison sentence. After he had come out of prison the Swiss authorities refused to renew his residence permit. This meant that he would have to return to Algeria whither, the Court found, his wife could not reasonably be expected to follow him. The Court laid down the following principles:

> "46. The Court recalls that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim

pursued (see Dalia, cited above, p. 91, § 52, and Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 34).

47. Accordingly, the Court's task consists in ascertaining whether the refusal to renew the applicant's residence permit in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.

48. The Court has only to a limited extent decided cases where the main obstacle to expulsion is the difficulties for the spouses to stay together and in particular for a spouse and/or children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure was necessary in a democratic society.

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple’s family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.”

Applying these principles, the Court found violation of article 8.

26. In *Üner v The Netherlands* (2006) 45 EHRR 421 the Grand Chamber confirmed the principles laid down in *Boultif*, adding to these at para 58:

> "–the best interests and well-being of the children, 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
>
> -the solidity of social, cultural and family ties with the host country and with the country of destination."

27. The Court then went on to say this:

> "59. The Court considered itself called upon to establish 'guiding principles' in the *Boultif* case because it had 'only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin' . . . . It is to be noted, however, that the first three guiding principles do not, as such, relate to family life. This leads the Court to consider whether the '*Boultif* criteria' are sufficiently comprehensive to render them suitable for application in all cases concerning the expulsion and/or exclusion of settled migrants following a criminal conviction. It observes in this context that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of article 8. However, as article 8 also protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v the United Kingdom*, no.2346/02, [61], ECHR 2002-III) and can sometimes embrace aspects of an individual's society identity (see *Mikulic v Croatia*, No.53176/99, [53], ECHR 2002-1), it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of article 8. Regardless of the existence or otherwise of a 'family life', therefore, the court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect

for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the 'family life' rather than the 'private life' aspect.

60. In the light of the foregoing, the Court concludes that all the above factors (see [57]-[59]) should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction."

28. Finally I must refer to the decision of the Grand Chamber in *Saadi v Italy* (2008) 24 BHRC 123. The United Kingdom intervened in this case in an attempt to persuade the Grand Chamber to reconsider the principles laid down in *Chahal.* The attempt did not succeed. The Grand Chamber held:

"139. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment (see para 122, above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no

> reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is 'more likely than not'. On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by article 3. . ."

Discussion

29. The Strasbourg cases to which I have referred illustrate three different situations. The first is the foreign case, where the applicant seeks to establish a breach of the Convention because of the treatment that he fears that he will receive in the country to which he is to be sent. Here Strasbourg has not differentiated between extradition and expulsion or deportation. Language has been used suggesting that it will only be in exceptional circumstances that a foreign case will involve an infringement of the Convention and that the Convention will only prove a bar to extradition or deportation where there is a real risk of a *flagrant* breach of the Convention. It is not any anticipated breach that will suffice.

30. The second situation is where, in a domestic case, breach of article 8 rights within the territory of the respondent State is relied upon *as a bar to deportation or expulsion* of an alien. Here the Grand Chamber has made it plain that the question of proportionality is detailed and fact specific. On the one hand the extent to which the removal of the alien is necessary in the public interest has to be considered having regard to the facts of the particular case. On the other hand the extent of the interference with article 8 rights has to receive an equally careful evaluation, having regard to the facts of the particular case. While it is unusual for an applicant to be able to make out a case of breach of the Convention in such circumstances, it is by no means unknown.

31. The third situation is where, in a domestic case, breach of article 8 rights within the territory of the respondent State is advanced *as a bar to extradition*. There is, in fact, no reported case in which such a complaint has succeeded, or even been held admissible where not joined with other allegations of breach.

32. So far as the subsidiary issues are concerned,

i) The reasoning of the Court in *Soering* 11 EHRR 439 and the express reference to "the seriousness of the crime" in *Raidl* 20 EHRR CD 114, 123 suggest that the gravity of the crime in respect of which extradition is sought is capable of being a material factor.

ii) There is no support for the proposition that the Court is solely concerned with the family rights of the applicant, to the exclusion of those of other members of the family. On the contrary, at least in deportation and expulsion cases, the Grand Chamber has made it clear in *Üner* 45 EHRR 421 that the interests of children are particularly material, and there is no reason to conclude that the same is not true in an extradition case, in so far as family rights weigh in the balance at all.

iii) The Court in *Soering* held that the possibility of trying a defendant in a forum where his fundamental rights will not be at risk can be a material factor when considering the proportionality of extradition in the face of a risk to those rights.

The domestic jurisprudence

33. When considering the domestic jurisprudence it is important to distinguish between the three different categories of case that I have identified in paragraphs 29 to 31 above. It is a failure to do so that has led to the primary issue of principle in this appeal.

34. I shall start my survey of the domestic cases with three appeals to the House of Lords that were heard together – *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323; *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368. The appellants in each appeal were unsuccessful asylum applicants who were resisting removal from the United Kingdom. In *Ullah* the applicants complained that in the countries to which they were to be removed their article 9 rights to practise their religions would be infringed. In *Razgar* the applicant complained that in Germany, to which country he was to be removed, he would not receive appropriate treatment for psychiatric illness from which he suffered, with the consequence that there would be interference with his article 8 right to respect for his private life. Thus these were foreign cases; indeed it was on these appeals that Lord Bingham of Cornhill coined the phrases "domestic cases" and "foreign cases" that I have adopted in this judgment: see [2004] 2 AC 323, paras 8-9. The principal issue was whether, in a foreign case, rights other than article 3 could be

engaged. The House of Lords, applying dicta of the Strasbourg Court, held that they could.

35. In paragraphs 17 to 20 of *Razgar* Lord Bingham set out five sequential questions that an immigration adjudicator should consider in cases where removal was resisted in reliance on article 8. The fourth was whether interference with the article 8 right was 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 – these being the criteria of justification under article 8(2). The fifth question, assuming an affirmative answer to the fourth question, was whether such interference was proportionate to the legitimate public end sought to be achieved.

36. Lord Bingham made the following comments on the answers to these questions:

> "19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see *Ullah* [2004] 2 AC 323, 339, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.
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> 20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

He subsequently added:

> "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

It is not apparent that these observations were restricted to foreign cases. They appear to have been of general application to cases of immigration control.

37. More generally, so far as there was discussion in these appeals of the approach to foreign cases, no distinction was drawn between expulsion and extradition. Indeed, in *Ullah* at para 13 Lord Bingham held that what he described as the *Soering* principle was potentially applicable in either case. He held that in either case successful invocation of Convention rights in a foreign case required the satisfaction of a stringent test. Where qualified rights, such as those under articles 8 and 9, were concerned, it would be necessary to show that there would be a flagrant denial or gross violation of the right, so that it would be completely denied or nullified in the destination country – see para 24.

38. In *Razgar*, at para 42, Baroness Hale of Richmond, emphasised the distinction between foreign cases and domestic cases. She said:

> "The distinction is vital to the present case. In a domestic case, the state must always act in a way which is compatible with the Convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved. Foreign cases, on the other hand, represent an exception to the general rule that a state is only responsible for what goes on within its own territory or control. The Strasbourg court clearly regards them as exceptional. It has retained the flexibility to consider violations of articles other than articles 2 and 3 but it has not so far encountered another case which was sufficiently serious to justify imposing upon the contracting state the obligation to retain or make alternative provision for a person who would otherwise have no right to remain within its territory. For the same reason, the Strasbourg court has not yet explored the test for imposing this obligation in any detail. But there clearly is some additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned."

I doubt whether, in making these comments, Lady Hale had in mind the question of whether a threshold test was appropriate in an extradition case.

39. *Razgar* and *Ullah* were considered by the Divisional Court in *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200; (Admin); [2007] QB 727. Among the many points taken by the applicants, who were resisting extradition to the United States on charges of fraud in relation to the Enron affair, was a contention that their article 8 rights in respect of family life in this jurisdiction would be infringed by their extradition. Further infringements of article 8 rights in the United States were also invoked. Laws LJ, in delivering the sole judgment, referred to the opinion of Baroness Hale, but doubted whether the case's classification as "foreign" or "domestic" would "cast much light on the stringency of the test for violation of Article 8 which the Court should apply" – para 115.

40. At para 118 he said this:

> "If a person's proposed extradition for a serious offence will separate him from his family, article 8(1) is likely to be engaged on the ground that his family life will be interfered with. The question then will be whether the extradition is nevertheless justified pursuant to article 8(2). Assuming compliance with all the relevant requirements of domestic law the issue is likely to be one of proportionality: is the interference with family life proportionate to the legitimate aim of the proposed extradition? Now, there is a strong public interest in 'honouring extradition treaties made with other states' (the *Ullah* case [2004] 2 AC 323, para 24). It rests in the value of international co-operation pursuant to formal agreed arrangements entered into between sovereign states for the promotion of the administration of criminal justice. Where a proposed extradition is properly constituted according to the domestic law of the sending state and the relevant bilateral treaty, and its execution is resisted on article 8 grounds, a wholly exceptional case would in my judgment have to be shown to justify a finding that the extradition would on the particular facts be disproportionate to its legitimate aim."

41. *Bermingham* is also of relevance to one of the subsidiary issues. The applicant sought an order that the Director of the Serious Fraud Office should exercise his statutory powers to investigate the possibility of instituting criminal proceedings in this jurisdiction, having particular regard to the fact that if the prosecution took place here the article 8 rights of the defendants would be protected. The court held that it would not be appropriate to grant such relief.

42. *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 involved the approach that should be adopted by an appellate authority to the invocation of article 8 rights by aliens who wished to be permitted to remain in this country in order to live with members of their families who were already established here. Thus the appeals involved domestic cases. Mr Nicholas Blake QC, for Mrs Huang, appears from p 179 of the law report to have suggested that *Razgar* had laid down a "truly exceptional" threshold test for the successful invocation of article 8 rights in the face of deportation, and to have attacked such a test.

43. In delivering the opinion of the committee Lord Bingham said this about the question of proportionality, at para 20:

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

The final comment has since been treated as an embargo on the application of a test of exceptionality, not only in domestic immigration cases but in extradition cases.

44. So far as immigration cases are concerned, the decision in *Huang* led to a number of cases being remitted to the Asylum and Immigration Tribunal on the ground that a test of exceptionality had mistakenly been applied by the Tribunal. In *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2008] 2 All ER 28, a domestic immigration case, Sedley LJ said this about *Huang*, at para 25:

> "The effect of their Lordships' decision (and, if we may say so, the intended effect of this court's decision) in *Huang* has thus not been to introduce a new interpretation of article 8 but to clarify and reiterate a well understood one. While its practical effect is likely to be that removal is only exceptionally found to be disproportionate, it sets no formal test of exceptionality and raises no hurdles beyond those contained in the article itself."

At para 31 Sedley LJ found it necessary to reiterate that there was no legal test of exceptionality as a surrogate for the article 8 decision. He said:

> "The fact that in the great majority of cases the demands of immigration control are likely to make removal proportionate and so compatible with article 8 is a consequence, not a precondition, of the statutory exercise. No doubt in this sense successful article 8 claims will be the exception rather than the rule; but to treat exceptionality as the yardstick of success is to confuse effect with cause."

45. The first decision to which we have been referred in which *Huang* was applied in an extradition context is *Jaso v Central Criminal Court No 2 Madrid* [2007] EWHC 2983 (Admin). The Madrid Court had issued European Arrest Warrants against the three appellants on charges of membership of a criminal organisation and terrorism. The appellants had unsuccessfully challenged extradition before the District Judge on a large number of grounds. These included the contention that extradition would violate articles 3, 5, 6 and 8 of the Convention. The factual basis for this contention was an allegation that, if extradited, the appellants would be subject to *incommunicado* police detention for up to 5 days. Thus this was a foreign case. The District Judge had applied an

exceptionality test and this was attacked before the Divisional Court. Dyson LJ, when giving the leading judgment, held, applying *Huang*, that there was no exceptionality test. He added, however, at para 57:

> "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."

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

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

47. The final decision to which I should refer is *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335. The appellant was resisting extradition to Missouri on charges which included two counts of murder in the first degree. He contended that, if convicted, he would be sentenced to imprisonment for life without eligibility of parole and that this would be inhuman treatment in violation of article 3. The House unanimously dismissed his appeal. A majority of the House held that the desirability of extradition was such that punishment which would be regarded as inhuman and degrading in the domestic context would not necessarily be so regarded when the choice was between either extraditing or allowing a fugitive offender to escape justice altogether. This has proved a controversial finding, but this is not an occasion on which it would be appropriate to review it. The case underlines the weight that the desirability of extradition carries as an essential element in combating public disorder and crime.

The judgment of the Divisional Court.

48. In giving the judgment of the Divisional Court in this case [2009] EWHC 995 (Admin), Laws LJ followed the approach of that court in *Jaso* and *Tajik.* He said:

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

49. Mr Sumption submitted in his written case that this reasoning embodied three fundamental errors:

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

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

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

Discussion

50. It was a fundamental premise of Mr Sumption's submissions that, when considering the impact of article 8, the Court should adopt a similar approach in an extradition case as that to be adopted in a case of deportation or expulsion. He drew our attention to the fact that in France the Conseil d'Etat certainly does not do this. In a deportation case, the Conseil d'Etat now has regard to the human rights implications – see *Abraham, R. La Convention europeenne des droits de l'homme et les measures d'eloignement d'etrangers"* (1991) Rev fr Droit adm, 497. So far as extradition is concerned, however, the Conseil d'Etat considers that, as a matter of principle extradition justifies any interference with article 8 rights that may be involved – see *De Deus Pinto,* CE, ass, 8 October 1999. Mr Sumption submitted that the latter stance was incompatible with the Strasbourg jurisprudence.

51. I agree that there can be no absolute rule that any interference with article 8 rights as a consequence of extradition will be proportionate. 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.

52. It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity. It is instructive to consider the approach of the Convention to dealing with criminals or suspected criminals in the domestic context. Article 5 includes in the exceptions to the right to liberty (i) the arrest of a suspect, (ii) his detention, where necessary, pending trial, and (iii) his detention while serving his sentence if convicted. Such detention will necessarily interfere drastically with family and private life. In theory a question of proportionality could arise under article 8(2). In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment– see *R (P) v Secretary of State of the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002, para 79, for discussion of such circumstances. Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate.

53. *Massey v United Kingdom* (Application No 14399/02) (unreported) given 8 April 2003 illustrates this proposition. The applicant complained, *inter alia*, that criminal proceedings and a sentence of six years imprisonment constituted an unwarranted interference with his family life and his children's right to a father. In ruling the complaint inadmissible, the court held:

> "The Court recalls that article 8.2 permits interference with an individual's right to respect for his private and family life in certain circumstances. The Court considers that the bringing of criminal proceedings and the imposition of a punishment following conviction fall within these exceptions since they are in accordance with the law and pursue . . . legitimate aims, namely, public safety, the prevention of disorder and crime and protection of the rights and freedoms of others. The Court therefore concludes that the prosecution and imprisonment of the applicant does not raise any issues under article 8 of the Convention."

54. There is an analogy between the coercion involved in extradition and the coercion involved in remanding in custody a prisoner reasonably suspected of wishing to abscond. In either case the coercion is necessary to ensure that the suspect stands his trial. Each is likely to involve a serious interference with article 8 rights. The dislocation of family life that will frequently follow extradition will not necessarily be more significant, or even as significant, as the dislocation of family life of the defendant who is remanded in custody. It seems to me that, until

recently, it has also been treated as axiomatic that the dislocation to family life that normally follows extradition as a matter of course is proportionate. This perhaps explains why we have been referred to no reported case, whether at Strasbourg or in this jurisdiction, where extradition has been refused because of the interference that it would cause to family life.

55. I reject Mr Sumption's contention that it is wrong for the court, when approaching proportionality, to apply a "categorical assumption" about the importance of extradition in general. Such an assumption is an essential element in the task of weighing, on the one hand, the public interest in extradition against, on the other hand, its effects on individual human rights. This is not to say that the latter can never prevail. It does mean, however, that the interference with human rights will have to be extremely serious if the public interest is to be outweighed.

56. The reality is that only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves. That, no doubt, is what the Commission had in mind in *Launder* 25 EHRR CD 67, 73 when it stated that it was only in exceptional circumstances that extradition would be an unjustified or disproportionate interference with the right to respect for family life. I can see no reason why the District Judge should not, when considering a challenge to extradition founded on article 8, explain his rejection of such a challenge, where appropriate, by remarking that there was nothing out of the ordinary or exceptional in the consequences that extradition would have for the family life of the person resisting extradition. "Exceptional circumstances" is a phrase that says little about the nature of the circumstances. Instead of saying that interference with article 8 rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition. A judge should not be criticised if, as part of his process of reasoning, he considers how, if at all, the nature and extent of the impact of extradition on family life would differ from the normal consequences of extradition.

57. These considerations are reflected in the judgment of Laws LJ in this case and the attack made on that judgment by Mr Sumption is not justified.

58. What general approach to human rights should the District Judge adopt at the extradition hearing? My comments in relation to this question should not be

treated as laying down a course that the judge is bound to follow. They are no more than advisory.

59. Mr Hermer QC, who appeared for Liberty as intervener, submitted that the judge should not start with consideration of the case for extradition, before turning to ask whether this was outweighed by the impact that extradition would have on article 8 rights. This approach was "the wrong way round". The judge should first consider the effect of the proposed extradition on the article 8 rights, before going on to consider whether such interference could be justified. The decision in each case should turn upon its individual facts.

60. Mr Hermer's submissions did not recognise any difference between extradition and expulsion or deportation. I did not find them either realistic or helpful.

61. The 2003 Act specifies those matters that the extradition judge has to consider. Before considering any objections to extradition, he has to consider whether the statutory requirements for extradition have been satisfied. This requires the judge to consider, among other things, the offence or offences in respect of which extradition is sought. These must carry a minimum sentence of at least 12 months' imprisonment, but this leaves scope for a very wide variation in the seriousness of the offence or offences that are alleged to have been committed.

62. The judge then has to consider a considerable number of possible statutory barriers to extradition. These include the matters that might violate human rights to which I have referred at para 4 above. It is only after he has done this that the judge has to consider whether extradition will be compatible with Convention rights pursuant to section 87 of the 2003 Act. This is a fact-specific exercise, and the judge must have regard to the relevant features of the individual case. It is at this point that it is legitimate for the judge to consider whether there are any relevant features that are unusually or exceptionally compelling. In the absence of such features, the consideration is likely to be relatively brief. If, however, the nature or extent of the interference with article 8 rights is exceptionally serious, careful consideration must be given to whether such interference is justified. In such a situation the gravity, or lack of gravity, of the offence may be material.

63. I do not accept Mr Perry's submission that the gravity of the offence can never be of relevance where an issue of proportionality arises in the human rights

context. The importance of giving effect to extradition arrangements will always be a significant factor, regardless of the details of the particular offence. Usually the nature of the offence will have no bearing on the extradition decision. If, however, the particular offence is at the bottom of the scale of gravity, this is capable of being one of a combination of features that may render extradition a disproportionate interference with human rights. Rejecting an extradition request may mean that a criminal never stands trial for his crime. The significance of this will depend upon the gravity of the offence. This obvious fact has been recognised at Strasbourg (see para 32 above).

64. When considering the impact of extradition on family life, this question does not fall to be considered simply from the viewpoint of the extraditee. On this subsidiary issue also I reject Mr Perry's submission to the contrary. This issue was considered by the House of Lords in the immigration context in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] AC 115. 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.

65. Indeed, in trying to envisage a situation in which interference with article 8 might prevent extradition, I have concluded that the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration. If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee under section 87 of the 2003 Act.

66. At this point I will deal with the other subsidiary issue of principle that has been raised – is it of relevance when considering proportionality that a prosecution for the extradition offence might be brought in the requested jurisdiction? As I have pointed out, the Strasbourg Court gave a positive answer to this question in *Soering* 11 EHRR 439. There has recently been a spate of cases in which the extraditee has argued that he ought to be prosecuted in this jurisdiction, of which *Bermingham* [2007] QB 727 was but one. The most recent was *R(Bary) v Secretary of State for the Home Department* [2009] EWHC 2068 (Admin). References to the others can be found at para 72 of the judgment in that case. In each one the argument was rejected.

67. Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country's treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an enquiry as to the possibility of prosecution in this country.

Application of the principles to the facts of this case

68. Human rights are in issue and it is for this court to reach its own decision as to whether Mr Norris' extradition would be compatible with his article 8 rights.

69. This is the second occasion on which this matter has reached the highest court in this jurisdiction. Mr Norris is a British national, born on 15 February 1943. He retired owing to ill-health in 2002. For some four years before he had been Chief Executive Officer of Morgan Crucible plc ("Morgan") and he had worked in the carbon division of that company for 29 years before then. Morgan and its subsidiaries became involved in the United States in price-fixing that was contrary to the law of the United States. Criminal proceedings in the United States resulted in a plea bargain under which Morgan paid a fine of $1 million and one of its subsidiaries paid a fine of $10 million. Most of Morgan's senior personnel were granted immunity from prosecution but these did not include Mr Norris.

70. On 28 September 2004 Mr Norris was indicted by a Grand Jury in Pennsylvania on one charge of price-fixing and three charges of obstructing justice. Extradition proceedings were commenced which he resisted on grounds, among others, that the conduct with which he was charged was not criminal under English law. So far as the price-fixing charge was concerned, this contention succeeded, but only when the matter reached the House of Lords – *Norris v Government of the United States of America* [2008] UKHL 16; [2008] AC 920. The House held, however, that the conduct alleged in relation to the charges of obstructing justice would have been criminal if carried out in this jurisdiction and that, accordingly, those offences were extraditable. The House remitted the matter for reconsideration by the District Judge because:

> " …he exercised his judgment on a basis different from that which now pertains, namely that Mr Norris was to be

> extradited on the main price fixing count, and not merely the subsidiary counts." (Para 110).

Mr Sumption fastened on this passage and submitted in his written case that "the main stuffing of the case against" Mr Norris had been knocked out by the decision of the House.

71. As to that submission I would simply comment that there is plenty of stuffing left. The gravamen of the case of obstructing justice appears in the following passages of the judgment of Auld LJ in the earlier proceedings – *Norris v Government of the United States of America (Goldshield Group plc intervening)* [2007] EWHC 71 (Admin); [2007] 1 WLR 1730 - based on a deposition of Lucy P.McClain, a trial attorney for the antitrust division of the US Department of Justice:

> "12. . . . Mr Norris instructed, through a 'task force' he set up for the purpose, all Morgan entities involved in the price fixing conspiracy to remove, conceal or destroy any documentary material, in particular Morgan's sales files in Europe, evidencing Morgan's involvement in the conspiracy. He also instructed the retention and concealment of certain documents to enable Morgan to continue monitoring the working of the conspiracy.
>
> 13. In about November 1999 Mr Norris met several of the co-conspirators in England to discuss the United States authorities' investigation into their conspiratorial dealings and meetings, and to devise a false explanation, other than price fixing, to be put to the authorities for the meetings. As Ms McClain put it in her affidavit:
>
> 'Norris and his subordinates… discussed ways in which they could conceal the true purpose of the price fixing meetings when asked about them. They decided to falsely characterise their meetings with competitors as discussions of legitimate joint ventures rather than disclose the fact that they were price fixing meetings. Norris expressed his concern that the United States investigators would not believe Morgan's false explanation that the meetings were held to discuss joint ventures, in part because Morgan had no contemporaneous

> notes of the meetings to support its joint venture explanation. Norris then directed his subordinates to create false summaries of the price fixing meetings that they would use as a guide or script in answering any future questions about what had occurred at their meetings.'
>
> 14. To that end, a 'script' was prepared which Mr Norris approved, of false information as to the purpose of the meetings for use in the event of any of the Morgan staff or others involved in the conspiracy being questioned by the authorities or by the federal grand jury. Those provided with the script were rehearsed and questioned about their recollection of the material contained in it. Those who Mr Norris felt would not be able to withstand questioning, he distanced from Morgan by arranging for their retirement or for them to become consultants. In January 2001 false handwritten summaries of potentially incriminating meetings were provided to the United States' authorities' investigators, who made plain they regarded Morgan's accounts of the meetings as false.
>
> 15. At or about the same time, Morgan sought to persuade a German company alleged to be a party to the conspiracy, to support it in its false representations to the United States authorities so as, not only to exculpate Morgan, but also to cast blame on a French company, also alleged to be a party to the conspiracy – a solicitation in which Mr Norris took a prominent and personal role."

72. Laws LJ rightly observed [2009] EWHC 995 (Admin), para 29 that the obstruction of justice charges, taken at their face value, were very grave indeed. The evidence is that, if Mr Norris is convicted, the conduct in question is likely to attract a sentence of between 21 and 27 months imprisonment. There is a possibility that the sentence will be significantly longer in order to reflect the gravity of the conduct that the obstruction of justice was designed to conceal.

73. If Mr Norris is extradited a year or more is likely to elapse before his trial. It is possible that the Department of Justice would oppose the grant of bail before and during the trial. If convicted he might be imprisoned in a low security "Federal Correctional Institution" with dormitory or cubicle accommodation.

74. There is a considerable body of medical evidence before the court, as there was before the Divisional Court, and I shall adapt and adopt the careful summary of that evidence made by Laws LJ.

75. Mr Norris is now 66 years of age. He and his wife were married in 1966. They have two sons and three grandchildren. The US Department of Justice investigation began in 1999. In 2000 Mr Norris was diagnosed as suffering from prostate cancer and underwent surgery in March 2001. He contracted MRSA in the hospital. A benign tumour was removed from his side in June 2002. He was not, however, free of cancer and had to undergo radiotherapy in 2002. He retired from Morgan on health grounds in October of that year. Towards the end of the same year Morgan struck a plea agreement with the Department of Justice, but it did not include the appellant. The extradition process effectively commenced in 2005, with the appellant's arrest on 13 January. In her first witness statement (made on 27 April 2005) Mrs Norris describes with some eloquence the deteriorating quality of life which she and her husband faced as these events crowded around them. In her second statement (30 May 2008) she paints a worsening picture, and also states (paragraph 8) that if the appellant had to spend any length of time in custody in the United States her psychiatric condition would prevent her from re-locating there, where the only people she knows are connected with Morgan, and they are prohibited by the terms of the plea bargain from speaking to her or her husband.

76. In a letter of 20 April 2005 to Mr Norris's solicitors Dr Jones, his general practitioner, reviewed the prostate cancer history, as regards which he could not say there had been a complete recovery, and the onset of other problems: raised blood pressure and shortness of breath. In October 2006 Dr Jones described difficulties relating to the appellant's hearing, left knee, right hip, incontinence and a recently developed hernia. He stated that "[t]he legal problems Mr Norris has been having during the past 2 – 3 years have had a devastating effect upon him and his family". By 7 February 2007, when the GP next wrote, the appellant's mental state had deteriorated. His powers of concentration were poor, he had marked short-term memory loss, was depressed and tended to shut himself away. He was anxious about his wife's psychological state. His physical problems largely persisted although his blood pressure was normal. He and his wife were "at the end of their tether". By 23 May 2008, when the GP next reported, the appellant was registered disabled and had had a total left knee replacement. Dr Jones was anxious as to his mental state and arranged for him and his wife to see a psychologist.

77. There are in fact psychiatric reports on both Mr Norris and his wife which pre-date the GP's May 2008 letter. Professor Tom Fahy provided these on 15

February 2007. In his report on Mr Norris he states that when he interviewed him, he "presented a normal mental state". However,

> "Although Mr Norris' current symptoms fall short of a formal psychiatric diagnosis, it is reasonable to assume that his symptoms would deteriorate in the face of imminent extradition, actual extradition, conviction and/or imprisonment in the US."

78. Professor Fahy reported again on 27 May 2008. He stated that

> "Mr Norris' mental health has deteriorated since I saw him in February 2007. He is now describing more prominent symptoms of low mood, loss of interest and pleasure in his usual activities and feelings of helplessness and pessimism about his life situation."

However,

> "Mr Norris' mood disturbance is not persistent or severe enough to warrant a diagnosis of a depressive illness."

Finally,

> "There is no serious prospect of this situation improving for him until the legal situation is resolved, though if he were to be extradited, it is likely that imprisonment and isolation from his family would lead to a further deterioration in his mental health and the development of more significant depressive symptoms."

79. Mrs Norris' state of health is described in a report dated 19 June 2008 from Michael Kopelman, who is a professor of neuropsychiatry at King's College London and St Thomas's Hospital. He saw both Mr and Mrs Norris on 9 June 2008, and interviewed them separately and together. Mrs Norris told him she had

had suicidal ideas, panic attacks and palpitations. Mr Norris told him there had been a "total change" in his wife's personality. Professor Kopelman opined that Mrs Norris suffered from a "major depression of moderate severity" or a "moderate depressive episode" (depending on which set of criteria was used). Its severity was however difficult to evaluate: she was able to maintain at least some social activities, but was a person who the doctor suspected was "good at hiding her real emotions". He concluded (Opinion, paragraph 6):

> "I have no doubt that the prolonged and more serious nature of Mrs Norris's current depression results from the prolonged extradition proceedings... To this extent, the continuing nature of these extradition proceedings has caused Mrs Norris 'hardship' in the sense of severe psychological suffering and mental deterioration. I have no doubt that this would be greatly worsened, were her husband to be extradited."

80. Mr Sumption submits that Mr and Mrs Norris' poor health, together with the length and closeness of their marriage, has made them highly dependent on each other. This and their advancing years, make them less resilient to the separation that Mr Norris' extradition would involve. It was originally Mrs Norris' intention to accompany her husband to the United States should he be extradited, but in a witness statement that she made last year she says that she cannot now contemplate going to the US to live on her own there without friends and family support. Because Mrs Norris will not accompany her husband to the United States, the interruption to their family life should he be remanded in custody, and during his imprisonment, should he be convicted, will be total. This contrasts with the position that would have prevailed had Mr Norris been imprisoned in this country, where visiting rights enable the family relationship to be preserved.

81. Mr Sumption contends that Mr Norris' extradition in these circumstances cannot be said to represent a proportionate answer to a "pressing social need". Nor, he argues, can it plausibly be said that the prevention of crime or the orderly functioning of extradition are public interests which will suffer substantial damage if someone in the particular position of Mr Norris is not extradited. The Government has argued that not to extradite Mr Norris would damage the principle of automatic, or virtually automatic, extradition, but no such principle exists.

82. In a case such as this it is the exception that proves the rule. One has to consider the effect on the public interest in the prevention of crime if any defendant with family ties and dependencies such as those which bind Mr Norris

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

83. For these reasons I would dismiss this appeal.

Postscript

84. On the eve of delivering judgment in this case the court received the report of the admissibility decision in *King v United Kingdom* Application No. 9742 /07. In holding Mr King's application in relation to his extradition to Australia manifestly ill-founded the Court at para 29 followed *Launder* in expressing the view, 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),

> "…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"

Referring to the fact that the applicant had a wife, two young children and a mother in the United Kingdom whose ill-health would not allow her to travel to Australia the Court remarked that this was, in its view, not an exceptional circumstance.

85. This decision does not alter my view that it is more helpful, when considering proportionality, to consider whether the consequences of interference with article 8 rights are exceptionally serious rather than simply whether the circumstances are exceptional. Either test is, however, likely to produce the same result and the decision demonstrates the futility of attempting to found an appeal on the basis that there has been inappropriate use of a test of exceptionality.

86. The court also cited *Soering* in support of the proposition that the considerations of whether prosecution exists as an alternative to extradition may have a bearing on whether extradition would be in violation of a Convention right. I remain of the view that rarely, if ever, is this possibility likely in practice to tilt the scales against extradition and it certainly does not do so in this case.

LORD HOPE

87. It would not be right to say that a person's extradition can never be incompatible with his right to respect for his family life under article 8 of the European Convention on Human Rights. But resisting extradition on this ground is not easy. The question in each case is whether it is permitted by article 8(2). Clearly some interference with the right is inevitable in a process of this kind, which by long established practice is seen as necessary in a democratic society for the prevention of disorder or crime. That aim extends across international boundaries, and it is one which this country is bound by its treaty obligations to give effect to. In this case extradition will be in accordance with the law, as the preconditions for Mr Norris's lawful extradition have all been satisfied. So, as Mr Sumption QC made clear in his opening remarks, the issue is entirely one of proportionality. This, as he said, is a fact-specific issue. He submitted that in the circumstances of this case extradition would be a violation of the article 8 right.

88. Mr Sumption challenged the government's assertion that the circumstances in which the interference with article 8 rights would not be proportionate will be exceptional. In para (2) of a closing memorandum on law which he provided to the District Judge and made available to the court on the second day of the argument he said that it was not necessary to show exceptional circumstances in order to make out a case for refusing extradition. He referred to *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 20, where Lord Bingham of Cornhill said that "exceptionality" was not a legal test. Applying that observation to this case, he added that the law recognises that the balance will not necessarily come down in favour of extradition, and that it would not be right to treat the test as a rule of thumb with substantially the same effect. In oral argument he said that there was no such threshold that had to be crossed. As it was put in *Haung*, this may be the expectation but it is not a legal test. The phrase "only in exceptional circumstances" was used by the Commission in *Launder v United Kingdom* (1997) 25 EHRR CD 67, but he said that this was an early decision and it had not been adopted by the Strasbourg Court in its later case law.

89. 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. As Lord Phillips has observed, the phrase "exceptional circumstances" says little about the nature of the circumstances: para 56, above. It tends to favour maintaining the integrity of the system as the primary consideration rather than focusing on the rights of the individual. It risks diverting attention from a close examination of the circumstances of each case. Although in its admissibility decision in *King v United Kingdom*, Application No 9742/07, 26 January 2010, it followed the Commission's decision in *Launder* in using the phrase "exceptional circumstances", decisions of the Strasbourg court have repeatedly shown that an intense focus on the rights of the individual is necessary when striking the balance that proportionality requires. 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.

90. *Huang v Secretary of State for the Home Department* was a domestic case where article 8 was relied on as a bar to expulsion, but I think that Lord Bingham's statement that exceptionality is not a legal test can be applied to extradition cases too. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 13, 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: *Cruz Varas v Sweden* (1991) 14 EHRR 1, para 70. Lord Steyn said in para 33 that, while the purpose of the two procedures was different, in the context of the possible engagement of fundamental rights under the ECHR 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.

91. The fact remains however that the cases in which an argument of the kind that Mr Sumption sought to present will succeed are likely to be very few. I agree with Lord Phillips that the reality is that it is only if some exceptionally compelling feature, or combination of features, is present that the interference with the article 8 right that results from extradition will fail to meet the test of proportionality. The public interest in giving effect to a request for extradition is a constant factor, and it will always be a powerful consideration to which great weight must be attached. The more serious the offence the greater the weight that is to be attached to it. As against that, those aspects of the article 8 right which must necessarily be interfered with in every case where criminal proceedings are brought will carry very little, if any, weight; *Massey v United Kingdom* (Application No 14399/02) (unreported) given 8 April 2003, p 12. Separation by the person from his family life in this country and the distress and disruption that this causes, the extent of which is bound to vary widely from case to case, will be inevitable. The area for

debate is likely to be narrow. What is the extra compelling element that marks the given case out from the generality? Does it carry enough weight to overcome the public interest in giving effect to the request?

92. In the present case extradition is sought on charges of obstructing justice. These are serious charges because of the methods that are said to have been used and the nature of the alleged conduct, and there is a strong public interest in giving effect to the treaty obligation so that they can be properly dealt with. It was submitted that extradition in this case would cause disproportionate damage to Mr and Mrs Norris's physical or psychological integrity, having regard to their state of health, their age and the likely effect of the separation that extradition will impose on them. Added to that is the fact that Mr Norris has had this process hanging over him for three years, much of which has been due to his successful challenge to his extradition on the charges of price-fixing. The effect of the delay is that he and his wife are that much older than they otherwise would have been, and this will make it all the more difficult for them to adapt to the consequences. Mr Sumption invited the court to avoid short cuts and to pay close attention to all the relevant facts in its assessment.

93. The only circumstance which strikes me as not inherent in every extradition process is the delay. Otherwise the issues that are raised in this case are really questions of degree. Distressing the process of separation will undoubtedly be, and I am conscious of the extra element of hardship which will arise because of the state of health of the parties. Due to their age, and especially to Mrs Norris's psychological condition, this is greater than it would normally be, but in my opinion not excessively so. Mr Norris is fit to travel and he is fit to stand trial. His family life must, for the time being, take second place. The delay is unusually long due to the time it took for Mr Norris to assert his legal rights in regard to the charges of price fixing. Its effect has been to increase the element of hardship. Had the remaining charges been less serious this might perhaps have been sufficient to tip the balance in Mr Norris's favour. But allegations of an attempt to obstruct the course of justice must always be taken very seriously, and I see no grounds for making an exception in this case. In view of the strong public interest in giving effect to the respondents' request so that these charges can be brought to trial in the jurisdiction that is best equipped to deal with them, I do not think that it is possible to say that Mr Norris's extradition on these charges would be disproportionate.

94. For these reasons, and those which Lord Phillips has given with which I am in full agreement, I agree that the appeal should be dismissed.

LORD BROWN

95. I agree entirely with the judgment of Lord Phillips on this appeal. For the reasons he gives it will be only in the rarest cases that article 8 will be capable of being successfully invoked under section 87 of the Extradition Act 2003. As Lord Phillips observes (at para 82):

> "[O]nly the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves."

Paragraph 65 of his judgment instances a rare case where the "defence" might succeed. It is difficult to think of many others, particularly where, as here, the charges are plainly serious.

96. It is important to understand the difference between the public interests under consideration by Strasbourg in the *Boultif v Switzerland* (2001) 33 EHRR 1179 and *Üner v The Netherlands* (2006) 45 EHRR 421 line of cases, upon which so much of the appellant's argument rested, and those involved in extradition. True, the ECtHR describes this interest as "the prevention of disorder or crime" but this is always in the specific context of "the expulsion and/or exclusion of settled migrants following a criminal conviction" (*Üner* paras 59 and 61). Those invoking article 8 rights in such cases have already been convicted and punished for their crimes. Decisions to expel or exclude are taken essentially in the interests of a sovereign state's right to regulate the entry and expulsion of aliens, besides, of course, the interests of deterring immigrants generally from crime. The public interests in extradition, however, are altogether more compelling. I fully share Lord Phillips' views expressed at para 52 of his judgment and for my part would also wish to endorse paras 21 and 22 of Laws LJ's judgment in the court below.

97. As to our domestic jurisprudence, *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 was concerned with article 8 in the context, not of extradition, but of immigration control. In this context, of course, the immigration rules and supplementary directions (to which Lord Bingham, giving the opinion of the Committee, referred at para 20) for the most part take account of the immigrant's article 8 rights. But not in all circumstances, so that there remains scope for article 8 to be successfully invoked in some cases. We rejected an exceptionality test since exceptionality as such can never be a helpful touchstone against which to judge whether in any particular case the interests of a lawful

immigration policy are outweighed by the immigrant's (and his family's) rights to private and/or family life. But even in this, non-extradition, context we contemplated article 8 succeeding only in "a very small minority" of cases. The legal test is proportionality, not exceptionality, but in immigration cases the court will seldom find removal disproportionate and, in extradition cases, more rarely still.

98. *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038 was a domestic extradition case concerned not with section 87 but with section 82 of the Extradition Act 2003 (making identical provision to section 14 in Part 1 of the Act). Amongst the issues arising was the correct approach to the question raised by section 82 as to whether the passage of time makes extradition unjust. In giving the judgment of the Committee I said this:

> "[W]e would . . . stress that the test of establishing the likelihood of injustice will not be easily satisfied. The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international co-operation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad. We were told that the section 82 (or section 14) 'defence' is invoked in no fewer than 40% of extradition cases. This seems to us an extraordinarily high proportion and we would be unsurprised were it to fall following the Committee's judgment in the present case." (para 36)

99. Seemingly it is now the section 87 (section 21 in Part 1) "defence" based on the extraditee's article 8 rights which is regularly being invoked. The incidence of this too may be expected to decline in the light of the Court's judgments on the present appeal. The reality is that, once effect is given to sections 82 and 91 of the Act, the very nature of extradition leaves precious little room for a "defence" under section 87 in a "domestic" case. To my mind section 87 is designed essentially to cater to the occasional "foreign" case where (principally although not exclusively) article 2 or 3 rights may be at stake.

100. It follows that I too would dismiss this appeal. In doing so I would register my agreement also with the judgments of Lord Hope, Lord Mance, Lord Collins and Lord Kerr, each of which I understand to be (as I believe and intend my own judgment to be) entirely consistent with everything said by Lord Phillips.

LORD MANCE

101. Central to the issues argued on this appeal is the submission by Mr Jonathan Sumption QC for the appellant, Mr Norris, that the District Judge and Divisional Court, while purporting to apply the decision of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, erred by in effect reintroducing for extradition cases an exceptionality test. *Huang* was a case involving claims by two failed asylum seekers that their removal would infringe their rights under article 8 of the European Convention on Human Rights to enjoy family life with relatives in the United Kingdom. But it is submitted that that difference in subject-matter is immaterial. It is further submitted that, whatever the test, the Divisional Court erred in concluding that the interference with Mr and Mrs Norris's private life that Mr Norris' extradition would entail is "necessary in a democratic society" (that it is proportionate to the legitimate interest served by his extradition) within the meaning of article 8(2) of the Convention.

102. That extradition would interfere with Mr and Mrs Norris's private and family life within article 8(1) is not in doubt. Further, it would do so within the United Kingdom, where such life is currently enjoyed. The case is thus a domestic rather than a foreign one, in the sense in which Lord Bingham drew this distinction in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para. 9. This is relevant when considering whether the interference is justified or excused under article 8(2), as being "in accordance with the law and … necessary in a democratic society" in an interest or for a purpose there specified. In "foreign" cases (like *Ullah* itself and *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368) the person resisting removal to a foreign country on the ground that it would interfere there with rights protected under article 8 must present "a very strong case": see *Ullah* per Lord Bingham at para. 24. In the same case, Lord Steyn at para. 50 spoke of the need to satisfy a "high threshold test", by establishing "at least a real risk of a flagrant violation of the very essence of the right before other articles [of the Convention] become engaged". See also per Lord Carswell at paras. 67-70, as well as the later decisions in *EM (Lebanon) v Secretary of State for the Home Department (AF (A Child)*

intervening) [2008] UKHL 64; [2009] AC 1198 and *MT (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 2 WLR 512.

103. The approach taken in foreign cases cannot be transposed to domestic cases, where the removal of a foreigner from the jurisdiction would interfere with his or her private or family life within the jurisdiction. *Huang* was a domestic case, in which Lord Bingham, giving the opinion of the appellate committee, noted that the questions generally to be asked in deciding whether a measure is proportionate were "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective". However, Lord Bingham at para 19 went on to stress the need in applying this test to balance the interests of society with those of individuals and groups, and to refer, in this connection, to the House's previous statement in *Razgar* [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77 that the judgment on proportionality "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage". Similar reference to the importance of achieving a fair balance between public and private interests is found in Strasbourg case-law, including *Dickson v United Kingdom* (2007) 46 EHRR 927 and *S v United Kingdom* (2008) 48 EHRR 1169 (paras. 109 and 111 below). Addressing a submission by the Secretary of State that it would "only be in an exceptional case" that the removal under the immigration rules would infringe article 8 (p. 173E), Lord Bingham in *Huang* [2007] 2 AC 167, para 20 said that, where the issue of proportionality was reached,

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

small minority. That is still his expectation. But he was not purporting to lay down a legal test."

104. In a later domestic case, *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159, Lord Bingham again described the exercise required under article 8:

> "12. …. the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

105. The present case concerns extradition, not immigration control, a distinction which Mr Perry QC for the Government emphasises. The purpose for which Mr Norris's extradition is sought is, in terms of article 8(2), "the prevention of disorder or crime …..". Mr Sumption argues that this restricts the court's focus to the particular risks of disorder or crime which may flow, presumably from Mr Norris himself, if Mr Norris were not extradited. That is in my view unrealistic. The balancing exercise between the public and private interests involves a broader focus. *Ullah* underlines both "the great importance of operating firm and orderly immigration control in an expulsion case" and "the great desirability of honouring extradition treaties made with other states": [2004] 2 AC 323, para 24. The European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439 acknowledged "the beneficial purpose of extradition in preventing fugitive offenders from evading justice" (para. 86) and said that, "as movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice" (para. 89). These statements refer to fugitive offenders, but similar public interests in extradition apply to suspects who have allegedly committed offences in countries other than those where they habitually

reside. In agreement with others of your Lordships, it is clear that the general public interest in extradition is a powerful one. This is so, not only in respect of a person already convicted, but also in respect of a person wanted to face trial. Without affecting the need for a case by case approach, I see it as being, in each of these situations, generally stronger than either the public interest in enforcing immigration control in respect of a failed asylum seeker or an over-stayer who has established family roots within the jurisdiction or even than the public interest in deporting a convicted alien upon the conclusion of his sentence, although this be to avoid the commission of further offences within the jurisdiction of the deporting state.

106. Under article 8, the ultimate question is whether Mr and Mrs Norris's interests in the continuation of their present private and family life in the United Kingdom are outweighed by a necessity, in a democratic society and for the prevention of disorder or crime, for Mr Norris to be extradited in order to face trial in the United States. Whether extradition is necessary depends upon whether it is proportionate to the legitimate interest served by extradition in his case or, as the European Court of Human Rights said in *Dickson* 46 EHRR 927 para 71, "whether a fair balance [is] struck between the competing public and private interests involved". The first step in any such enquiry must, in this context also, be to identify and examine all the relevant facts in the particular case. The nature and seriousness of the alleged offence will be relevant to the strength of the case in favour of extradition: see e.g. *Raidl v Austria* (1995) 20 EHRR CD114 and *King v United Kingdom* (Application No. 9742/07) (both extradition cases) in which complaints were held inadmissible. Laws LJ examined this aspect in the Divisional Court [2009] EWHC 995, paras. 28-29 and concluded that "the obstruction of justice charges, taken at their face value, are very grave indeed". Lord Phillips after re-examining the position in his paras. 69-72 reaches the same conclusion, and so do I. Another relevant factor may sometimes be whether a trial would be possible in the United Kingdom, but I agree with Lord Phillips (paras. 66-67) that, while one should not prejudge the facts of particular cases, this is in practice likely to be relevant (if it can be at all) only in otherwise marginal cases. Mr and Mrs Norris's personal circumstances, the nature of their private and family life and the likely effect of extradition upon it and each of them will all be of primary importance. I need not repeat here the detailed account of these matters contained in the judgment of Laws LJ in the Divisional Court, paras. 30-37 and of Lord Phillips, paras. 73-80. In weighing up such personal factors against other factors, it is of course also relevant that extradition is by its nature very likely to have adverse consequences for the private or family life within the jurisdiction of the person being extradited. The mere existence of some adverse consequences will not be a sufficient counterweight, where there is a strong public interest in extradition.

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

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

109. A further potential problem about such formulations is that they may tend to divert attention from consideration of the potential impact of extradition on the particular persons involved and their private and family life towards a search for factors (particularly *external* factors) which can be regarded as out of the run of the mill. Different people have different ages, different private and family lives and different susceptibilities. They may react and suffer in different ways to the threat of and stress engendered by potential extradition in respect of the same offence or type of offence. And some of the circumstances which might influence a court to consider that extradition would unduly interfere with private or family life can hardly be described as "exceptional" or "striking and unusual". Take a case of an

offence of relatively low seriousness where the effect of an extradition order would be to sever a genuine and subsisting relationship between parent and baby, or between one elderly spouse and another who was entirely dependant upon the care performed by the former.

110. Strasbourg case law supports the need for caution about the use of such formulations, while also indicating that statements that undue interference with article 8 rights will only occur "in exceptional circumstances" have not either necessarily or always been viewed as problematic. Thus, the Commission in *Launder v United Kingdom* (1997) 25 EHRR CD67, 73, para 3 – after reciting the basic test of necessity (which "implies a pressing social need and requires that the interference at issue be proportionate to the legitimate aim pursued") added:

> "The Commission considers that it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life. The Commission finds that in the present case no such circumstances have been shown to exist".

In *King v United Kingdom* (where Mr King was accused of being a member of a gang engaged in a conspiracy to import large quantities of ecstasy into Australia) the Court returned to this passage, saying:

> "Mindful of the importance of extradition arrangements between States in the fight against crime (and in particular crime with an international or cross-border dimension), the Court considers that it will only be in exceptional circumstances that an applicant's private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition (see *Launder v United Kingdom*, no. 27279/95, Commission decision of 8 December 1997)."

The fact that Mr King had in the United Kingdom two young children and a mother whose health would not allow her to travel to Australia was not an exceptional circumstance, in which connection the Court could not "overlook the very serious charges he faces" and was accordingly satisfied that it would not be disproportionate to extradite him to Australia.

111. In *Dickson v United Kingdom* 46 EHRR 927 the issue was the consistency with article 8 of a policy whereby requests for artificial insemination by prisoners were "carefully considered on individual merit" but "only …. granted in exceptional circumstances" (para. 13). The European Court of Human Rights considered that "the policy set the threshold so high against them [the applicant prisoners] . . . that it did not allow a balancing of the competing individual and public interests and a proportionality test ,,,, as required by the Convention" (para. 82); and that it was not "persuasive to argue …. that the starting-point of exceptionality was reasonable since only a few persons would be affected, implying as it did the possibility of justifying the restriction of the applicants' Convention rights by the minimal number of persons adversely affected" (para. 84).

112. On the other hand, in *McCann v United Kingdom* 47 EHRR 913, the local authority had determined Mr McCann's right to remain in his home by obtaining from his wife a notice to quit, the effect of which upon him she did not understand. The European Court of Human Rights, while holding that Mr McCann should in these circumstances have been given the opportunity to argue the issue of proportionality under article 8, added:

> "54. The court does not accept that the grant of the right to the occupier to raise an issue under article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465 observed …. , it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings."

The minority observation which the European Court approved appears in these terms in Lord Bingham's speech [2006] 2 AC 465, para 29:

> "I do not accept, as the appellants argued, that the public authority must from the outset plead and prove that the possession order sought is justified. That would, in the overwhelming majority of cases, be burdensome and futile. It is enough for the public authority to assert its claim in accordance with domestic property law. If the occupier wishes to raise an article 8 defence to prevent or defer the

> making of a possession order it is for him to do so and the public authority must rebut the claim if, and to the extent that, it is called upon to do so. In the overwhelming majority of cases this will be in no way burdensome. In rare and exceptional cases it will not be futile."

The context in both *Kay* and *McCann* was one of an absolute common law right to possession of property, to enforcement of which the article 8 right to respect for the home might sometimes represent an obstacle. In contrast, as Lord Bingham noted in *Huang* [2007] 2 AC 167, para 17, the statutory scheme governing immigration control itself contemplates that a person may fail to qualify under the immigration rules and yet have a valid claim under article 8. A similar exercise of weighing competing interests is required under s.87 of the Extradition Act 2003.

113. Finally, in *S v United Kingdom* 48 EHRR 1169, the European Court held that the blanket and indiscriminate retention of fingerprints, cellular samples and DNA profiles of persons suspected, but not convicted, of offences, and subject only to a discretion "in exceptional circumstances" to authorise their deletion, failed to strike a fair balance between the competing public and private interests (paras. 35 and 125).

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

115. What matters in any event is whether, as a result of whatever formulation has been adopted, the adjudicative exercise has been slanted or distorted in a manner which undermines its outcome in any particular case. In the present case,

on the facts set out by Laws LJ and Lord Phillips and for the reasons given in relation to those facts by Lord Phillips in para 82 and by Lord Hope in para 93, I am left in no doubt that the balance between public and private interests comes down clearly in favour of Mr Norris's extradition, as serving a pressing social need and being proportionate to the legitimate aim pursued, or, in conclusion, as reflecting an appropriate weighing of the public and private interests engaged, despite the grief and interference with his and his wife's private and family life that extradition will undoubtedly cause.

116. I have read Lord Phillips' judgment with its addendum written in the light of *King v United Kingdom*, and find nothing inconsistent with the way in which I see the matter and in which I have expressed my own reasons for reaching the same conclusion as he does.

LORD COLLINS

117. I agree with Lord Phillips that Mr Norris' appeal should be dismissed for the reasons he gives.

118. In 1878 the Report of the Royal Commission on Extradition said:

> "it is the common interest of mankind that offences against person and property, offences which militate against the general well-being of society, should be repressed by punishment … [W]e may reasonably claim from all civilised nations that they shall unite with us in a system which is for the common benefit of all …" (in Parry, *British Digest of International Law*, vol 6 (1965), at 805)

119. Some 75 years ago the commentary to the Harvard draft Convention on extradition pointed out:

> "The suppression of crime is recognized today as a problem of international dimensions and one requiring international co-operation… The State, whose assistance … is requested, should view the request with favor, if for no other reason, because it may soon be in the position of requesting similar assistance … [T]he most effective deterrent to crime is the prompt apprehension and punishment of criminals, wherever they may be found. For the accomplishment of these purposes States cannot act alone; they must adopt some effective concert of action" (*Harvard Research in International Law*, 1935, p 32)

120. This appeal concerns crime of an international character, although with some unusual features. The principal charge in the United States was that of price-fixing contrary to the Sherman Act. The 1972 UK-US Extradition Treaty (by contrast with the 2003 Treaty, Article 2(4) and Extradition Act 2003, section 137(3)) applied only to offences "committed within the jurisdiction of the other Party" (Article I). Much of Mr Norris' alleged conduct was said to have occurred outside the United States (in particular, participation in meetings in Europe, Mexico and Canada to discuss and agree prices), but Morgan Crucible had subsidiaries in the United States which were alleged to be part of the price-fixing cartel, and no point on extra-territoriality was taken. The basis of the decision of the House of Lords in March 2008 was that price-fixing was not a criminal offence in England until the Enterprise Act 2002, and that since it was not a criminal offence when the offence was alleged to have been committed, it was not an extradition offence under the Extradition Act 2003 and therefore there was not the requisite double criminality: *Norris v Government of the United States of America* [2008] UKHL 16, [2008] AC 920.

121. But the obstruction of justice charges brought against Mr Norris were held to satisfy the double criminality test: if Mr Norris had done in England what he was alleged to have done in the United States he would have been guilty in England of offences of conspiring to obstruct justice or of obstructing justice. The obstruction of justice charges involve conduct outside the United States, but also include allegations that Mr Norris directed an alleged co-conspirator to instruct an employee of a United States subsidiary to conceal or destroy incriminating documents, and that he participated in a scheme to prepare false evidence to be given to the United States authorities and to the Grand Jury. The effect of the evidence before the Divisional Court was that, if Mr Norris is convicted on the obstruction of justice charges, it is at the least possible that the judge will have regard to the anti-trust violations in sentencing him for obstruction of justice. The Divisional Court, applying *Welsh v Secretary of State for the Home Department* [2006] EWHC 156 (Admin), [2007] 1 WLR 1281 and *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, held that

this was not contrary to the principle of specialty (also, but less commonly, referred to as speciality): [2009] EWHC 995 (Admin). The principle is reflected in Article XII(1) of the 1972 UK-US Extradition Treaty and section 95 of the Extradition Act 2003. The traditional statement of the principle is that a surrendered person will not be tried or punished for any offence other than that in respect of which he has been extradited: *Oppenheim's International Law*, 9th ed Jennings and Watts (1992), vol 2, para 420; Whiteman, *Digest of International Law*, vol 6 (1968), p 1095 (and at 1100 on non-extraditable offences as aggravation). The Divisional Court refused to certify as a question of law of general public importance the question whether it offended the specialty principles if offences which were not extradition offences could be treated as aggravating factors for sentencing purposes. The Appeal Committee of the House of Lords did not give leave to appeal on this point, and it is therefore not before this court.

122. The sole question before this court is whether Mr Norris' extradition to the United States is "compatible with the Convention rights within the meaning of the Human Rights Act 1998" (Extradition Act 2003, section 87(1)). The same question would have arisen prior to the Extradition Act 2003 as a result of the combined effect of the Human Rights Act 1998, section 6(1), and the discretion of the Home Secretary under the Extradition Act 1989, section 12.

123. The only direct reference to extradition in the Human Rights Convention is the exception to the right to liberty under Article 5(1) for "the lawful arrest or detention … of a person against whom action is being taken with a view to deportation or extradition" (Article 5(1)(f)).

124. But the extradition process may engage other Convention rights, as the leading judgment in *Soering v United Kingdom* (1989) 11 EHRR 439 on the responsibility of the requested State under Article 3 dramatically shows. But "while the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition … it makes it quite clear that successful reliance demands presentation of a very strong case. … [T]he removing state will always have what will usually be strong grounds for justifying its own conduct: … the great desirability of honouring extradition treaties made with other states": *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at [24].

125. In the present case the question is whether, in extraditing Mr Norris to the United States, the United Kingdom would be in breach of its obligation under Article 8 of the Human Rights Convention to respect private and family life.

126. The primary object of Article 8 is to protect the individual against arbitrary action by public authorities, but it is well established that there are, in addition, positive obligations inherent in effective respect for family life. The removal of a person from a country where close members of that person's family are living may amount to an infringement of the right to respect for family life: *Boultif v. Switzerland* (2001) 33 EHRR 1179, and many other decisions including *Y v Russia* [2008] ECHR 1585, at [103]. In determining whether interference by a public authority with the rights guaranteed by Article 8(1) is necessary for the purposes of Article 8(2), regard must be had to the fair balance which has to be struck between the competing interests of the individual and of the community as a whole: *Keegan v. Ireland* (1994) 18 EHRR 342, at [49], and most recently *Eberhard and M v Slovenia* [2009] ECHR 1976, at [126].

127. In this case the balance has to be struck in the context of a bilateral extradition treaty providing for the surrender of persons alleged to have committed extraditable crimes. It hardly needs to be said that there is a strong public interest in international co-operation for the prevention and punishment of crime. Consequently, the public interest in the implementation of extradition treaties is an extremely important factor in the assessment of proportionality: e.g. *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at [24]; *Wright v Scottish Ministers (No 2)* 2005 1 SC 453, at [77]; *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 AC 335, at [24].

128. As a result, in cases of extradition, interference with family life may easily be justified under Article 8(2) on the basis that it is necessary in a democratic society for the prevention of crime: *HG v Switzerland*, Application 24698/94, September 6, 1994 (Commission). In *Soering v United Kingdom* (1989) 11 EHRR 439 at [89] the Strasbourg Court said:

> "… inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad

> should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition …"

129. More recently the Court, in *Öcalan v Turkey* (2005) 41 EHRR 45, re-affirmed what had been said in *Soering* and added (at [86]):

> "The Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention … "

130. It is inherent in the extradition of a citizen of the requested state that it is almost certain to involve an interference with family life, and that it is why it has been said that it is only in exceptional circumstances that extradition to face trial for serious offences in the requesting state would be an unjustified or disproportionate interference with family life: *Launder v United Kingdom* (1997) 25 EHRR CD67, at [3]; and cf *Raidl v Austria* (1995) 20 EHRR CD114, at 123. See also *R (Warren) v Secretary of State for the Home Department* [2003] EWHC 1177 (Admin), at [40]-[41]. This approach has been confirmed in the recent admissibility decision in *King v United Kingdom*, Applicn 9742/07.

131. The public interest in the prevention and suppression of crime, which includes the public interest in the United Kingdom's compliance with extradition arrangements, is not outweighed by the mutual dependency and the ill-health, both physical and mental, of Mr and Mrs Norris. Lord Phillips has dealt with the question whether it is relevant whether a prosecution for the alleged offences could be brought in the requested State. It was treated as a factor in *Soering v United Kingdom* at para 110. In the admissibility decision in *King v United Kingdom*, Applicn 9742/07, the Court confirmed that considerations as to whether prosecution existed as an alternative to extradition might have a bearing on whether the extradition would be in violation of Convention rights. The point has also arisen in *Ahsan v United Kingdom* [2009] ECHR 362, a case involving a request by the United States for extradition to answer charges for alleged terrorist offences, in which the Strasbourg court has asked the parties for submissions on the relevance, if any, which is to be attached to the applicant's submission that he could and should be tried in the United Kingdom. Although the point does not

arise for decision on this appeal, it will not normally be relevant, for the reasons given by Lord Phillips, that a prosecution could be brought in the United Kingdom.

LORD KERR

132. I agree that this appeal should be dismissed. The centrepiece of the appellant's case is that the importance to be attached to the need for an effective system of extradition should only be assessed by reference to the particular circumstances of an individual case. Thus, the question becomes, would the decision not to extradite this person because of interference with his Article 8 rights cause unacceptable damage to the public interest.

133. I do not accept this argument. The specific details of a particular case must obviously be taken into account but recognition of a wider dimension is also required. In other words, it is necessary to recognise that, at some level of abstraction or generality, the preservation and upholding of a comprehensive charter for extradition must be maintained. The question cannot be confined to an inquiry as to the damage that an individual case would do to the system of extradition. It must be approached on a broader plane. It should also be recognised that the public interest in having an effective extradition system extends beyond deterrence of crime. It also embraces the need for effective prosecution of offenders – see *Soering v United Kingdom* (1989) EHRR 439, para 89.

134. Although the appellant argued that the Divisional Court, while disavowing an exceptionality approach, in fact applied such a test in a somewhat re-cast form, that claim does not survive careful consideration of what the Divisional Court actually said. The Divisional Court did not impose an exceptionality requirement. It merely reflected the significant difficulty involved in displacing the substantial consideration of the need for a coherent and effective system of extradition.

135. Mr Perry QC's principal argument was to the effect that the public interest in preserving a workable and effective system of extradition was unalterable and constant. I would be disposed to accept that argument provided 'constant' is understood in this context to mean that it will always arise. I do not accept that it

will be of unvarying weight in every case. It will always be a highly important factor but there will be some cases where its importance will be properly assessed as overwhelming. Recognition of the fact that this will always be an important consideration does not create an exceptionality requirement, however; it merely reflects the reality that this is an unchanging feature of the extradition landscape. Sedley LJ was therefore right in *AG (Eritrea) v Secretary of state for the Home Department* [2007] EWCA Civ 801; [2008] 2 All ER 28 when he said at para 31 that the circumstance that article 8 claims will rarely be successful is one of result rather than a reflection of an exceptionality requirement.

136. While it will be, as a matter of actual experience, exceptional for article 8 rights to prevail, it seems to me difficult, in light of *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, to revert to an exceptionality test – a test which, at times, Mr Perry appeared to invite us to rehabilitate. But it is entirely possible to recognise that article 8 claims are only likely to overcome the imperative of extradition in the rarest of cases without articulating an exceptionality test. This message does not depend on the adoption of a rubric such as 'striking or unusual' to describe the circumstances in which an article 8 claim might succeed. The essential point is that such is the importance of preserving an effective system of extradition, it will in almost every circumstance outweigh any article 8 argument. This merely reflects the expectation of what *will* happen. It does not erect an exceptionality hurdle.

137. I accept Mr Sumption QC's argument that the starting point must be that article 8 is engaged and that it is then for the state to justify the interference with the appellant's rights. But, because of the inevitable relevance of the need to preserve an effective extradition system, that consideration will always loom large in the debate. It will always be a weighty factor. Following this line, there is no difficulty in applying the approach prescribed in para 12 of *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159. On this analysis the individual facts of each case can be evaluated but that evaluation must perforce be conducted against the background that there are substantial public interest arguments in play in every extradition case. That is not an *a priori* assumption. It is the recognition of a practical reality.

138. There is nothing about the facts of this case that distinguishes it significantly from most cases of extradition, or indeed from most cases of white collar crime. If Mr Norris were prosecuted in this country, no doubt many of the fears, apprehensions and effects on his and his wife's physical and mental health would accrue in any event. The added dimension of having to face trial and possible incarceration in America is, of course, a significant feature but not

substantially more so than in many other cases of extradition. The only matter of moment is the delay that has occurred from the time that extradition was first sought but, as has been pointed out, this was to some extent created by the actions of the appellant himself and is, in any event, not of sufficient significance that it cannot be outweighed by the need to preserve effective extradition.