APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 33
HCA/2019/10/XM

Lord Brodie
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD BRODIE

in

THE APPLICATION FOR LEAVE TO APPEAL

under section 26(1) of the Extradition Act 2003

by

DV

Appellant

against

THE LORD ADVOCATE

on behalf of the Government of the Republic of Romania

Respondent

Appellant: CM Mitchell QC; Good & Stewart
Respondent: Dickson, Sol Adv; Crown Agent

6 February 2020

Introduction and procedural history

[1] This appeal was heard on 6 February 2020. On the same day, after an adjournment, the court announced its decision, and stated that it would give its reasons in writing at a later date. Because of practical difficulties associated with the lockdown due to the coronavirus the date of issue of this opinion has been later than the court would have wished.

[2] The appeal is under section 26 of the Extradition Act 2003. The appellant and requested person (hereinafter "the appellant") is a Romanian national. On 5 December 2017, she was sentenced to serve a period of 13 months imprisonment following upon her conviction at the Local Court, Cluj-Napoca, Bucharest, Romania for an aggravated theft which took place on 28 November 2014. The appellant had travelled to Romania from Scotland to attend the trial, but had returned to Scotland following her conviction. Thereafter, she did not return to Romania for the sentencing hearing on 5 December 2017. Her sentence became final on 9 January 2018, no appeal having been lodged.

[3] The Romanian authorities sought the extradition of the appellant by means of a European Arrest Warrant ("EAW") issued on 19 January 2018, and certified by the National Crimes Agency under section 2(7) of the Extradition Act 2003 on 8 February 2018. The appellant was arrested and appeared at Edinburgh Sheriff Court on 19 April 2018. She opposed extradition, and was released on bail with conditions to mitigate the risk of flight. Although an extradition hearing was fixed for 3 May 2018, there was a series of adjournments and the full hearing did not take place until 30 May 2019.

[4] At that hearing, the appellant opposed extradition on the grounds that to extradite her would breach her rights in terms of articles 3 and 8 of the European Convention on

Human Rights. At the conclusion of the evidence the hearing was continued to 1 August 2019 for submissions and to await the outcome of another case. At the continued hearing on 1 August 2019, the sheriff ordered that the appellant be extradited to the Republic of Romania in terms of section 21(3) of the 2003 Act.

[5] A notice of application for leave to appeal under section 26 of the 2003 Act was lodged on the appellant's behalf on 8 August 2019. In terms of that notice, the appellant sought to appeal the decision of the sheriff only in relation to the article 3 challenge, and that on the basis that the sheriff had failed to attach sufficient weight to the evidence of the defence expert witness, Dr James McManus, in relation to prison conditions in Romania.

[6] However, when the case called in this court for a hearing of the application for leave to appeal on 18 October 2019, the appellant's counsel moved to adjourn the hearing with a view to her ingathering further information and amending the terms of the notice so as to include a new matter which had not been before the sheriff at the extradition hearing. The new matter concerned the appellant's youngest child, a daughter, who had, following the conclusion of the evidence at the extradition hearing but prior to the continued calling of the case in the Sheriff Court on 1 August 2019, given birth to a baby daughter for whom the appellant was in effect the primary carer. This, it was argued, gave rise to circumstances providing grounds for a further challenge to the appellant's extradition by reference to article 8. The solicitor advocate for the respondent accepted, under reference to sections 26(5) and 27(4) of the 2003 Act, that it would be competent to allow amendment of the application in order to introduce new matter, despite its lateness. The court accordingly adjourned the hearing until 15 November 2019 and on that date allowed an amended notice of application for leave to appeal to be received and continued the hearing of the appeal until 6 February 2020.

Grounds of Appeal

[7] In terms of the amended notice of application for leave to appeal, it was submitted that the Court should allow the appeal on the basis that evidence which had not been available at the extradition hearing had come to light which would have resulted in the sheriff deciding the question before him differently in that he would have been required to order the appellant's discharge.

The sheriff's determination of the article 8 challenge

[8] It is clear from the sheriff's report that article 8 was not the main ground of challenge presented by the appellant at first instance. The greater part of the sheriff's report, and indeed the written submissions presented to him by both parties, were concerned with article 3 and related to prison conditions in Romania. That challenge is no longer the subject of any appeal.

[9] In relation to the article 8 challenge as originally presented, it was, according to the sheriff's report, "candidly recognised" by the appellant's agent that hers was not the strongest case. The evidence led in support came from the appellant and her husband. That evidence was that the appellant had five children, two of whom, RV aged 19 and CV aged 12, lived with her. RV had two children who also lived in the appellant's home. RV did not work, but was in receipt of benefits. Both the appellant and her husband worked, and were jointly responsible for the finances of the family. The submission to the sheriff was that the appellant played a principal role in the care of her children, and her grandchildren, and that if the appellant were to be extradited it would have both a financial and emotional impact on the family.

[10] In his report, the Sheriff makes it clear that he found the appellant to be "inherently unreliable" in her evidence. Her position had been that she had not been told of the sentence imposed upon her in respect of her most recent conviction, and that she only became aware of it when the EAW was served upon her. She had told her Romanian lawyer that she was returning to Scotland.

[11] The Sheriff found that the appellant had deliberately attempted to conceal her criminal record, which included a custodial sentence in Scotland for 12 months for theft in 2012 (the appellant's counsel explained to us that this conviction related to the theft of purses on buses), and periods of imprisonment following convictions for petty theft in Romania, the Netherlands and Germany. Most recently, she had been imprisoned for theft in Romania on 27 December 2016. In 1997, again in Romania, she had been imprisoned for aggravated theft for 3 years. Initially, the appellant's evidence had been that she had only ever been in prison 22 years before, but her credibility on this issue having been questioned, and the convictions having been put to her, she did not deny them.

[12] In reaching his decision on the article 8 challenge, the sheriff had regard to the decisions in *Polish Judicial Authority* v *Celinski* [2016] 1 WLR 551 and *H(H)* v *Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338. He accepted that there would be an interference with the appellant's family life if extradition was ordered. She would have to be absent, abroad, for a period of time and that would impact on the appellant and her immediate family and their life together. While the sheriff took these matters into account in the balancing exercise incumbent upon him, he found that there was no evidence that the inevitable consequence of extradition in this case would be "exceptionally severe" for this family. The balance weighed firmly in favour of extradition.

Agreed factual position before this court

[13] As we have indicated, the appellant's circumstances altered between the conclusion of the evidence at the extradition hearing on 30 May 2019 and 1 August 2019 when the case called again before the sheriff, in that her granddaughter, AV, was born on 5 July 2019. AV is the daughter of CV, who was 13 years of age at the time she gave birth. Although it was suggested that AV's birth certificate may have been handed to the sheriff at the continued hearing on 1 August, no evidence appears to have been led, nor any submissions advanced, as to the impact of the birth of AV on the family life of the appellant and her family.

[14] In preparation for the appeal hearing on 6 February 2020, the parties lodged a Joint Minute setting out the up-to-date factual position upon which it was agreed that the appeal should proceed. The following facts were agreed:

1. The [appellant] is sought for extradition by the authorities of Romania to serve a sentence of 1 year and 1 month imprisonment for a single offence [of] aggravated theft imposed on 05 December 2017, made final by lack of appeal on 09 January 2018.
2. The offence of aggravated theft for which extradition is sought is described within the European Arrest Warrant (EAW) as having been committed by [the appellant] on 28 November 2014 when she stole several food products from a store in a mall complex, in the City of Napoca, Romania.
3. That [the appellant] has a criminal record in Romania, Italy, Germany, the Netherlands and Scotland for analogous offending, which is replicated at Annex A, attached.
4. That [the appellant] is a Romanian national and was born 28 February 1976.
5. [The appellant] has 5 children. [CV] (14, born 10 January 2006) currently resides with her mother [the appellant] and her father [FC]. No other children of the family currently reside within the family home. [CV] came to Scotland with her parents when she was 6 years old.
6. On 27 June 2019 Glasgow City Council Social Work officials were made aware that [CV] was 38 weeks pregnant. [CV] had not told her mother or school teachers she was pregnant. [CV]'s daughter, [AV] was born on 05 July 2019.
7. That at the time of the extradition hearing when [the appellant] gave her evidence in the Sheriff Court her daughter had not told her she was pregnant.
8. That since the birth of the baby [AV], [the appellant] and [CV] share the parenting duties and [the appellant] remains the main carer for [CV] and [AV].

9. That during the week [the appellant] cares for baby [AV] during the day when [CV] is at school and [the appellant] also undertakes tending to the baby at night, midweek. That [CV] cares for the baby midweek when she is home from school during the day and at weekends during the day and overnight.

10. [The appellant] teaches [CV] how to parent [AV].

11. [FC], father of [CV] works full time in order to support his family [and] is not in a position to provide parental support to [CV] or take over the role that [the appellant] currently occupies in the lives of her daughter and grand-daughter as main care giver.

12. The care provided by [the appellant] allows [CV] to continue with her education at [a named school].

13. [CV] is doing well in school and wishes to continue into Higher Education.

14. Social workers have not identified any other family members who help care for [AV] on a regular basis.

15. That [CV] and [AV] are subject to Glasgow City Council's child protection register due to risk factors of child exploitation and neglect.

16. The child protection plan requires a weekly visit to the family home by a social worker.

17. That it is unlikely that a child of [CV]'s age could successfully parent a baby on her own. Moreover [CV], as a child would not be allowed to parent the child alone given that she herself is a child and the Social Work Department could not allow her to be left alone in a house parenting a child.

18. That it is in the interests of [CV] that she attends school and achieves sufficient progress to proceed to higher education.

19. For the remainder of [CV]'s adolescence and young adulthood she will require the support of an adult who is committed to her and the baby. [CV] will not be able to parent her infant child successfully without this sustained support.

20. There is a social care package available to her in Scotland. This includes a pastoral care teacher, social worker and nurse as well as financial benefits at the rate of £400 per month.

21. Should [the appellant] be extradited the care of [AV] and the education of [CV] would be directly affected whatever interim resources were put in place to replace the role of [the appellant].

    If [CV] remains in the UK:

    a. [CV] would not be able to attend her current school; she would have to go to the young parent's support base where she could take her baby ([AV]) with her.

    b. No one would provide assistance to [CV] in caring for [AV] for night time feeds (2 – 3 times a night) and she would have to get up early in order to attend school.

c. [CV] would lose the support of her mother in developing her relationship with [AV] and learning how to be a mother.

d. It is likely that [CV] would likely to be taken into care as she would have no-one available to supervise her at home with her child.

e. [AV] would lose the bond formed with her main care giver [the appellant].

If [CV] returned to Romania and moved in with her grandparents, uncle and his children there:

f. She would leave her education in Scotland behind, but there is an accessible secondary school available 4 kilometres from where her grandparents live.

g. Her 4 siblings also live in Romania (aged 25, 23, 21 and 19).

h. She anticipates support from her family who live in Romania.

i. She would be removed from the support system available for her in Scotland.

j. She would be removed from the education system available to her in Scotland

k. She and [AV] would be removed from their main care giver [the appellant]

22. There is a significant difference in support provided by the State on one hand and support from family members who have a social and psychological commitment to the mother and her infant child.

23. Being a "child mother" is a risk factor for mental health issues. In the absence of support … [CV] is likely to become a vulnerable individual and this may persist for the remainder of her life.

24. If there is a lack of family support it would be difficult for [CV] to be educationally successful and parent her child.

25. [CV] wishes to remain in Scotland, to study full time here and to be parented by her mother [the appellant] and for [the appellant] to remain as the main care giver to both herself and her daughter

26. [RV], [CV's] sister, lives in Romania with her three children and husband. She has no accommodation in Scotland and does not want to return to Scotland to take over the role of primary care giver to her sister and her niece.

27. That Defence productions X and X are copies of the Romanian passport of [CV] and the birth certificate of [AV].

28. [The appellant] would not be able to avail herself of a child and baby unit within Arad Prison [in Romania] to care for her granddaughter.

Submissions

Appellant

[15] Counsel for the appellant invited the Court to allow the appeal, to quash the extradition order in respect of the appellant and to discharge her, all in terms of section 27 of the 2003 Act. Had the sheriff considered the new information, it would have caused him to consider the challenge on article 8 grounds differently, and he would have been required to order the appellant's discharge, as to do otherwise would have been to breach the article 8 rights of the appellant and her family.

[16] The test was that set out in *HH*, Lady Hale at para 30 in particular. The court must first ask itself whether there would be an interference with the right to respect for private and family life. Having answered that in the affirmative the Court should consider whether the gravity of the interference with family life was justified by the gravity of the public interest pursued.

[17] On the interests of children in such cases, it was submitted that a primary consideration was the right to family life of the appellant's youngest child and her child, the appellant's granddaughter (*HH* Lady Hale at para 33). There was a strong public interest in ensuring children are properly brought up. If the appellant was to be extradited her daughter and her grandchild would be taken into the care of the local authority. Her daughter would have her education significantly disrupted. Her daughter and grand-daughter would lose the bond they have with their mother and primary care giver respectively. The meeting of both children's practical and emotional needs would be significantly affected by the removal of their primary caregiver.

[18] Further, in weighing up the public interest in extradition, the sheriff would have had to consider as part of that test the nature and the seriousness of the crimes involved. The

nature of the offending in the present case was at the lowest end of the spectrum of criminal behaviour.

[19] In all the foregoing circumstances, in carrying out the balancing exercise required in such cases, the Court would have come to the view that it would have been required to order the appellant's discharge.

Respondent

[20] The solicitor advocate for the respondent confirmed that there was much in respect of which he was in agreement with counsel for the appellant. In circumstances where the Romanian authorities had not responded to an enquiry as to whether there might be an alternative to insisting upon extradition, what divided him and counsel for the appellant was a difference of value judgement on the weight to be attached to two powerful and conflicting interests such as was referred to by Lord Wilson in *HH* at para 150. There was no issue as to whether article 8 was engaged and no dispute that the extradition of the appellant would adversely impact on her child and her grandchild. However the test was one of proportionality as determined by a judicial assessment of conflicting public interests (*HH* at para 125). These interests included the need to honour the United Kingdom's international obligations under the European Framework Decision of 13 June 2002 (Decision 2002/584/JHA) to which part 1 of the 2003 Act gave effect.

[21] It was submitted that in this case extradition would be proportionate having particular regard to the appellant's criminal history. She had been convicted in Romania, the Netherlands, Germany, Italy and Scotland and sentenced to significant terms of imprisonment. A child should not be held responsible for the sins of her parent, but it should only be in very rare cases that extradition may be avoided if, given broadly similar

circumstances, courts in the United Kingdom would impose an immediate custodial sentence notwithstanding the interests of dependent children (*HH* at para 132). Where a custodial sentence cannot proportionally be avoided, a Scottish court might mitigate the length of the sentence by reason of the consequent effect on a dependent child or children but where a sentence of imprisonment has been imposed on the basis that it is necessary to satisfy the requirements of retribution, deterrence and protection of the public it will only be in a rare situation that such a sentence could be described as a disproportionate interference with the rights of others (*Gorrie* v *MacLeod* 2014 SCCR 187 at para [20]). Had the appellant been convicted in Scotland of the offence in respect of which extradition was requested it is likely, given her record of previous convictions, that she would have been sentenced to imprisonment. It was submitted that extradition was proportionate in the present case.

[22] Turning to the exercise described by the Divisional Court in *Polish Judicial Authority* v *Celinski*, on the side of the balance favouring extradition was the length of the sentence to be served (13 months), the appellant's significant criminal record for analogous offences, the fact that a court in Scotland might well impose a similar sentence as had the Romanian court, the consideration that the United Kingdom should not become a safe haven for foreign criminals, the consideration that the United Kingdom should give effect to its treaty obligations, the fact that the appellant had been present in court when she was convicted and had thereafter fled, and that during the period after conviction she had committed further offences in other jurisdictions. On the side of the balance going against extradition there was the accepted interference with the article 8 rights of the appellant, her daughter and her grand-daughter. In weighing these respective factors the court had to keep in mind the weighty public interest in implementing competently presented requests for extradition. The question might be stated as whether it was proportionate for someone with a substantial

criminal record, who has been convicted in presence, has left the jurisdiction in which she was convicted, come to Scotland, and committed further offences, to be allowed to say that her family circumstances are such that she should not be sent back to serve a sentence of only 13 months imprisonment. There was no suggestion that the children involved would necessarily have to return to Romania. Putting the matter shortly, the question was whether this was a case which fell into the rare category where extradition would be disproportionate. It was submitted that it was not.

Discussion

Nature of the court's jurisdiction

[23] Section 27 of the Extradition Act 2003 provides as follows:

> "**27 Court's powers on appeal under section 26**
>
> (1) On an appeal under section 26 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—

(a) order the person's discharge;

(b) quash the order for his extradition."

[24] It is clear from the terms of his report that, notwithstanding that he may have had sight of AV's birth certificate, the sheriff, quite understandably, did not take the impact of her birth into account in reaching his decision on article 8. There had been no evidence as to the impact of the birth on the family life of the appellant or her children and it does not appear to us that the sheriff was invited to hear further evidence on the change of circumstances. Accordingly, we are satisfied that this "issue" was not raised before the sheriff and therefore the applicable provision by reference to which we must consider this case is section 27(4). Thus, this is not an appeal where the issue is whether the sheriff erred either in fact or law. Rather, having been brought to the point by the sheriff determining the relevant antecedent statutory questions set out in part 1 of the Act, none of which determinations have been challenged, this court is required to decide the section 21 question *de novo*.

The section 21 question: person unlawfully at large: human rights: the authorities

[25] Section 21 of the 2003 Act requires that in considering whether to extradite an individual "unlawfully at large", as the appellant is, the judge must determine whether that individual's extradition would be compatible with Convention rights within the meaning of the Human Rights Act 1998 and, if it would not, order that individual's discharge.

[26] The Convention right founded on here is that set out in article 8(1) and (2) of the Convention: that there shall be no interference with a person's right to respect for his family

life except such as is in accordance with law and necessary for the prevention of disorder or crime.

[27] Where a person enjoys family life it is inevitable that an order for extradition to another jurisdiction will interfere with that family life. The same of course is true of a sentence of imprisonment imposed by a domestic court, and as was observed by Lord Hope in *BH* v *Lord Advocate* 2012 SC (UKSC) 308 at paras [58] and [59], it is well established that extradition may amount to a justified interference under Art 8(2) if it is in accordance with the law, is pursuing the aims of the prevention of disorder and crime and is necessary in a democratic society. The European Court of Human Rights has repeatedly said 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. The fact that the Strasbourg court had, as at the date of the Supreme Court's decision in *BH*, not yet decided any extradition case in favour of the applicant, even where those to be extradited were the parents of young children, indicated how high the bar against refusing a request for extradition is set.

[28] Extradition in accordance with law may nevertheless be a disproportionate interference with family life, and therefore a contravention of article 8, with the result that, if the extradition judge has so determined, he must order the requested person's discharge, as is provided by section 21(2). The focus is not exclusively on the requested person's rights. The Supreme Court has made it clear that the impact of extradition on family life does not fall to be considered simply from the viewpoint of the requested person; the family unit has to be considered as a whole, and each family member regarded as a potential victim (*Norris* v *Government of the United States of America (No 2)* [2010] 2 AC 487 per Lord Phillips at para 64). Accordingly, the question to be addressed by a court in considering whether there

has been a breach of an individual's Convention rights in terms of article 8 is whether the interference with the private and family lives of the requested person and members of his or her family is outweighed by the public interest in extradition.

[29] In *HH*, the Supreme Court determined three separate extradition appeals. Each concerned a challenge to extradition based on article 8, and in each case, the requested persons had young children residing with them in the United Kingdom. In the first two appeals, (referred to as "the first case" in the judgments of the Supreme Court) the children involved risked both parents being extradited. In the third appeal (referred to as "the second case" in the judgments), the requested person was the primary care giver to the children. There was no dispute that extradition in each case would have a significant, negative impact on the children's lives. The question was whether the children's best interests were outweighed by the public interest in extradition.

[30] In answering that question in each of the three appeals, the Supreme Court had regard to its earlier decision in *Norris supra*, an extradition case not involving children, but also to its decision in the case of *ZH (Tanzania)* v *Secretary of State for the Home Department* [2011] 2 AC 166, an immigration case in which the weight to be attached to the best interests of children was considered in the context of article 8. Although not all of the justices were agreed as to the outcome in each of the cases before them in *HH*, they did agree that, in determining any individual case, great weight should attach to the constant and strong public interest in extradition, which was born out of the United Kingdom's international treaty obligations. That public interest would outweigh the article 8 rights of the family unless the consequences of the interference with family life were "exceptionally severe".

[31] Importantly, however, the Supreme Court also confirmed that the weight to be attached to the public interest would vary in the particular case according to the nature and

seriousness of the crimes involved. Delay since the commission of the crimes may also be a factor in both diminishing the weight to be attached to that public interest, and increasing the impact on family life. Equally, "exceptionality" was not the test, and it was important not to treat extradition cases as falling within a special category which diminished the need to examine the interference with the individual's right to respect for his or her family life which would flow from his or her extradition. Further, and importantly so far as the present case is concerned, the Supreme Court determined that in considering article 8 in any case where a child's rights were involved, the child's best interests were a primary consideration, notwithstanding that they may be outweighed by countervailing considerations.

[32] The approach to be adopted by a judge in the light of *HH* where there was reliance on article 8 as a basis for resisting extradition, was considered by the Divisional Court in England (in a formation of three chaired by the Lord Chief Justice) in *Polish Judicial Authority* v *Celinski supra*. The Divisional Court took the opportunity to confirm that the general principles set out in *Norris* and *HH* are those to be followed where the interests of children were concerned. However, the Divisional Court also took the opportunity to stress that the public interest in ensuring that extradition arrangements are honoured is very high. So too was the public interest in discouraging persons from seeing the United Kingdom as a state willing to harbour fugitives from justice. The Divisional Court expected an extradition judge to address these factors expressly in his or her reasoned judgment. The decisions of the judicial authority of a member state making a request should be accorded a proper degree of mutual confidence and respect. Further, it was emphasised that in applying the principles from *HH* in cases where extradition is sought under an EAW following conviction, it will rarely be appropriate for the extradition judge to consider whether the sentence imposed by the requesting authority was significantly different from what a court

in the United Kingdom would have imposed in similar circumstances, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been. Judges at extradition hearings will seldom have the detailed knowledge of the background of the offender or his/her offending which the sentencing judge will have had before him or her. Each member state is entitled to set its own sentencing regime and levels of sentence. It was not for United Kingdom courts to second guess any such policy or regime. Further, the United Kingdom court should be careful not to impose its own views as to the seriousness of the offending concerned.

[33] It was the opinion of the Divisional Court that judges hearing cases where reliance is placed on article 8 should adopt an approach which clearly sets out an analysis of the facts as found and contains in succinct and clear terms adequate reasoning for the conclusion arrived at by balancing the necessary considerations for and against extradition.

[34] Before us parties accepted the correctness and applicability to Scotland of the principles derived from *Norris* and *HH* and set out and applied in *Celinski*. We see no reason to disagree. It is the "structured approach" proposed in *Celinski* with its drawing up of a "balance sheet" of factors for and against extradition after having made findings of relevant facts, which we will attempt to follow in our role as section 21 decision-maker in the present case.

[35] In *Celinski* the Divisional Court also considered what should be the approach of an appellate court when it was discharging what is properly an appellate function. As this is not the situation here, we say nothing about that.

Decision

[36] We turn to our assessment of whether the extradition of the appellant would be proportionate having regard to article 8.

[37] The relevant findings in fact have been provided by the agreement between the parties which is set out in the Joint Minute and reproduced at paragraph [14] above. We accept the way the facts have been aggregated, as if in a balance sheet, by the solicitor advocate for the respondent. In favour of extradition there is: (1) the length of the sentence to be served (13 months), in the sense that it is not insignificant but, equally, is not very lengthy and therefore the appellant will not be absent from Scotland for a long period of time; (2) the appellant's significant criminal record for analogous offences; (3) the fact that a court in Scotland might well have imposed a similar sentence as had the Romanian court, (4) the consideration that the United Kingdom should not become a safe haven for foreign criminals; (5) the consideration that those convicted of crimes should serve their sentences and that the United Kingdom should give effect to its treaty obligations; (6) the fact that the appellant had been present in court when she was convicted and had thereafter fled; (7) and that during the period after conviction she had committed further offences in other jurisdictions. Against extradition there are the various likely adverse consequences for the appellant's child and her grandchild which can be inferred from the facts stated in paragraphs 6, 8 to 26 and 28 of the Joint Minute.

[38] We have regard to all the factors referred to by the solicitor advocate as favouring extradition but, with one exception, we have not given them much weight. As for factor (1), a requested person may be extradited even where, in the opinion of the requested court, the offence for which that person has been convicted does not appear to be very serious. The seriousness of the extraditable offence is nevertheless relevant; where the offence is serious

that weighs the balance in favour of extradition, where it is not serious it does not. As Lord Judge put it in *HH* at para 125 "Self evidently theft by shoplifting for a few items of goods many years earlier raises different questions from those involved in an armed robbery of the same shop or store…" What we have in the present case is a conviction for shoplifting of some items from a food store a number of years ago which attracted a custodial sentence of 13 months. If anything, the trivial nature of this offence points away from extradition, albeit we noted and have had regard to the point made by the solicitor advocate for the respondent that were the appellant to be extradited her absence from her home in Scotland should not be for more than 13 months. Factors (2) and (7) are not to the appellant's credit, but we question whether they add very much to the balance, similarly factor (3). Factors (4) and (6) can be subsumed in factor (5). They are aspects of the same consideration.

[39] It is factor (5), the consideration that those convicted of crimes should serve their sentences and that the United Kingdom should give effect to its treaty obligations, together with factors which are ancillary to it, (4) and (6), to which we must give weight. That factor (5) is something which will be present in every extradition case makes it none the less powerful. As the United Kingdom Supreme Court and the European Court of Human Rights have made very clear, where a formally valid request for extradition is made which otherwise complies with the laws of the requested state (as here) the very strong expectation is that it should be granted and that is so even where, in the eyes of the requested court, the offence involved is not particularly serious. That expectation will in almost every circumstance outweigh any article 8 argument (*Norris*, Lord Kerr at para 136).

[40] It is our opinion, balancing the relevant factors, that notwithstanding the strong public interest in giving effect to extradition requests, it would not be proper to do so here. A primary consideration for the court must be the best interests of the children involved.

The agreed facts demonstrate that without the appellant to fulfil the role of their primary carer, both are at risk of very serious detriment to their welfare. It is no doubt the fact that the welfare of dependent children will almost always be adversely affected when a parent is incarcerated, particularly when that parent is a primary carer, but in our opinion this is a case where that is particularly clearly so and where the adverse consequences will be particularly severe. The crisis which arose when the thirteen-year-old CV gave birth to AV, would appear to have been satisfactorily managed by the appellant taking on the role of principal carer of AV while continuing to look after CV. To withdraw the childcare provided by the appellant would amount to an interference with the children's article 8 rights in a way which will inevitably be damaging and probably very damaging. We can see that there may be cases where because of the seriousness of the offence of which the requested person has been convicted, damage to dependent children's welfare may have to be accepted, but this does not appear to us to be such a case. The appellant's conduct may not have been exemplary but one cannot avoid the fact that the conviction in respect of which extradition is sought was in respect of shoplifting in circumstances which attracted a 13 month sentence. To imperil the chances of two children growing up into well-functioning adults by extraditing their primary carer at what are critical stages in their respective lives because of a conviction for shoplifting is, in our opinion, clearly disproportionate. The balance comes down against extradition.

[41] Accordingly, leave to appeal is granted and the appeal is allowed.