Neutral Citation Number: [2011] IEHC 248

THE HIGH COURT

2008 226 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003,

AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

- AND -

D. L.

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 22nd day of June, 2011

Introduction
The respondent in these proceedings (and the applicant/moving party in the present motion) is the subject of a European arrest warrant issued by the Republic of Poland on the 27th of August, 2008. The warrant was endorsed for execution by the High Court in this jurisdiction on the 21st of November, 2008. The respondent was arrested in August, 2010, and brought before the High Court in accordance with s. 13 of the European Arrest Warrant Act 2003, as amended, (hereinafter referred to as "the Act of 2003").

The respondent is wanted to serve a composite sentence of two years and six months imprisonment imposed on him by a District Court in Poland on the 10th of October, 2005, for two offences corresponding in this jurisdiction to the offences of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences Act 2001 and assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997, respectively. The matter proceeded in due course to a s.16 hearing and on the 25th of May, 2006, this Court made an order pursuant to s.16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him.

Immediately following the making of the s.16 order, the respondent made an application for the postponement of his surrender on humanitarian grounds pursuant to s. 18(1) and (2) of the Act of 2003. As important legal issues were raised in the course of submissions made on both sides, the Court saw fit to reserve judgment until today's date.

The evidential basis for the application
The evidential basis for the application comprises the averments contained in an affidavit sworn by the respondent on the 27th of October, 2010, and material exhibited therewith; as well as the contents of an affidavit sworn on the respondent's behalf by his solicitor, Cahir O'Higgins, on the 18th of May, 2011, exhibiting medical reports and correspondence relating to the respondent's daughter, N.

The relevant portion of the respondent's own affidavit is contained in paragraphs 3 to 8 respectively, where he stated:-

> "3. I … am a citizen of Poland. I was sentenced by the District Court … on 18th (sic) October, 2005, to a term of imprisonment of two years and six months for two offences which were committed on 4th February, 2001. The sentence was postponed on that date and on 6th December, 2005, and then on the 29th June, 2006, by the District Court …, until the 29th December, 2006, because of my daughter N.'s health problems.
>
> 4. N. was born on the 2nd of January, 2004. She had very serious heart complications and was kept in hospital and then transferred to a children's hospital ….
>
> 5. In 2006 I desperately needed to earn money to provide from my daughter and my wife, R. N. was in hospital …, and my wife had to pay for travel, accommodation and medication expenses. I left Poland on 8th September, 2006, and came to Ireland in order to see if I could find work. I did find work and I sent money back to N. and my wife. I worked as a steel fixer for a company manufacturing concrete walls …, from September to November, 2006. From January, 2007, I worked for five months delivering leaflets and flyers for an advertising business all over the country. From May to December, 2007, I worked for a road construction company …. From January, 2008, to the present I have worked … as a butcher … although I am currently on sick leave because of my mental health. My wife and daughter joined me in Ireland on 20th September, 2008.
>
> 6. N. has several medical conditions, including a heart condition. She has regular checkups …. She is due for an appointment there in April, 2011. She has learning difficulties, and requires special education provision. She becomes 'hyper-emotional' and is very attached to me and she would be devastated if I am separated from her. She needs an operation on her left eye, which will be carried out in (Ireland), and she has a problem with her leg, and requires special shoes. Doctors in Ireland have commented that this condition was not being properly treated in Poland.
>
> 7. I and my family have no home to return to in Poland. I regard it as a crisis for my family if they have to return to Poland because I have to serve my prison sentence. We have no house in Poland. My mother is deceased and I have no contact with my father. My wife's father is deceased and her mother is in her sixties and frail and unable to offer help to us. She is from northern Poland … a very poor village (there). I believe that if my daughter lived there and needed emergency treatment she would be unable to obtain it speedily. I believe that the standard of medical treatment, and education, is better for N. in Ireland than in Poland. My wife and I have a younger daughter, L., who was born on 6th

July, 2009, in (Ireland) and we want to bring up our children here.

8. I am suffering from depression, and am currently on sick leave from work and on medication. My doctor arranged for me to see a psychiatrist. I beg to refer to a copy of his medical report upon which marked with 'A' I have endorsed my name prior to the swearing hereof."

The medical report exhibited with the affidavit is from the respondent's g.p. who says that he has, *inter alia*, an "anxiety disorder". He further comments:-

> "Was referred to psychiatric service in August 2010. Psychiatrist (on the basis of referral) suggested to refer D. to neurologist first, as is no evidence of mania or psychosis."

The relevant portion of the affidavit of the 18th of May, 2011, sworn by the respondent's solicitor, Cahir O'Higgins, is contained in paragraphs 3 to 6 respectively, where he states:-

> "3. …. . I beg to refer to a letter from his family doctor, dated the 14th of March 2011, upon which marked with 'A' I have indorsed my name prior to the swearing hereof, which confirms that his daughter, N., has a number of medical conditions of a serious nature and is in the care of three consultant paediatric specialists, and has developmental delay and is due to receive the support of a child psychologist and physiotherapy.
>
> 4. The respondent has instructed me today that N. is currently attending (a hospital) for physiotherapy treatment.
>
> 5. In respect of the respondent, I beg to refer to a letter from (a doctor), dated 15th February, 2011, and a letter from the respondent's family doctor dated 14th March 2011, upon which marked with 'B' I have indorsed my name prior to the swearing hereof. The letters confirm that the respondent is receiving treatment at (a) psychiatric clinic of … for mental health conditions. The respondent has informed me today that these conditions are continuing and that he is still receiving treatment for them.
>
> 6. The respondent instructs that he and his wife are desperate to avoid any disruption to N.'s treatment regime in Ireland. She is in need of physical and psychological treatment, and the respondent instructs that, as he stated in his affidavit, his daughter relies on him greatly and will be devastated if he is removed from her."

The Court has considered carefully the medical reports exhibited marked 'A' and 'B', respectively, by Mr O'Higgins. He has fairly summarised and accurately characterised these reports, and it is not necessary to quote them in full for the purpose of this judgment. It will suffice to set out the list of N.'s various physical and psychological conditions as stated in the report exhibited marked "A". These are stated to be:

> 1. Congenital heart disease (involving coarctation of the aorta and hypoplasia of the pulmonary trunk), for which she has had multiple surgeries;
>
> 2. Strabismus, again for which she has had surgery;
>
> 3. Squint of left eye;
>
> 4. Talipes;
>
> 5. Developmental delay (attention, concentration, behavioural difficulties);
>
> 6. Eczema;
>
> 7. Renal failure in the past;
>
> 8. Chronic lung disease in first year of life;
>
> 9. Persistent productive cough.

The relevant statutory provisions

The relevant statutory provisions are provided in s.18(1) and (2), respectively, of the Act of 2003, and are in the following terms:-

> "18.—(1) The High Court may, if satisfied that circumstances exist that would warrant the postponement, on humanitarian grounds, of the surrender to the issuing state of a person to whom an order under *section 15 or 16* applies, direct that the person's surrender be postponed until such date as the High Court states that, in its opinion, those circumstances no longer exist.
>
> (2) Without prejudice to the generality of *subsection (1),* circumstances to which that paragraph applies include a manifest danger to the life or health of the person concerned likely to be occasioned by his or her surrender to the issuing state in accordance with section 15 (5) or 16(5)."

These provisions were intended to implement Article 23(4) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) which is in the following terms:-

> "The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed."

Previous consideration of the relevant statutory provisions by this Court

The only case, in so far as this Court is aware or has been able to ascertain, in which the statutory provisions in question have received any judicial consideration is the case of *Minister for Justice, Equality & Law Reform v Adam (No 2)* [2011] IEHC 87, (Unreported, High Court, Edwards J., 10th March, 2011), a case in which the respondent sought a postponement under s.18(3) of the Act of 2003 in circumstances where a district judge had adjourned domestic proceedings then also pending against the respondent for some months to enable him to make a "poor box" contribution and thereby possibly avoid a prison sentence on the domestic matter or alternatively be dealt with more leniently than he otherwise might. In the course of my judgment in that case, which was primarily concerned with s. 18(3), I made the following remarks *obiter* concerning s.18 (1) and (2) of the Act of 2003:

> "….the Court notes that both the Act (in s. 18(1) & s. 18 (2), and the underlying Framework Decision in Article 23(4), make specific alternative provisions for a possible temporary postponement on humanitarian grounds but the relevant provisions have not been invoked by the respondent in this case. Moreover, the Court is by no means convinced that the hampering of the respondent's ability to make a poor box contribution; and, indirectly, of persuading the District Judge to apply s.1 (1) of the Probation of Offenders Act, 1907, alternatively of persuading the District Judge to impose a more lenient sentence than he might otherwise do, could provide a basis for seeking a postponement on humanitarian grounds. Whilst the terms of s. 18(2) are expressed to be without prejudice to the generality of s. 18 (1), Article 23(4) of the Framework Decision, which these provisions were intended to implement, speaks of such postponement arising "exceptionally" and for "serious" humanitarian reasons such as danger to the requested person's life or health. In the present case, any potential prejudice might be to the character or good name of the requested person, and/or possibly to his liberty. However, if such prejudice were to arise it would be in accordance with law, which requires, *inter alia*, that any sentence that might be imposed should be proportionate to the admitted crime. The Court considers it doubtful in such circumstances that any such prejudice could be characterised as giving rise to humanitarian considerations, much less serious considerations of that sort."

The respondent's submissions
Counsel for the respondent, Mr Michael Lynn B.L., has submitted that in the particular circumstances of this case both Article 8 of the European Convention on Human Rights (hereinafter referred to as "the Convention"), and Article 24 of the Charter of Fundamental Rights of the European Union (O.J. 30.3. 2010 – 2010/C83/02 [EN C83/389]) (hereinafter referred to as "the Charter"), are engaged and he seeks to rely on both in support of his application for a postponement of his client's surrender on humanitarian grounds. In particular he contends that this Court, in considering the question of a possible postponement, should regard the best interests of the respondent's daughter, N., as a primary consideration.

While acknowledging the terms of Article 23(4) of the Framework Decision, he urges that the Framework Decision is not directly effective and that there is no need to have recourse to it where the domestic implementing legislation is clear in its own terms. He contends that his client is entitled to rely upon, and the Court should in the first instance have regard to, the plain terms of s.18 (1) and (2) of the Act of 2003 which, he submits: (i) refers only to humanitarian considerations (and thereby perhaps allows for postponement in a wider range of circumstances than the underlying Article of the Framework Decision which speaks of "serious" humanitarian considerations) and (ii) admits of the taking of a wider view than that which the Court has previously indicated was its view in its *obiter* remarks in *Adam (No 2).* He urges that the Court should take a wider view than it did in *Minister for Justice, Equality & Law Reform v Adam (No 2)* [2011] IEHC 87, (Unreported, High Court, Edwards J., 10th March, 2011) and construe the s. 18(1) and (2) provisions in conformity both with Article 8 of the Convention which guarantees *respect for family life*, and with Article 24 (and in particular sub article 2 thereof) of the Charter which mandates that "in all actions relating to children ... the child's best interests must be a primary consideration".

It was further submitted that while in *Minister for Justice Equality & Law Reform v Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011), this Court had rejected an argument that it was required in the extradition context to have regard to the "best interests" of a child who might potentially be affected by the Court's decision as the primary or paramount consideration, the argument in that case had not been based on Article 24 of the Charter. Rather, the Court's decision was based upon the fact that the respondent in that case was inappropriately relying upon Article 3(1) of the United Nations Convention on the Rights of the Child which the Court considered the respondent could not directly rely upon, because Articles 29(3) and (6) of the Constitution have been interpreted as precluding the Irish Courts from giving effect to an international agreement if it is contrary to domestic law or grants rights or imposes obligations additional to those of domestic law; *In re Ó' Laighléis* [1960] I.R. 93. It was urged that in the present case the Court should revisit the issue in the light of Article 24 of the Charter, and counsel sought to nuance the argument slightly. He conceded that the best interests of an affected child could never be "*the*" primary or paramount consideration in extradition matters, but submits that nonetheless the Court is required by the Charter to regard it as "a" primary consideration. The Court considers that a serious issue has been raised in regard to the status of Article 24 of the Charter and I will return to it later in this judgment.

When pressed by the Court concerning how long a postponement the respondent was looking for, counsel stated that 6 weeks was being sought "in the first instance" (the Court's emphasis). This would be to facilitate the psychological assessment which N. is due to undergo imminently, and the preparation of a report based on that assessment. He urged that this postponement was required both because it is in N.'s best interests, and also out of respect for the family life of the respondent, his spouse and children. It was submitted that in circumstances where the Court is disposed to surrender the respondent to Poland, the family as a whole cannot be expected to make a decision on possible relocation to Poland without having available to it the essential information that the pending psychological assessment would provide, particularly in terms of knowing what best to do in all their interests, and especially in the interests of N. who has a range of physical and psychological conditions. Further, as N. and her father have a particular bond, such that she is likely to be distraught upon their enforced separation, it is desirable and in her best interests that she should not be subjected to that trauma until her psychological assessment has been completed. However, counsel would not discount the possibility that an application for a further postponement might be made when the psychological assessment was to hand, depending on what it contained.

The applicant's submissions
Counsel for the applicant in the proceedings (and respondent to the present motion), Mr Tony McGillicuddy B.L., submits that the argument being made is close to an argument that the respondent should not be surrendered at all on Article 8 grounds, and he says that the Court should not be asked to deal with an Article 8 proportionality argument by the "back door". In fairness to counsel for the respondent, he rejects this and in doing so has conceded that the bar has been set so high with respect to any possible non-surrender on Article 8 grounds that he could never have hoped to resist his client's surrender on that basis, and he stresses that he has not heretofore, and is not now, seeking to do that. However, he believes that Article 8 is nonetheless engaged in terms of his application for a six week postponement of his client's surrender on humanitarian grounds.

It has been further submitted by counsel for the applicant that even if the Court was to accept that Article 8 is engaged, the

evidence in the case does not meet the threshold for putting the Court on enquiry. He says that both the Act and the Framework Decision are clear. Postponement can only be temporary. It can only be for a short time and it can only be granted for humanitarian reasons. Moreover, the Framework Decision makes it clear that these must be serious humanitarian reasons, and he points to the fact that the same example is given both in s. 18(2) of the Act of 2003, and in Article 23(4) of the Framework Decision, namely that the surrender would manifestly endanger the requested person's life or health. It was further submitted that the example given relates to circumstances directly affecting the person facing surrender, rather than a third party such as a spouse or child, and that it is by no means clear that a postponement can be sought in the interests of a third party.

Counsel for the applicant has pointed to an initial reluctance on the respondent's side to specify the length of the postponement being requested. The Court is asked to note that it was only when pressed on this, both by counsel for the applicant and the Court, that a period of six weeks was committed to by counsel for the respondent. Moreover, the Court is asked to note that counsel for the respondent is not foreclosing on the possibility of an extension being sought to any postponement that might initially be granted, or on the further possibility of a fresh application being made on different grounds when the report of the awaited psychological assessment is to hand. It is urged that the high water mark of the respondent's case is that the child and father have a particular bond, and that the child will be distressed if he is surrendered. However, there is no medical evidence that it would be contrary to N.'s physical or psychological health to surrender the respondent immediately, or that the child's pending psychological assessment would be prejudiced by her father's immediate surrender. While the applicant accepts that it may be distressing and inconvenient for the respondent's family if he is surrendered immediately, he contends that the breaking of, or suspension of, or abrogation of, family bonds is an inevitable consequence of surrender and imprisonment. It was submitted that the respondent has not demonstrated for what humanitarian reasons a postponement is required. He has not shown how it would be inhumane to either him personally or to his family if he is surrendered immediately. There is only the respondent's own assertion that his immediate surrender would have grave consequences for him and his family, and in particular, adverse health consequences for N. There is no medical evidence to support it.

The applicant does not accept, for reasons that the Court will elaborate on in a separate subsection to this part of this judgment, that the Charter can be relied upon directly by the respondent, or that the Court is bound to have regard to Article 24(2) in considering the respondent's postponement application. However, he contends that it is unnecessary in any event for the respondent to seek to have recourse to the Charter because it is accepted by the applicant that in any case in which Article 8 is engaged, and in which a child might be affected by the Court's decision, the jurisprudence of the ECtHR indicates that the best interests principle must be taken into account as "a" primary consideration (though not as "the" primary or paramount consideration as was urged by the respondent in *Bednarczyk)*. Specifically, in *Üner v The Netherlands* (2006) 45 EHRR 421, the ECtHR identified the best interests principle as a factor to be taken into account whenever a Court is engaged in conducting the proportionality exercise that it is required to conduct where Article 8 is engaged and a child is involved. However, this concession is made without prejudice to the applicant's argument that while in extradition matters the best interests of affected children are "a primary consideration" they cannot generally override the public interest in effective extradition procedures.

Reliance on the Charter of Fundamental Rights
Notwithstanding the applicant's stated views to the contrary, counsel for the respondent has argued strenuously that the Charter can be relied upon by a person in the position of the respondent in proceedings such as these. He argues that it is directly applicable and is part of domestic law where, as he puts it, "a member state is engaged in European Union legal activity".

In seeking to rely on the Charter, the respondent points to the fact that post the enactment and coming into force of the Lisbon Treaty, Article 6(1) of the Treaty on European Union (hereinafter TEU) provides:-

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

Counsel for the respondent seeks to rely in particular on Article 24 of the Charter which deals with the rights of the child and provides:-

> "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

Counsel for the respondent argues that since Article 24 of the Charter, and in particular sub-article 2 thereof, is directly applicable, the requirement that "in all actions relating to children … the child's best interests must be a primary consideration" must be regarded as part of our domestic law for purposes of the application of the European Arrest Warrant Act 2003.

The respondent's basis for contending that the Charter is directly applicable and can be relied upon before this Court is based upon a particular interpretation of the provisions of Articles 51 and 52 respectively of the Charter, having regard to an explanatory memorandum prepared under the authority of the Praesidium of the Convention which drafted the Charter and promulgated in connection therewith. This explanatory memorandum is entitled *Explanations Relating to the Charter of Fundamental Rights* (O.J. 14.12.2007 – 2007/C303/02 [EN C303/17]) (hereinafter referred to for convenience as the "explanations document"). Both sides in this case accept that the said explanations document is a legal instrument to which regard may be had.

Article 51 of the Charter deals with its scope, whereas Article 52 deals more specifically with the scope of guaranteed rights and freedoms recognised by the Charter. Both of these are contained within the general provisions in Title VII of the Charter. It will be recalled that Art 6(1) TEU requires the Charter to be "interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter that set out the

sources of those provisions." It is therefore appropriate at this point to set out both the terms of Articles 51 and 52 respectively, and the "explanations" contained in the explanations document relating to those provisions.

Article 51 is in the following terms:-

> "Scope
>
> 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
>
> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

The explanations relating to Article 51 contained in the explanations document state:-

> "Explanation on Article 51 — Field of application
>
> The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by the Cologne European Council. The term 'institutions' is enshrined in the Treaties. The expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation (see, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union).
>
> As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.
>
> Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.
>
> Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 *Grant* [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be 'implementation of Union law' (within the meaning of paragraph 1 and the above-mentioned case-law)."

Article 52 is in the following terms:-

> "Scope and interpretation of rights and principles
>
> 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
>
> 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
>
> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
>
> 4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
>
> 5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
>
> 6. Full account shall be taken of national laws and practices as specified in this Charter.
>
> 7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

There are lengthy explanations relating to Article 52 contained in the explanations document. For the purpose of this judgment only

those relating to sub-article 5 are directly relevant. These explanations state:-

> "Explanation on Article 52 — Scope and interpretation of rights and principles"
>
> "Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the 'precautionary principle' in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 *Pfizer v Council*, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 *Van den Berg* [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34."

Counsel for the respondent has submitted that the Charter makes a clear distinction between rights and principles. He argues that the Charter, interpreted in accordance with the explanations document, envisages that "rights" must at all times be respected whenever Member States authorities are acting in the scope of EU law, and may indeed give rise to direct claims for positive action by the relevant authorities. Conversely, principles are not required to be respected but rather to be observed by implementation through legislative or executive acts. Accordingly, unlike rights which must always be respected when Member States authorities are acting in the scope of EU law, principles become significant for the Courts only when legislative or executive acts are interpreted or reviewed, and they cannot give rise to direct claims for positive action.

Counsel for the respondent submits that in the present case this Court is a relevant Member State authority and, further, that in seeking to operate and implement the Act of 2003, which in turn was enacted to transpose and give effect to the Framework Decision, this Court is acting in the scope of EU law. He argues that on that basis, and because in the respondent's submission Article 24 of the Charter creates rights, this Court is bound in considering the respondent's postponement application under s. 18 (1) and (2) of the Act of 2003 to regard the best interests of the respondent's daughter, N., as being a primary consideration.

In support of his contention that Article 24 creates rights as opposed to establishing principles, counsel for the respondent again calls in aid the explanations document which states with respect to Article 24:-

> "Explanation on Article 24 — The rights of the child
>
> This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.
>
> Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents."
>
> Reliance is placed on the fact that Article 3.1 of the United Nations Convention on the Rights of the Child (hereinafter the UNCRC) requires that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This Court has previously stated in *Minister for Justice Equality & Law Reform v Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011), that Article 3.1 cannot be relied upon directly before the Irish Courts (unlike how it was successfully relied upon before the UK Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 W.L.R. 148) because it must be regarded as imposing an obligation greater than that imposed by domestic law. However, the Charter was not relied upon, and this Court was not referred to it, by the respondent in *Bednarczyk*. Accordingly, if Article 24 of the Charter, which is based, *inter alia*, on Article 3 of the UNCRC, and in particular Article 24(2) thereof, creates rights which this Court is bound to respect, and is to be regarded as directly applicable and as part of our domestic law, then the net effect of this is that Article 3.1 of the UNCRC has in fact been incorporated into Irish domestic law. The Court is urged to so hold.
>
> In response to these arguments, counsel for the applicant has submitted that the Court should look askance at counsel for the respondent's submissions because what his client is in fact seeking is an indefinite postponement which, if granted, would *de facto* constitute a refusal to surrender, and that therefore his application must be regarded as an attempt by the back door to resist surrender at all but under the guise of a postponement application.

As to the merits of the argument based on the Charter, counsel for the applicant says that his opponent is misreading the Charter and the consequences of the Charter. He argues that the Charter applies to EU institutions and member states in implementing EU law. He says the Charter can only be forward looking and cannot apply to the Framework Decision as it was not in force either on the 13th of June, 2002, when the Framework Decision was adopted by the Council, or when the Act of 2003 was enacted by the Oireachtas to transpose and give effect to that Framework Decision. The version of the Charter adopted and now in force was only adopted in 2007 and, indeed, it is only since the enactment, ratification and coming into force of the Lisbon Treaty that Article 6 TEU reflects that the European Union recognises the rights, freedoms and principles set out in the Charter and states that the Charter is to have the same legal value as the Treaties.

Counsel for the applicant has submitted that this Court in assessing any impact the Charter might have has to look at the EU law in question and the Irish law implementing that, *i.e.,* the Act of 2003.

The EU law in question is contained in the Framework Decision. The Framework Decision itself expresses, in recital no. 12, that the Framework Decision "respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union." Counsel for the applicant points out that this is a reference to the Charter as it was expressed in 2000, not the version currently recognised and afforded the same legal status as the Treaties by the current (post Lisbon Treaty) Article 6 TEU. The Framework Decision outlines that "(n)othing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when

there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons." It further outlines that the Framework Decision "*does not prevent a Member State from applying* its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media." In recital no. 13 it is stated that "(n)o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment", while recital no. 14 deals with the protection of individuals with regard to automatic processing of personal data.

The main obligation under the Framework Decision is that set out in Article 1(2) thereof, *i.e.* that "Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision", and Articles 3 and 4, respectively, then deal with the grounds for mandatory non-execution of the European arrest warrant and the grounds for optional non-execution of the European arrest warrant. Article 5 then sets out the guarantees to be given by the issuing Member State in particular cases.

Counsel for the applicant has submitted that the EU law, as set out in the Framework Decision, the essentials of which have just been rehearsed, is not directly effective and requires to be implemented. That has been done in Ireland through the enactment by the Oireachtas of the Act of 2003. The Act of 2003 contains provisions, notably in s.37, where a person's surrender can be refused on constitutional grounds or on Convention grounds, and then for certain specified reasons. There are further matters outlined in Part 3 of the Act, such as s. 45, concerning trial *in absentia*, but in terms of fundamental rights concerns, and how they are incorporated within the Act of 2003, and how they are to be dealt with, the main provision is s.37. Counsel submits that that is how the state has implemented the EU law in question and it is within that framework that this Court must address any issues raised relating to fundamental rights, including any matters relating to the welfare of children arising from any *prima facie* obligation on the Court to surrender a respondent.

Counsel for the applicant urges that even if the Charter is capable of being relied upon by the respondent in so far as rights identified or enumerated within it are concerned, this Court can, and should, reject the submission made on behalf of the respondent that Article 24(2) identifies or enumerates any "right" as opposed to a "principle". He submits that while arguably Article 24(1) might be concerned with rights, Article 24(2) clearly sets out a principle - what is widely known as "the best interests principle", and that Article 52(5) of the Charter, when read in conjunction with the explanations document, makes it abundantly clear that, while such a principle should be observed by the Union's institutions or by Member States authorities when implementing EU law through legislative or executive acts, it cannot give rise to direct claims for positive action by the Union's institutions or by Member State authorities such as this Court. The Union's institutions have not made any attempt in the Framework Decision to incorporate the "best interests principle" nor has Ireland, as a relevant Member State seeking to implement EU law *i.e.*, the Framework Decision, sought to do so. Accordingly, the "best interests principle" is not cognisable by this Court on the basis of Article 24(2) of the Charter.

Counsel for the applicant has further submitted that if the Court finds against him on this aspect of his submission, and considers that Article 24(2) of the Charter does identify or enumerate a "right" as opposed to a "principle", the Court should take the view that it can only be invoked in relation to matters such as child care or adoption litigation, and hold that it is not meant to impact on surrender applications under the Framework Decision in circumstances where the terms of the Framework Decision are clear and it has not been amended to take account of the putative right in question.

Consideration of the "best interests" of children in the extradition context
Counsel for the applicant has further commended to this Court that the correct approach for it to adopt in considering in any case whether or not to refuse a surrender on fundamental rights grounds is that set forth in the English Supreme Court case of *Norris v. Government of the United States of America (No 2)* [2010] 2 A.C. 487. He submits that as the application presently before the Court, which is dressed up as a short postponement application, but which in his characterisation is "in reality an attempt by the back door to prevent surrender on fundamental rights grounds", the Court should also bear in mind and apply the *Norris* principles in dealing with this application. Further, he points to two recent decisions of the English High Court in which it is made clear that the decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 W.L.R. 148, to which this Court has earlier alluded, and which was an immigration case, does not change the considerations that were held to apply in *Norris* in circumstances where there is a child that might be affected by the Court's decision. The two recent decisions referred to are *B v The District Courts in Trutnov and Liberec (Czech Judicial Authorities)* [2011] EWHC 963 (Admin) and *R (H.H.) & Anor v the Deputy Prosecutor of the Italian Republic, Genoa (Italian Judicial Authorities) & Ors* [2011] EWHC 1145 (Admin). These decisions suggest that while in extradition matters the best interests of affected children are "a primary consideration" they cannot generally override the public interest in effective extradition procedures. Counsel for the applicant has further submitted that principles set forth in these English decisions, *i.e. Norris*, *B* and *HH* respectively, are consistent with, and reconcilable with, the previous decision of this Court in *Minister for Justice, Equality & Law Reform v F.L.J.* (Unreported, High Court, Edwards J., 8th April, 2011).

In *Norris*, the Government of the United States of America sought the extradition of the defendant, a British citizen, and a former chief executive officer of a leading international manufacturer of carbon products, to stand trial on indictment in respect of four alleged offences, including one offence of conspiracy with other producers of carbon products to operate a price fixing arrangement or cartel in several countries including the United States, and three offences of conspiracy to obstruct justice by witness tampering and by the alteration, destruction, mutilation and/or concealment of evidence. In the course of the extradition proceedings, which were commenced before a district judge, the defendant was ultimately successful, following a series of appeals which went all the way to the House of Lords, in his objection to being extradited on the price fixing count on the grounds that correspondence could not be demonstrated with an offence under the law of England and Wales. Following the House of Lords decision, the case was remitted to the district judge with regard to outstanding issues. It was then unsuccessfully argued before the district judge that the ill-health of the defendant and his wife, who were then aged 65 and 64 respectively, their mutual dependency based on a long and close marriage, and the effect that his extradition would have on his wife's depressive illness, made the interference with their rights under Article 8 of the European Convention on Human Rights disproportionate to the public interest in his extradition for charges subsidiary to the main cartel charge. Having rejected the defendant's Article 8 objections, the district judge ordered the defendant's extradition. The defendant then sought a judicial review of the district judge's decision in the High Court and a Divisional Court of the Queen's Bench Division rejected his appeal. He then further appealed to the Supreme Court but this appeal was also dismissed.

The principal judgment on behalf of the UK Supreme Court was delivered by Lord Phillips, with whom all the other members of the Court (Lord Judge, Lord Hope, Lord Rodger, Baroness Hale, Lord Brown, Lord Mance, Lord Collins and Lord Kerr) agreed. At paras. 25 and 26 of the official report of his judgment, in the course of reviewing the Strasbourg jurisprudence on proportionality, he states the following:-

> "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, at paras 46-48:

'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 v France* (1998) 33 EHRR 625, para 52, and *Mehemi v France* (1997) 30 EHRR 739, para 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'."

According to counsel for the applicant, in the case presently before the Court, the passages just cited clearly demonstrate that it is well established that it is appropriate for a Court, in considering the proportionality of a proposed measure, to take into account relevant interests including the "best interests and well-being of children". In that regard, counsel for the applicant reiterates his contention that it is unnecessary in the circumstances of this case for the respondent to seek to have recourse to Article 24(2) of the Charter.

Returning to the judgment of Lord Phillips, at para. 51 *et seq* he further states:-

"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 none the less weighs very heavily indeed. In *Wellington* [2009] AC 335 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] 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, at para 2:

'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".

In further support of the approach advocated by Lord Phillips, the Court has also been referred to the relatively short additional judgment of Lord Collins, in *Norris*, where he states at para. 130 of the report:-

> "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 CD 67, para 3; and cf *Raidl v Austria* (1995) 20 EHRR CD 114, para 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* (Application No 9742/07) (unreported) given 26 January 2010".

Counsel for the applicant in the present case submits that the effect of the judgment in *Norris* was to set the bar extremely high with respect to possible non-surrender or non-extradition of a person on the grounds of an unjustified or disproportionate interference with family life. The UK Supreme Court found that in the circumstances of that case the required threshold for intervention had not been met. Moreover, counsel emphasises that although the Supreme Court was not dealing in that particular case with a child, the decision was rendered in circumstances where it was aware that the best interests principle is something that is incorporated in the Article 8 case law.

In so far as the decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 W.L.R. 148 is concerned, in which Baroness Hale discussed at some length the best interests principle, and on whose conclusions the respondent in *Bednarzyk* placed some reliance, counsel for the applicant in the present case stresses that it was an immigration case, and not an extradition case, and that it has since been held in two extradition cases decided by the English High Court that it is not to be regarded as having any implications for, or as changing the emphasis of, the principles set forth in *Norris*.

In *R (H.H.) & Anor v the Deputy Prosecutor of the Italian Republic, Genoa (Italian Judicial Authority) & Ors* [2011] EWHC 1145 (Admin), the Italian authorities sought the extradition of both the mother (H.H) and father (P.H) of three children for drugs offences. A district judge ordered the H's extradition and they sought to judicially review his decision in the High Court. There were a number of issues in the case, not all of which are germane to the issues with which this Court is concerned. However, one of the issues concerned whether the appellants' right to respect for family life guaranteed by Article 8 of the European Convention on Human Rights ("ECHR") would be violated by their extradition. The focus of the Article 8 claim was the plight of the H's three young children in the event that their parents were extradited. It was claimed that to do so would be disproportionate since that would effectively render the children *de facto* orphans and result in them being adopted or placed in care.

The case was heard by a Divisional Court of the Queen's Bench Division. Giving the judgment on behalf of the Court, Laws L.J reviewed the evidence which was undisputed and stark. It was to the effect that there was no guarantee that the children, if adopted or fostered, or if one or more were adopted and the other or others fostered, would be kept together. Moreover, separation from both parents would have a profound effect on the children's physical and emotional health and might lead to multiple problems for the children in the future.

In considering the Article 8 issue, Laws L.J. stated at para. 49 of his judgment that:-

> "49. The question here is not the resolution of a disputed factual issue but the correct application of legal principle. In particular, I must consider what if any is the impact of the decision of the Supreme Court in *ZH (Tanzania)* [2011] UKSC 4; [2011] 2WLR 148 upon its earlier judgment in *Norris v USA* [2010] UKSC 9; [2010] 2WLR 572".

Having reviewed the judgments in *Norris* in great detail, Laws L.J. then turned to a consideration of the decision in *ZH*, and says the following at paras. 55 *et seq* of his judgment:-

> "55. *ZH (Tanzania)* was not an extradition case. The appellant, a failed asylum-seeker, faced removal from this country to Tanzania. She had two children, aged 12 and 9 at the relevant time, who were British citizens. They had lived here with their mother all their lives, mostly at the same address. She was estranged from their father though he remained in contact with the children. She had an "appalling" immigration history, having put forward fraudulent claims for asylum. At length, however, the Secretary of State conceded that it would be disproportionate to remove the appellant, but was "understandably concerned about the general principles which the Border Agency and appellate authorities should apply" (Baroness Hale, paragraph 13). The specific question for the court's consideration was formulated by Lady Hale at paragraph 1:

"[I]n what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?"

56. At paragraph 23 Lady Hale observed:

"For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC [sc. the United Nations Convention on the Rights of the Child 1989]:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.'"

Lady Hale indicated (paragraph 25) that the Strasbourg court expects national authorities "to apply article 3(1) of UNCRC and treat the best interests of a child as 'a primary consideration'". She proceeded (paragraph 26) to cite Australian authority in line with this, and emphasised (paragraphs 30 ff) the "particular importance" of nationality "in assessing the best interests of any child". The core of her reasoning, if I may say so, is to be found in paragraph 33:

"We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that 'there really is only room for one view' (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."

57. Lord Brown and Lord Mance agreed with Lady Hale. Lord Hope and Lord Kerr gave concurring judgments. Lord Kerr said this:

"46. It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.""

Responding to a submission by counsel on behalf of the children to the effect that the reasoning in *ZH* applies with no less force to an extradition case such as the one before him, and also to a submission by counsel on behalf of the wife to the effect that *Norris* must be regarded as modified by *ZH*, Laws L.J stated at paras. 59 to 63 of his judgment that:-

"59 I consider it impossible to suppose that the court in *ZH* intended to depart from any of the reasoning in *Norris*. There is no reference whatever in the former case to the latter, nor indeed to extradition itself. And as I have said, the court in *Norris* sat nine Justices. The decision in *Norris* must in my judgment be taken as determinative of the law relating to Article 8 claims by prospective extraditees, no less since *ZH* than before. That is not to say, however, that *ZH* has no impact upon the application of the principles in *Norris*. The proposition that "the best interests of the child shall be a primary consideration" (UNCRC Article 3(1)) is of general application. But the indefinite article – "a primary consideration" – is significant. As Lady Hale stated in *ZH* (paragraph 25), "'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'".

60. Accordingly, while the best interests of affected children are "a primary consideration" in extradition cases, they cannot generally override the public interest in effective extradition procedures. There has to be an "exceptionally compelling feature" (*Norris* paragraphs 56, 91), giving rise to "the gravest effects of interference with family life" (paragraph 82). That is not *ipso facto* supplied by an extradition's adverse consequences for the extraditee's children. In fairness I did not understand Mr Keith or Mr Wise to submit otherwise.

61. The search for what may in truth amount to such an exceptionally compelling feature is, I think, illuminated by these two following considerations. First, it is clear that Lord Phillips in *Norris* did not regard extradition on the one hand and expulsion or deportation on the other as being in the same case: see paragraph 60. The implication is that if an extradition is to be condemned as disproportionate, the factor or factors relied on to that end must be substantially more pressing than in a deportation case.

62. The second consideration, which tends to explain the first, consists in the differences between the nature of the public interest in extradition and that in expulsion or deportation. Mr Hardy submitted that expulsion and deportation are matters only of domestic policy, whereas extradition promotes a universal public benefit. This latter aspect reflects what was said by Lord Phillips at paragraph 52 in *Norris* (I have already set it out): "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." I would venture also to cite this passage from my own judgment in *Norris* in this court (quoted by Lord Phillips at paragraph 48):

> "21… [T]he 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."
>
> These citations describe the importance of the extradition process. But they do not articulate a qualitative difference between deportation and extradition such as might explain why, if it be so, it takes a more pressing Article 8 case to override the latter than the former. Mr Hardy's contrast between what is domestic and what is international (or universal) will not on its own suffice.
>
> 63. In my judgment the answer is suggested by the following contrasting features of immigration and extradition policy. Good immigration policy (it will generally be recognised) is not all one way; that is to say, it will by no means always be fulfilled by the expulsion of the alien in question. The striking of reasonable balances is an inherent feature of the policy itself, certainly as it is reflected in the current Immigration Rules promulgated by the Secretary of State. But this is not true of the extradition regime. The public interest in extradition is *systematically* served by the extradition's being carried into effect, subject to the proper procedures. Where that does not happen, it is not because the striking of reasonable balances is an inherent feature of the policy. It is because, and only because, there exists in the particular case an "exceptionally compelling feature" giving rise to "the gravest effects of interference with family life", which is quite a different matter. As Lord Hope said in *Norris* (paragraph 91) "[t]he public interest in giving effect to a request for extradition is a constant factor"; and he referred (*ibid.*) to "the extra compelling element that marks the given case out from the generality"".

The Divisional Court ultimately concluded that the proposed extradition of the H's would not be disproportionate. It held that where an extraditee is a parent with young children, their family life will inevitably be disrupted; indeed it may be very gravely disrupted, by the extradition. The Court further acknowledged that the extradition of both parents would certainly make it worse. It was a matter of degree. The Court concluded, however, that there was no feature specific to this family which constituted so pressing and powerful a consideration as to justify the discharge of the parents or either of them on Article 8 grounds.

In *B v The District Courts in Trutnov and Liberec (Czech Judicial Authorities)* [2011] EWHC 963 (Admin) there was again an Article 8 issue in the context of the proposed extradition of a single mother of four children, aged 9, 5, 3 and 2 years, respectively. In the course of considering this issue in the context of an appeal against the order of a district judge ordering the mother's extradition, Silber J, sitting in the Queens Bench Division, addressed the question at para. 44 of the judgment as follows: "[h]as *ZH (Tanzania) v Secretary of State* affected the article 8 rights of a person who has young children and who is the subject of an extradition request?" In reviewing the judgment of Baroness Hale in *ZH*, he noted that she drew a distinction between two types of cases, namely:-

> "a) Those in which long-term residents of the United Kingdom have committed a crime in which case the proportionality exercise would be subject to consideration of the interest of the prevention of disorder and crime. The relevant factors would include those set out in *Boultif v Switzerland* (2001) 33 EHRR 1179 9 [17]; and
>
> b) Cases which arise in the ordinary immigration context where a person is to be removed because he or she has no right to be or to remain in this country and different factors would be applicable".

Silber J. comments, at para. 51, that "[w]hat is significant is that a third class of case dealing with extradition was not considered and that that is not surprising because that was not the issue which arose on that appeal". Further, he noted that it was "clear that many important cases on the impact of article 8 on extradition cases and in particular the landmark case of *Norris* were not considered or apparently not even referred to". Again he felt, at para. 52, that was "not surprising because earlier in the year in which the Supreme Court had heard *ZH*, they had decided *Norris* in which Lord Phillips of Worth Matravers PSC had explained in respect of a submission that when considering the impact of article 8, the court should adopt a similar approach in extradition cases such as that to be adopted in the case of deportation or expulsion". Philips L.J. held, as cited by Silber J. at para. 52, that: -

> "'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."

and that:-

> "...It is certainly not right to equate extradition with expulsion or deportation in this context'".

After quoting more extensively from the judgment of Lord Phillips in *Norris*, including certain of the passages quoted earlier in this judgment, Silber J. remarked at paras. 55 and 56 of his judgment that:

> "55. It is clear that the approach of the courts to article 8 rights has to be radically different in extradition cases from what it is in deportation or immigration cases because of the very important obligation of the State to ensure that those who are to be investigated, prosecuted or imprisoned for criminal offences are returned to those countries. This is fortified by the Council Framework Decision of 13 June 2002, which led to the Act being passed. The purpose of the Framework Decision is to impose on Member States, such as the United Kingdom an obligation under article 1(2) to execute any EAW on the basis of mutual obligations.
>
> 56. This factor relating to the obligation of the State to return fugitives from justice is not present in deportation cases or immigration cases. Therefore decisions on article 8 rights in those areas are of no real relevance in extradition cases where the need to extradite fugitives from justices almost invariably out weighs the article 8 rights of the person sought to be extradited. This leads to the inevitable conclusion that *ZH* does not alter the existing law in relation to article 8 claims barring extradition orders to the effect that unlike in cases of deportation and challenges to removal by those who have no right to remain here, the circumstances in which it would not be proportionate to remove a person subject to an extradition request for Article 8 reasons would be rare because of the high threshold set in *Norris* as I have explained in paragraphs 52 to 54 above".

Ultimately, the Court in *B* concluded that in the circumstances of that case, the evidence adduced by the appellant failed to show that it would not be proportionate to extradite her in the light of the high threshold set in *Norris*.

The Court's Decision

In the Court's view, it is important not to lose sight of the fact that this is an application for postponement of surrender on humanitarian grounds rather than an application for surrender itself. While the Court notes the applicant's concern that this is in reality an attempt to prevent surrender on Article 8 grounds by the "back door", the Court is prepared to accept the assurances of counsel for the respondent at face value and will regard the present application solely as being for a short temporary postponement of six weeks on humanitarian grounds.

In that regard, the first requirement is that the evidence must establish the existence of humanitarian grounds. Two issues arise with respect to this aspect of the matter: (a) what is meant by "humanitarian" grounds, and (b) whether they must relate to the proposed extraditee personally, or can they also relate to a third party such as, in this case, the respondent's daughter?

The word "humanitarian" appears in both the Act of 2003 and in the underlying Framework Decision. Neither of these documents attaches any special meaning to it, and so the word should be accorded its ordinary meaning. It is used as an adjective and it is used in conjunction with the word "grounds" in the Act of 2003, and "reasons" in the Framework Decision. Accordingly, it imports something about those grounds or reasons that is to do with, or is a feature of, the humanity or human nature of the subject person, whether that be the proposed extraditee or another person. When used as an adjective, the word "humanitarian" most commonly connotes having concern for or helping to improve the welfare and happiness of people; alternatively it pertains to the saving of human lives or to the alleviation of human suffering.

The common example given both in s.18 (2) of the Act of 2003, and in Article 23(4) of the Framework Decision is danger to the person's life or health. The Court takes the point that this is an indicative example only and is not intended to be definitive. However, it makes it clear that what is contemplated is a prejudice that impinges upon some fundamental personal right of the subject individual to the extent of threatening his or her core well being, or perhaps very existence as a human being, such as a threat to life, or a threat to physical or mental health, or to bodily integrity, or a threat to that individual's dignity as a human person. These are again examples and do not constitute an exhaustive list. The important feature is that the prejudice, whatever it is, must impinge directly on some aspect of the individual's human condition or identity. The Court can see no reason in principle, particularly having regard to Article 8 of the Convention, why the prejudice in question must be personal to the proposed extraditee. It seems to the Court, that where Article 8 is engaged, a potential prejudice of a humanitarian nature to a spouse or child or other family member of the proposed extraditee could be relied upon. However, an alleged failure to respect family life is unlikely in itself to be sufficient in that regard. It would require something more, such as a serious specific prejudice to an individual family member, for that failure to have the necessary "humanitarian" quality about it.

Where humanitarian grounds are shown to exist, there is then a second requirement that must also be satisfied. It must be demonstrated that a postponement "is warranted" in all the circumstances on the humanitarian grounds identified. This brings in the question of proportionality. While the Act of 2003 does not establish a gravity threshold in terms of the humanitarian grounds identified, the Framework Decision speaks of "serious humanitarian reasons". In the Court's view, in a postponement application, just as in surrender applications, regard must be had to the public interest in extradition as well as to the predicament of the individual (or persons) who is (are) at risk of prejudice. The Court agrees with the approach advocated in *Norris*, and in *HH* and *B*, respectively, and in particular, endorses the views of Laws L.J. in *HH* that the public interest in extradition is systematically served by the extradition being carried into effect, subject to the proper procedures. Of course, it is not all about the public interest but the Court is satisfied that before postponement of an extradition would be "warranted", it would have to be demonstrated that the humanitarian grounds relied upon were so grave and of such a serious nature, and that the desirability of avoiding the apprehended prejudice was so compelling, as to render postponement the only effective option.

The Court, in making an assessment as to whether a postponement is warranted, in circumstances where Article 8 is engaged and prejudice to a child of the proposed extraditee is relied upon as constituting the humanitarian grounds, is entitled, and is indeed obliged having regard to the jurisprudence of the ECtHR, to have regard to the best interests of the child as "a" primary consideration. The Court agrees with counsel for the applicant that it is not necessary for the respondent to rely on the Charter in this regard.

While the Charter has been relied upon by the respondent it is not necessary for the purpose of giving judgment in this case for the Court to decide definitively whether or not it may be relied upon in the European arrest warrant context, and if so in what circumstances it may be relied upon. The Court will not decide a moot. That said, and subject to the possibility of being persuaded otherwise after full argument in a future case in which the issue requires to be adjudicated on definitively, I see no reason at the present time to deviate from a provisional view which I have expressed previously in an *obiter dictum* in *Minister for Justice, Equality and Law Reform v Adam (No 1)* [2011] IEHC 68 (Unreported, High Court, Edwards J., 3rd March, 2011), that in an appropriate case (*i.e.*, where a right is being relied upon rather than a principle) the Charter can be relied upon in the European arrest warrant context.

The Court holds its provisional view notwithstanding that the Charter must be regarded as forward looking and therefore did not apply at the time of the legislative implementation of the Framework Decision in terms of the enactment by the Oireachtas of the Act of 2003. However, the Court tends to agree with the respondent that in operating the Act of 2003 which incorporates the underlying Framework Decision, the Court, as a relevant Member State authority, is ostensibly acting within the scope of EU law. However, the Court also tends to agree with counsel for the applicant that Article 24(2) of the Charter contains an expression of principle rather than the enumeration of a right that can be relied upon directly. Be all of that as it may, these issues are academic in the circumstances of this case because under the Convention the Court is obliged in any event to have regard to the best interests principle.

As regards the best interests principle generally, the Court agrees entirely with counsel for the applicant that while in extradition matters the best interests of affected children are "a primary consideration" they cannot generally override the public interest in effective extradition procedures.

Turning then to the facts of the present case, the Court is not satisfied that in the circumstances of this case the initial threshold requirement of the establishment of humanitarian grounds is met, based on the anticipated prejudice to the health, particularly the emotional health, of the respondent's daughter, N., if she is subjected to a sudden enforced separation from him in circumstances where she is asserted to be emotionally fragile and hyper-emotional and also suffers from other physical and mental adversities. While the Court accepts that N. has a variety of physical and mental health difficulties there is in fact no medical evidence at all to suggest that she will suffer aggravation of any of these difficulties if her father is surrendered. The Court only has the respondent's unsupported assertion and belief in that regard. While it is undoubtedly the case that separation from her father consequent upon his surrender will be distressing for N., the evidence does not establish that it will cause any harm to her, in the sense of a medical pathology, either mentally or physically. While again, there may be great uncertainty in the minds of the respondent and his spouse and other family members concerning how best to care for N. in circumstances where the respondent is to be surrendered, and concerning whether some or all of the family should remain in Ireland in their own or in N.'s interests, none of these issues gives rise

to concerns that could be characterised as humanitarian concerns. Even if that were not so, and humanitarian concerns were held to exist, they certainly do not exist at a level of gravity such that they would warrant a postponement in this case even for a short period of just six weeks.

In the circumstances the Court is not disposed to accede to the application for a postponement.