Trinity Term
[2012] UKSC 24
On appeal from: [2011] HCJAC 77

JUDGMENT

BH (AP) (Appellant) and another *v* The Lord Advocate and another (Respondents) (Scotland)

KAS or H (AP) (Appellant) *v* The Lord Advocate and another (Respondents) (Scotland)

before

Lord Hope, Deputy President
Lady Hale
Lord Mance
Lord Judge
Lord Kerr
Lord Wilson
Lord Brown

JUDGMENT GIVEN ON

20 June 2012

Heard on 5, 6, 7 and 8 March 2012

Appellant (BH)
Herbert Kerrigan QC
Linda Pike
(Instructed by Good & Stewart)

Respondent
W James Wolffe QC
Graeme Hawkes
(Instructed by The Appeals Unit, Crown Office)

Respondent
Lord Boyd of Duncansby QC
Kenny McBrearty
(Instructed by Scottish Government Legal Directorate Litigation Division)

Appellant (KAS or H)
Christopher Shead
Andrew Mason
(Instructed by Thompson & Brown)

Respondent
W James Wolffe QC
Graeme Hawkes
(Instructed by The Appeals Unit, Crown Office)

Respondent
Lord Boyd of Duncansby QC
Kenny McBrearty
(Instructed by Scottish Government Legal Directorate Litigation Division)

Intervener
Manjit Gill QC

James Dixon
(Instructed by Coram Children's Legal Centre)

Intervener
Lord Wallace of Tankerness QC Advocate General for Scotland
John MacGregor
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

LORD HOPE (with whom Lady Hale and Lord Kerr agree)

1. The question in this case is whether the appellants BH ("Mr H") and his wife KAS or H ("Mrs H") should be extradited to the United States of America to face trial in Arizona. The United States has requested their extradition under the Extradition Act 2003 on charges of conspiracy and unlawful importation into the United States of chemicals used to manufacture methamphetamine, knowing or having reasonable cause to believe that they would be used for that purpose. If they were the only persons whose interests had to be taken into account, the answer to be given to this question would have been relatively straightforward. The crimes of which they are accused are very serious, and the public interest in the honouring of extradition arrangements for the prevention and punishment of crime is compelling: *Norris v Government of the United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487. But the persons whose interests must be taken into account include the appellants' children too. It is obvious that the children's interests will be interfered with to at least some degree by the extradition of either parent. If both parents are to be extradited the effect on the family life of the children will be huge. The weight to be given to their best interests lies at the heart of the issue whether the extradition of both parents, or either of them, would be proportionate.

2. The case comes before this court as an appeal against the determination of a devolution issue by the High Court of Justiciary. The appellants had argued both before Sheriff McColl in the Sheriff Court and in the High Court of Justiciary that it would be incompatible with their Convention rights within the meaning of the Human Rights Act 1998 for them to be extradited, as this would interfere with the exercise of their right to respect for their private and family life contrary to article 8 of the European Convention on Human Rights. Mrs H is the mother of six children, of whom the eldest is aged 14 years and the youngest is just one year old. Mr H is the father of the four younger children.

3. In a judgment delivered on 3 April 2008 after a hearing which began on 16 November 2007 the sheriff held that the appellants' extradition would be compatible with their Convention rights. So she sent the case of each appellant to the Scottish Ministers in terms of sections 87(3) and 141(1) of the 2003 Act for their decision whether either of the appellants was to be extradited. On 29 May 2008 the Scottish Ministers ordered the appellants to be extradited to the requesting territory. The appellants appealed to the High Court of Justiciary under section 103 read with section 216(9) of the 2003 Act. On 29 July 2011, after proceedings in that court which the court itself acknowledged had been exceptionally protracted, the High Court of Justiciary (Lord Osborne, Lord Reed

and Lord Mackay of Drumadoon) held that neither of the appellants was entitled to be discharged under section 87 of the 2003 Act: [2011] HCJAC 77, para 101.

4. There is no appeal to this court from a decision of the High Court of Justiciary under section 103 of the 2003 Act: sections 114(13) and 116. But the question whether the Scottish Ministers had no power in terms of section 57(2) of the Scotland Act 1998 to make an order for the appellants' extradition because their extradition would be incompatible with their Convention rights is a devolution issue within the meaning of paragraph 1(d) of Schedule 6 to the Scotland Act. An appeal lies to this court under paragraph 13 of the Schedule against the determination of a devolution issue by a court of two or more judges of the High Court of Justiciary. On 11 August 2011 the High Court of Justiciary granted leave to the appellants to appeal to this court in respect of the devolution issues relating to article 8 that arose during the hearing of the appeal under the 2003 Act.

5. The appellants submit that the public interest in giving effect to the extradition request is outweighed by the consequences that this would have for the best interests of their children. The proper conclusion, they say, is that the proposed interference fails to meet the test of proportionality required by article 8. So the Scottish Ministers had no power to order their extradition, as to extradite them would be incompatible with their rights and those of their children under article 8 of the Convention.

The facts

6. Mr H and Mrs H are both British citizens. They are aged 48 and 34 respectively. Mrs H is the mother of six children: A, who was born on 5 August 1997 and is 14; B, who was born on 16 March 1999 and is 13; C, who was born on 15 October 2002 and is nine; D, who was born on 16 February 2006 and is six; E, who was born on 5 May 2009 and is three; and F, who was born on 29 March 2011 and is one. Mr H is the father of C, D, E and F. The father of A never lived with Mrs H (Miss S, as she then was) and has never had contact with that child. The father of B lived in family with Miss S until they separated in 2001. Mr H who was then living in Middlesbrough and had three children by previous relationships, was Miss S's employer at the time of the separation. He helped Miss S to find accommodation for herself and her children A and B in Middlesbrough. In about 2002 they formed a relationship. They were married in 2008.

7. Mr H spent a period from about 1989 to 1994 or 1995 living in the United States. He and his then partner had a daughter J, who was born in about 1986. When she was aged 6 and they were living in Arkansas she made disclosures to a

school teacher which indicated that she had been a victim of sexual abuse by Mr H. This led to a police investigation and she was taken into care. Mr H left Arkansas and moved to Oklahoma where he could not be prosecuted for offences said to have occurred in Arkansas. But he remained in contact with J's mother, with whom he devised a plan for J to be returned to live with them. She persuaded the authorities to return J to her sole care, and then took the child with her to Oklahoma so that she could resume her relationship with Mr H. Following their return to the United Kingdom that relationship came to an end. Mr H formed a relationship with someone else by whom he had a son. While he was living in that family he learned that J had again been taken into care. But he took no steps to offer her a home with him in this new relationship.

8. After the birth of C, who was his first child with Mrs H, J's allegation that she had been sexually abused by Mr H when they were living in Arkansas came to the notice of the local authority in Middlesbrough. It brought proceedings against him under the Children Act 1989 in the Family Division of the High Court for his contact with Miss S's children to be terminated. Mr H responded by mounting an attack on the local authority's email system which led to the taking out of an injunction against him. In a judgment which was delivered on 30 January 2004 His Honour Judge Bryant, sitting as a judge of the High Court, found that Mr H had sexually abused J on a number of occasions in Arkansas and Texas in 1993 and 1994. He said that he was satisfied that Mr H remained a real and continuing danger to young girls, and continued the proceedings so that Miss S's position in relation to his findings could be ascertained. She accepted Judge Bryant's findings, and on 6 September 2004 he made an order against Mr H that he was to have no contact whatsoever with Miss S's children A, B and C. Regrettably, his order was ignored entirely by both Mr H and Miss S.

9. On 23 March 2005 search warrants were granted by Teesside Magistrates' Court under the Firearms Act 1968 in connection with an investigation into Mr H ordering a handgun through the internet. They were executed at a business address in Stockton-on-Tees and at residential addresses in Middlesbrough. Two handguns were recovered as well as documents, computers and bank records which contained information relating to the sale of chemicals through a website whose address was "kno3.com". The chemicals included red phosphorus and iodine. The information showed that red phosphorus and iodine had been sold to customers around the world including about 400 customers in the United States and that the appellants were aware that it was illegal to sell these substances in that country.

10. In April 2005 the appellants left Middlesbrough and moved with the three children to Scotland where they have remained ever since. Mrs H has relatives in the Bonnybridge area. On 21 June 2006 further search warrants were granted by Teesside Magistrates' Court. On 23 June 2006 they were backed by a sheriff at Falkirk Sheriff Court. They were executed on the same day at a business address in

Grangemouth and at a residential address nearby. A quantity of red phosphorus and iodine was recovered, as well as documents, computers and bank records indicating that the appellants were still trading in these substances. They were arrested but not at that stage detained in custody.

11. Following a separate investigation which had been conducted by authorities in the United States over the same period, an indictment was filed in the United States District Court for the District of Arizona on 27 September 2006 charging the appellants with various offences relating to the importation into that country and the distribution there of red phosphorus and iodine. This led to the request that they be extradited to the United States so that they could face trial in that court. Warrants for the appellants' arrest were issued in the United States on 28 September 2006.

12. On 31 January 2007 the proceedings for the appellants' extradition first came before the sheriff and the appellants were remanded in custody. They both were released on bail after seven months in custody on 31 August 2007. Mr H's bail order was revoked on 21 April 2011 following his failure to attend a hearing of his appeal in the High Court of Justiciary. A warrant was issued for his arrest and he was returned to custody on 26 April 2011. Mrs H was again remanded in custody on 29 July 2011 when the High Court of Justiciary refused the appellants' appeals. She was released on bail on 12 August 2011, but Mr H remains in custody.

13. Initially, following her release, Mrs H visited Mr H in prison with all six children. The number of visits then diminished and only the four younger children regularly go to the prison with her. The two elder children are reluctant to take part in these visits. Within a few weeks of her release from custody Mrs H decided that she did not want her relationship with Mr H to continue, and their relationship has broken down. The children were placed on the child protection register in July 2009 as a result of allegations of sexual abuse against Mr H by the nine year old daughter of a neighbour. They were removed from the register after a case hearing on 13 December 2011. But this was on the basis that they would be restored to it if Mr H were to be released from custody and to resume contact with the family.

The extradition request

14. On 3 November 2006, by Diplomatic Note No 078, the United States requested the extradition of the appellants in accordance with article VIII of the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America of 8 June 1972 (Cmnd 6723), as amended by the Supplementary Treaty of 25 June

1985. A new treaty, the Extradition Treaty of 2003 (Cm 5821) came into force on 26 April 2007. But as the extradition documents in this case were submitted before that date the new treaty does not apply to it.

15. As is well known, the 1972 Treaty imposed mutual obligations on each party to extradite in respect of offences which carry a sentence of at least 12 months imprisonment in each jurisdiction. These obligations are however subject to specified exceptions. Among them is article V(2), which provides that extradition may be refused on any ground which is specified by the law of the requested party. It follows that the United Kingdom will not be in breach of its treaty obligations if, by reason of section 87 of the 2003 Act or section 57(2) of the Scotland Act 1998, extradition is refused on the ground that to extradite the person whose extradition is requested would be incompatible with any of the Convention rights.

16. The documents submitted in support of the request included a copy of the indictment of the Grand Jury of the United States District Court for the District of Arizona dated 27 September 2006 and warrants for the arrest of the appellants. 82 counts are specified in the indictment. The first is a count of conspiracy in the following terms:

> "Beginning on a date unknown to the Grand Jury but no later than August of 2004, continuing through at least September of 2006, in the District of Arizona, and elsewhere, defendants [the appellants] did knowingly and intentionally conspire and agree with each other and with others known and unknown to the Grand Jury, to commit offenses against the United States including the following:
>
> a. to knowingly and intentionally distribute a listed chemical, specifically Red Phosphorus, knowing and having reasonable cause to believe it will be used to manufacture a controlled substance, in violation of Title 21 United States Code, Sections 841(c) (2);
>
> b. to knowingly and intentionally import and distribute a chemical, specifically Red Phosphorus, which may be used to manufacture a controlled substance, knowing and having reasonable cause to believe that it will be used to manufacture a controlled substance in violation of the Controlled Substances Act and the Controlled Substances Import and Export Act, in violation of Title 21 United States Code, Sections 843(a)(7); and

> c. to knowingly and intentionally distribute a List I chemical, specifically Red Phosphorus, without the registration required by the Controlled Substances Act, in violation of Title 21 United States Code, Section 843(a)(9)."

17. The indictment then gives details of the manner and means of the conspiracy. It alleges that the appellants are the owners and founders of an internet business which operated under various names but is referred to in the indictment as "KN03". At all relevant times they operated a website through which their business solicited customers around the world, including customers in the United States, who were seeking to purchase chemicals. Among the chemicals that they sold were red phosphorus and iodine. It is alleged that the appellants knew that these chemicals could be used to manufacture methamphetamine. This is a central nervous system stimulant drug which has a high potential for abuse. At the relevant time it was listed in the United Kingdom under the name methylamphetamine as a class B drug for the purposes of the Misuse of Drugs Act 1971. It was re-classified as a class A drug by the Misuse of Drugs Act 1971 (Amendment) Order 2006 (SI 2006/3331). The indictment states that the website advertised that it offered "discreet delivery" and that customers often asked for discreet packaging in the comments which they submitted along with their orders for chemicals. It also states that KN03 shipped orders to its customers with incorrect and misleading labelling as to the contents being sent. This included labelling on red phosphorus indicating that it was "red metal for iron works" and labelling on iodine indicating that it was "for medical use".

18. The indictment states that in addition to requests for discreet packaging KN03 received other emails alerting the appellants to the fact that the chemicals sold were being used to manufacture methamphetamine. A website giving a recipe for manufacturing methamphetamine from red phosphorus and iodine was found saved on a KN03 computer. Between August 2004 and August 2006 KN03 sold 296 kg of red phosphorus and 44 kg of iodine to customers in the United States, including customers in Arizona. Numerous examples are given of persons who manufactured methamphetamine in Arizona and ordered chemicals from KN03. At least 70 methamphetamine manufacturing locations are said to have been found in the United States which were supplied with chemicals by KN03. KN03 is said to have received approximately $132,922 between August 2004 and August 2006 from customers in the United States purchasing red phosphorus and iodine.

19. Counts 2 to 17 allege the unlawful distribution by the appellants of red phosphorus knowing and having reasonable cause to believe that it would be used to manufacture a controlled substance in violation of specified provisions of the United States Code. Details are given of 16 specific supplies to customers in Arizona. Counts 18 to 33 allege the unlawful distribution and importation of red phosphorus knowing and having reasonable cause to believe that it would be used

to manufacture a controlled substance in violation of another group of specified provisions of the United States Code, in relation to which details are given of the same 16 supplies. Counts 34 to 49 are counts of the distribution of red phosphorus without the required registration. Counts 50 to 65 allege the unlawful use of a communication facility, specifically the internet and United States mail, in committing the felony constituted by the unlawful distribution of red phosphorus to the same 16 customers in Arizona. Counts 66 to 81 are counts of importing red phosphorus into the United States without the required registration. Count 82 is a count of conspiracy to import red phosphorus into the United States without the required registration in violation of the relevant provisions of the United States Code.

20. In an affidavit sworn on 30 October 2006 which was submitted in support of the extradition request Mary Beth Pfister, Assistant US Attorney for the District of Arizona, gave this explanation of the general nature of the evidence to be relied on by the prosecutor:

> "The evidence the government will use to prove all of the allegations contained in the indictment against [Mr H] and [Mrs H] will include the incriminating computer records recovered from KN03 including emails, the admissions by [Mr H] and [Mrs H] regarding their involvement in the operation, the false and misleading statements made on packaging of KN03 products sent to the United States, the undercover sales made to the United States authorities, the fact that KN03 continued to sell red phosphorus to customers in the United States even after being advised that the sales were illegal and after being advised that the products were being used for the manufacture of methamphetamine, and the evidence that KN03 customers were operating clandestine methamphetamine laboratories."

21. The sheriff held that all the counts in the indictment were extradition offences. The High Court of Justiciary held that the conduct alleged in relation to paragraph 12(c) of count 1 and counts 34 to 82 would not constitute an offence under the law of Scotland. It allowed the appellants' appeal against the sheriff's decision to that extent, and in relation to these offences only ordered the appellants' discharge and quashed the orders for their extradition with respect to them. The appeal against the remaining charges was refused.

22. The number of counts listed in the indictment might suggest, at first sight, that the allegation is of a course of wrongful conduct on a grand scale. As the foregoing summary indicates, its length is attributable to the separate listing of each of the various provisions of the United States Code said to have been violated in relation to each of the specific transactions that have been identified.

Nevertheless the allegation is of a sustained and deliberate course of unlawful conduct, during which the appellants are said have sold 296 kg of red phosphorus and 44 kg of iodine to about 400 customers in the United States between August 2004 and August 2006 in return for which they are said to have received approximately $132,922. The High Court of Justiciary noted in para 96 of its judgment that the conduct was said to have persisted even after the execution of the search warrants in England and an undertaking to desist. The appellants are said to have been well aware that these products were being used for the clandestine manufacture of methamphetamine and for this reason to have gone to some lengths to conceal the nature of their activities. The potential for harm to which their alleged conduct is said to have contributed is very great, due to the addictive nature of that drug and its potential for abuse.

23. There is no doubt, even after the subtraction from the indictment of counts 12(c) and 34 to 82 by the High Court of Justiciary, that the offences that have been alleged against the appellants are very serious. All the offences are punishable in the United States, the lowest penalty being four years' imprisonment and the maximum 20 years. Conduct of this kind would attract a term of imprisonment well in excess of the minimum period 12 months referred to in section 137(2)(b) of the 2003 Act were the appellants to be prosecuted in Scotland.

Is the appeal competent?

24. As has already been noted in para 4 above, there is no appeal to this court from a decision of the High Court of Justiciary under section 103 of the 2003 Act. Section 114(13) provides that the provisions of section 114 relating to appeals to this court from a decision of the High Court do not apply to Scotland. Section 116, read together with section 141(1), provides that a decision of the sheriff or the Scottish Ministers under Part 2 may be questioned in legal proceedings only by means of an appeal under that Part. Section 34 makes similar provision in relation to a decision of the sheriff under Part 1 of the 2003 Act. On the other hand, paragraph 13 of Schedule 6 to the Scotland Act 1998 provides a right of appeal to this court against the determination of a devolution issue by a court of two or more judges of the High Court of Justiciary, with the leave of the court from which the appeal lies or, failing such permission, with leave of the Supreme Court. This is a right of appeal which is separate and distinct from that provided by the 2003 Act.

25. The question is whether the right of appeal to this court under paragraph 13 of Schedule 6 to the Scotland Act can survive the clear and unequivocal direction in section 116 of the 2003 Act that a decision of the sheriff may be questioned only by means of an appeal under Part 2 of that Act and the equivalent direction in section 34 with regard to proceedings under Part 1 which exclude appeals to the Supreme Court against decisions under those Parts of the Act by the High Court of

Justiciary. Although no-one in these proceedings submits that it cannot and that the Supreme Court does not have jurisdiction to determine this appeal, the question whether it does have jurisdiction is obviously a matter of general public importance. We were invited to consider it as a preliminary issue in the light of written submissions provided by counsel for the Scottish Ministers and the Lord Advocate.

26. Among the issues which the sheriff must consider in his capacity as a judge under Part 2 of the 2003 Act is whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998: section 87(1). The question whether for the Scottish Ministers to order the person to be extradited to the territory to which his extradition is requested under section 93 of the 2003 Act would be incompatible with his Convention rights for the purposes of the Scotland Act 1998 is just another way of putting the same question. Section 57(2) of the Scotland Act provides that a member of the Scottish Executive has no power to do any act so far as the act is incompatible with any of the Convention rights. That provision is of general application, irrespective of the source of the power that is being exercised. The functions which sections 93 and 141(1) of the 2003 Act confer on the Scottish Ministers are subject to the constraints of section 57(2) of the Scotland Act in just the same way as any other function which they may be called upon to exercise. There can be no doubt that the question whether an order for a person's extradition by the Scottish Ministers would be incompatible with any of the Convention rights falls within the definition of a devolution issue in paragraph 1(d) of Schedule 6 to the Scotland Act and that, as such, it is open to determination by the court under the provisions of that Schedule. But under the system that the 2003 Act lays down the question whether the person's extradition would be compatible with the Convention rights must be determined by the court before the question whether an order for the person's extradition should be made can come before the Scottish Ministers.

27. There are two aspects of the system that Part 2 of the 2003 Act lays down that might be taken as suggesting that the right of appeal in relation to a devolution issue under the Scotland Act has been excluded. The first is to be found in section 118(2), which applies where the effect of the decision of the relevant court on an appeal is that the person is to be extradited to a category 2 territory. A similar provision relating to the system in Part 1 is to be found in section 35. Section 118(2) provides that the person must be extradited to the category 2 territory

> "before the end of the required period, which is 28 days starting with –
>
> the day on which the decision of the relevant court on the appeal becomes final, or

the day on which the proceedings on the appeal are discontinued."

The relevant court in the application of this provision to Scotland is the High Court of Justiciary: section 118(8)(a). The remaining provisions of this section, which make detailed provisions as to when the decision becomes final in the event of an appeal to the Supreme Court, do not apply to Scotland: section 118(8)(b). There is no provision which tells us when the 28 day period is to start should there be an appeal against the High Court's determination of a devolution issue under the Scotland Act. The problem could perhaps be cured if the Supreme Court were to remit the case to the High Court to pronounce a final order in the event that it decides that the appeal to it should be dismissed. This would involve reading the words "becomes final" in section 118(2)(a) as embracing this possibility. But this solution is not without difficulty. In contrast to the situation contemplated by the remaining provisions of section 118, no specific time limit is provided either by the Scotland Act or by an Act of Adjournal for applications for leave to appeal to this court under paragraph 13 of Schedule 6.

28. The second aspect is to be found in section 115A(1)-(4), which was inserted by the Police and Justice Act 2006, section 42 and Schedule 13, paragraph 8(13). Its Part 1 equivalent is to be found in section 33A, inserted by paragraph 8(5) of that Schedule. Subsections (1)-(4) of section 115A make provision for a person to be remanded in custody where that person's discharge has been ordered on appeal but the court is informed immediately on behalf of the category 2 territory of an intention to appeal to the Supreme Court. Those provisions do not apply to Scotland: section 115A(5). There is no equivalent provision which enables the person to be detained in custody should the Lord Advocate wish to appeal to the Supreme Court on behalf of the category 2 territory against the determination of a devolution issue in that person's favour. This is a significant omission. It puts the Lord Advocate, should he wish to appeal in that event, at a significant disadvantage in comparison with the authorities in the other parts of the United Kingdom.

29. It is reasonably clear that, when the 2003 Act and the Police and Justice Act 2006 which amended it were enacted, Parliament did not contemplate that decisions of the High Court of Justiciary in an appeal under section 87(1) against the sheriff's determination of the question whether the person's extradition would be compatible with the Convention rights would be appealable under the Scotland Act. But this does not lead inevitably to the conclusion that an appeal to the Supreme Court under that Act against the determination of a devolution issue by the High Court as part of an appeal under section 103 of the 2003 Act is incompetent. There are powerful considerations the other way.

30. First, there is the fact that the effect of the Scotland Act is that the Scottish Ministers derive their existence only from that Act. As has been repeatedly pointed out by the court, they have no power to act other than in a way that is consistent with section 57(2) of that Act: see, eg, *R v HM Advocate* [2002] UKPC D3, 2003 SC (PC) 21, [2004] 1 AC 462, paras 46, 129; *McGowan v B* [2011] UKSC 54, 2011 SLT 37, [2011] 1 WLR 3121, para 6. The functions that the 2003 Act has conferred on the Scottish Ministers must be seen in that light. It would perhaps have been open to Parliament to override the provisions of section 57(2) so as to confer on them more ample powers than that subsection would permit in the exercise of their functions under the 2003 Act. But in my opinion only an express provision to that effect could be held to lead to such a result. This is because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act. This in itself must be held to render it incapable of being altered otherwise than by an express enactment. Its provisions cannot be regarded as vulnerable to alteration by implication from some other enactment in which an intention to alter the Scotland Act is not set forth expressly on the face of the statute. In any event, the courts presume that Parliament does not intend an implied repeal: *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388, per Arden LJ at p 405. In modern times, when standards of parliamentary draftsmanship are high, the presumption against implied repeal is strong: *Nwogbe v Nwogbe* [2000] 2 FLR 744, para 19, per Walker LJ. And it is even stronger the more weighty the enactment that is said to have been impliedly repealed: *Bennion on Statutory Interpretation*, 5th ed (2008), p 305.

31. The provisions of Schedule 6 which enable devolution issues to be brought to the Supreme Court on appeal go hand in hand with the constraints which the Scotland Act imposes on the powers of the Scottish Ministers. They are as much part of the constitutional settlement as the constraints themselves. They were included in the Scotland Act as a means of ensuring that the rule of law and the protection afforded by the Convention rights is respected across the entire range of the activities of the Scottish Government. It permits of no exceptions, and the right of appeal to the Supreme Court under paragraph 13 of Schedule 6 is part of that mechanism. The fact that this right has not been expressly excluded by the 2003 Act is a powerful reason for holding that it is unaffected by sections 34 and 116.

32. Then there is the fact that it has been held, in the context of proceedings under the 2003 Act in England and Wales, that sections 34 and 116 apply only to decisions in respect of which a right of appeal lies under the 2003 Act. As was pointed out in *R (Hilali) v Governor of Whitemoor Prison* [2008] UKHL 3, [2008] AC 805, para 21, one of the features of the provisions about appeals in the 2003 Act is that not every decision that the judge is required to take can be appealed under the statute: see *R (Asliturk) v City of Westminster Magistrates' Court* [2010] EWHC 2148, [2010] 1 WLR 1139; *R (Nikonovs) v Governor of Brixton Prison* [2005] EWHC 2405 (Admin), [2006] 1 WLR 1518, para 18 where Scott Baker LJ

said that it would require the strongest words in a provision such as section 34 to remove the ancient remedy of habeas corpus where the applicant was able to satisfy the court that he had not been brought before a judge as soon as practicable for the purposes of section 4(5), a decision under which is not appealable. This adds force to the point that, although sections 34 and 116 of the 2003 Act provide that a decision of a judge under the relevant Part of the Act may be questioned by means of an appeal under that Part, they have no application to the system for the determination of devolution issues that the Scotland Act lays down because they do not exclude resort to it expressly. The system under which the present appeal has been brought before this court lies outside the contemplation of those sections of the 2003 Act.

33. The competency of devolution minutes in extradition proceedings was considered in *Goatley v HM Advocate* [2006] HCJAC 55, 2008 JC 1 and *La Torre v HM Advocate* [2006] HCJAC 56, 2008 JC 23. In both cases the Lord Advocate conceded that devolution minutes were competent in proceedings under the 2003 Act as the functions carried out by the Lord Advocate and the Scottish Ministers under Part 2 of the 2003 Act were acts that they were performing as members of the Scottish Executive within the meaning of section 57(2) of the Scotland Act. This concession was approved by the High Court: *Goatley*, paras 13 and 14; *La Torre* paras 46 and 47. It seems to me, with respect, that it was properly made and the High Court was right to give the concession its approval. If an extradition were to be incompatible with the Convention rights of the person to be extradited the Scottish Ministers would be carrying out an act which they had no power to do. A challenge to their proposed exercise of that function by means of a devolution minute is a parallel remedy to that afforded by section 87(1) of the 2003 Act. The issue which the sheriff and, in its turn the High Court, had to decide under that subsection was just as much a devolution issue as it was an issue arising under the 2003 Act. The effect of the statutes is that the appellants are entitled to exercise the right of appeal which paragraph 13 of Schedule 6 to the Scotland Act provides for, notwithstanding the fact that there is no appeal to this Court against the determination of the High Court under the 2003 Act.

34. For these reasons I would hold that the appeal to this court against the determination of the devolution issue for which the High Court gave permission is not prohibited by section 116 of the 2003 Act and that it is competent. It is to be hoped that the difficulties that the operation of sections 115A and 118 and their equivalents in Part I of the 2003 Act may give rise to will be the subject of an early legislative solution by Parliament.

The proceedings below

35. On 15 January 2007 the Scottish Ministers issued a certificate under section 70 of the 2003 Act to the effect that the extradition request was valid. They sent it to the Sheriff Court, as they were required to do by subsection (9) of that section. On 16 January 2007 warrants were granted for the arrest of the appellants. They appeared before the sheriff on 31 January 2007 and were remanded in custody. They remained in custody until they were released on bail in August 2007. When they were on remand their four children (E and F had not yet been born) were looked after by Mrs H's mother who had had regular contact with them up to that date. Other family members and friends of the family had individual children to stay with them from time to time.

36. The extradition hearing before the sheriff began on 16 November 2007. The children were not separately represented. It was suggested in the written case for Mrs H that it would have been appropriate for submissions to have been entertained on their behalf. But Mr Hugo Keith QC, who appeared for the Official Solicitor in *HH and PH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 which was heard together with the cases of Mr and Mrs H in this court, accepted that cases where this is needed will be rare. The court was also shown the product of inquiries made by the Crown Office's International Co-operation Unit through the European Judicial Network as to whether children are separately represented in extradition proceedings before the national courts in other Contracting States. The responses that were received indicate that the practice in almost every state is for the children not to be separately represented, although in Malta the parents can ask for the child to be represented. It was not suggested before the sheriff or in the High Court of Justiciary that separate representation was necessary in this case. The court should nevertheless be alive to the information that is needed for it to have regard to the best interests of the child as a primary consideration: *HH and PH*, para 86, per Lady Hale. The sheriff took the necessary steps in this case.

37. The hearing continued on dates in January and March, and the sheriff issued her judgment on 3 April 2008. In para 66 she said that she did not regard either of the appellants as credible or reliable witnesses. She rejected a submission by Mr H's counsel that she should disregard the judgment of Judge Bryant in the High Court in Middlesbrough. In her view it was relevant to the appellants' credibility and reliability and it was inconceivable that they were not aware of his injunction. In para 67 she said that she did not accept the picture that the appellants had sought to present of themselves and their children as totally united and alone without any support being available if the extradition request were to be granted. In para 68 she said that the bleak scenario of the four children of necessity being taken into care and housed separately and without being able to sustain their relationship with

their parents to the extent that it would be extinguished or irreparably damaged was not made out.

38. The sheriff provided her explanation for this assessment in the next two paragraphs. In para 69 she said that she accepted that Mrs H's mother was at times overwhelmed with the care of the children, who were naturally upset by the removal of their parents. The mother said that she would not be able to cope with caring for them again. But she did not say that she was not prepared to play any part in the children's care should the need arise, and in her past conduct she had shown great care and support for them. In para 70 the sheriff said that if Mrs H's mother did not feel able to care for them the local authority might require to accommodate them. In that situation it would look to find accommodation in the first instance within the children's wider family or close friends. If, as the evidence indicated, there were no friends or family willing or able to take care of the children the local authority would require to place the children in foster care. She accepted evidence from a social services resource team manager that it might prove difficult to find a placement for all the children in one family. But no permanent placement would be considered until the final outcome of any proceedings in the United States was known. She accepted the social workers' evidence that however the children were to be placed everything possible would be done to foster their relationship with one another and their parents. In para 76 she said that it seemed to her highly unlikely that Mrs H's mother would not participate in any efforts by the local authority to maintain those relationships.

39. The sheriff was referred to declarations by two witnesses from the United States which indicated that the United States authorities are committed to encouraging family visits in appropriate circumstances, to allowing visits beyond the confines and security of the prison and to allow family groups to visit where those members had travelled a long distance. She was also referred to the Council of Europe Convention on the Transfer of Sentenced Prisoners of 21 March 1983, Council of Europe Treaty Series No 112, which entered into force in the United States on 1 July 1985 and in the United Kingdom on 1 August 1985. She was told that in evaluating a request that a sentenced person should serve a sentence of imprisonment in the home country the United States authorities include consideration of the presence of close family members in the home country, the strength of their family ties and the likelihood of family reunification. In para 76 she said that the mechanisms operated by the United States authorities to maintain and assist in the fostering of family bonds would assist the appellants to maintain their bond with the children and the children to maintain their bonds with them, even if any such arrangements could not be regarded as ideal.

40. The sheriff's conclusion was, as she said in para 82 of her judgment, that the appellants' extradition would be compatible with their Convention rights. She answered the question in section 87(1) of the 2003 Act in the affirmative and sent

the case of each appellant to the Scottish Ministers for their decision under section 93 whether the appellants were to be extradited. On 29 May 2008 the Scottish Ministers ordered the appellants to be extradited to the requesting territory. Mr H appealed to the High Court of Justiciary under section 103 of the 2003 Act against the sheriff's decision and under section 108 against the order for his extradition by the Scottish Ministers. Mrs H appealed under section 103 against the sheriff's decision to send her case to the Scottish Ministers.

41. The appeals were set down for hearing on 4 to 6 March 2009. On 4 March 2009 the court was informed that those instructed for Mrs H had withdrawn from acting, and the hearing of her appeal was adjourned to a later date. The hearing of Mr H's appeal proceeded but it was not completed on 6 March so it was continued for hearing for four more days in May 2009. Mrs H's appeal was set down for that date also, but it had to be adjourned again having regard to the imminent birth of E, who was born on 5 May 2009. Investigations then had to be made into Mrs H's mental health. Following the completion of those investigations an application was made on Mrs H's behalf for her to be discharged under section 91 of the 2003 Act. The Lord Advocate submitted that the court had no jurisdiction to consider that matter so the case had to be continued again for a hearing on jurisdiction. Having held that it did have jurisdiction, the court heard evidence about Mrs H's mental condition and concluded that her contention that her mental condition was such that it would be unjust or oppressive for her to be extradited had not been established.

42. After various other procedural hearings a further application was made on Mrs H's behalf in June 2010 in which it was maintained that there had been a material deterioration in her health since the previous application had been considered. She had again become pregnant and had suffered a miscarriage in February 2010. This had been found to be a molar pregnancy which had required monitoring. A further hearing was fixed for 11 August 2010. The court was then informed that, despite advice that she should avoid pregnancy because of risks to her health, Mrs H had become pregnant again. The hearing fixed for that date was discharged. At a procedural hearing on 24 September 2010 the court was informed that Mr H had instructed new solicitors and counsel (his fourth set of representatives). On 7 December 2010 the court refused Mrs H's second application under section 91. Mrs H then again changed her representatives for the fifth time.

43. A continued hearing of the appeals proceeded on 10 January 2011. It had to be adjourned again on 14 January 2011 when Mr H told the court staff that Mrs H, who was by now seven months pregnant, had been taken to hospital. A further hearing was fixed for 19 April 2011, but it had to be adjourned to 21 April as the court was informed that Mr H had attempted suicide that morning by taking an overdose of paracetamol and had been taken to hospital. Mr H failed to attend

court on that date. A letter was produced from a general practitioner saying that, for unspecified reasons, he was unfit to attend court. For this and other reasons the hearing was adjourned to 26 April 2011, when the court was provided with a discharge letter prepared by a consultant psychiatrist who had examined Mr H on 20 April 2011 in Stirling Royal Infirmary. He said that when he saw Mr H that day he had been quite explicit about the fact that he wished to attract a psychiatric diagnosis, as was his wife, to avoid extradition to America. Mr H denied having said any such thing, but the court heard evidence from the consultant psychiatrist whom it found to be an entirely convincing witness. In para 26 of its opinion of 29 July 2011 (see para 44, below) the court said that the evidence relating to this episode supported its conclusion that Mr H was a devious and manipulative individual whose behaviour can be unpredictable and irresponsible.

44. The hearing of the appeals was concluded on 28 April 2011. Mr H, for whose arrest a warrant had been issued on 21 April 2011, was remanded in custody. The opinion of the court was delivered by Lord Reed on 29 July 2011: [2011] HCJAC 77. In para 99 he said that in the case of Mr H it appeared to it to be plain that his extradition could be justified under article 8(2). He was charged with very serious offences, and his case did not come close to meriting his discharge under section 87 of the 2003 Act. In para 101 he said that it had to be recognised that the family life of Mrs H and the children would inevitably be disrupted by her extradition. But he said that, applying the guidance in *Norris v Government of the United States of America (No 2)* [2010] 2 AC 487 and having regard to the seriousness of the offences charged, the court had come to the conclusion that Mrs H also was not entitled to be discharged under section 87. On 11 August 2011 the court gave leave to the appellants to appeal to the Supreme Court in respect of the devolution issues relating to article 8 that had arisen during its hearing of the appeal.

The reasoning of the High Court of Justiciary

45. As has just been noted, Lord Reed said in para 101 of his opinion that the court had applied the guidance in *Norris* in coming to its conclusion in the case of Mrs H: see paras 72-78. In para 79 he considered the decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166. Having done so, Lord Reed set out his understanding of the approach to be adopted in paras 80-81. In para 81 he said that it was important to note that *ZH* was concerned not with extradition but with deportation, and that the approach adopted to article 8 rights in extradition cases must be radically different from that adopted in deportation or expulsion cases. He referred to the following passage in the admissibility decision in *King v United Kingdom* (Application No 9742/07) (unreported) given 26 January 2010, para 29 where the Strasbourg court said:

> "Mindful of the importance of extradition arrangements between states in the fight against crime (and in particular crime with an international or cross-border dimension), the court considers that it will only be in exceptional circumstances than an applicant's private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition."

46. Summing up on this point at the end of para 80 of his opinion, Lord Reed said:

> "Since the factors which are generally of overriding importance in extradition cases are not present in deportation or expulsion cases, it follows that decisions on article 8 rights in cases of the latter kind are of no direct relevance in the context of extradition."

In para 81 he referred to passages in paras 15 and 51 of the judgment in *Norris*, in which Lord Phillips indicated that the distinction between extradition and deportation was fundamental to its reasoning. He also said that it was necessary to bear in mind that *Norris* was not referred to in the judgments in *ZH* nor was it cited in argument. He summarised the court's approach to *ZH* in these words:

> "Against that background, we are not persuaded that anything said in *ZH* was intended to modify or depart from what had been said in *Norris*, or indeed was said with extradition in mind. At the same time, in a case where it is necessary to determine whether the extradition of a person with dependent children is justified under article 8(2) of the Convention, the best interests of the children are naturally a primary consideration. As appears from *King v United Kingdom*, however, that consideration will be outweighed, in all but exceptional circumstances, by the public interest in the application of extradition arrangements."

47. We in this court have the great advantage of being able to develop our own thinking on the issues raised by these two cases, and I would not wish to be too critical of the way the High Court of Justiciary sought to reconcile them. Their task was not made easier by the fact that the focus in *Norris* was on the state of health of Mr and Mrs Norris and not on Mr Norris's relationship with his two sons, who were grown up, or with his three grandchildren. It was acknowledged that the impact of extradition on family life did not fall to be considered simply from the viewpoint of the extraditee, that the family unit had to be considered as a whole and that each family member had to be regarded as a victim: para 64, per Lord Phillips. But, on the facts of that case, it was only Mr and Mrs Norris who were

seen as the victims. The conclusions that can be drawn from *Norris* are set out by Lady Hale in *HH and PH v Deputy Prosecutor of the Italian Republic, Genoa*, para 8. *ZH* on the other hand was entirely different case on its own facts and, as it was concerned with immigration control and not extradition, nothing that was said in *Norris* was relevant to how it should be decided. So *Norris* was not referred to in the judgments, nor was it cited in argument.

48. That does not mean, however, that nothing that was said in *ZH* is relevant to how issues about the rights of children should be dealt with in the context of extradition. On the contrary, the reasoning in that case can have a very real and important part to play in the extradition context too where those affected by a request for extradition include the children of the persons sought to be extradited. The error in the court's reasoning was to see these two cases as dealing with entirely different things. While that was true when the facts in *ZH's* case were being considered, it would not have been true if *ZH* had come first and the family unit to which it was necessary to have regard in *Norris* had included children, as it does in the present case. As I said in *Norris*, para 89, I do not think that there are any grounds for treating extradition cases as falling into a special category which diminishes the need to examine carefully the way the process will interfere with the individual's right to respect for his family life. The need to do this here is just as great as it was in *ZH*, although the conclusion that is likely to be reached may not be the same.

49. I cannot agree therefore with the proposition that the approach adopted to article 8 rights in extradition cases must be radically different from that adopted in deportation or expulsion cases. The public interest in giving effect to a request for extradition is a constant factor in cases of that kind. Great weight will always have to be given to it, and the more serious the offence the greater will be that weight. The public interest in immigration control lacks the treaty base which is at the heart of the extradition process. But, the question, so far as the article 8 right is concerned, is the same in both cases. How is one to balance two powerful and competing interests? In *Norris*, para 91, I said that the question was whether the article 8 right carries enough weight to overcome the public interest in giving effect to the request or in maintaining a proper and efficient system of extradition. I agree with Lord Wilson that the significance of the way one puts the question may be more theoretical than practical: *R (HH and PH) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, para 152. But I think that it would be more accurate where the family life of children is involved, as the best interests of children are a primary consideration, to put the question the other way round as I did in *ZH*, para 44: is the article 8 right outweighed by the strength of any other considerations?

The article 8 rights in this case

50. As Ross D Parke and K Alison Clarke-Stewart declared in the opening sentence of their paper "Effects of Parental Incarceration on Young Children" (December 2001), for imprisoned mothers one of the greatest punishments that incarceration carries with it is separation from their children. The same point can be put the other way round. One of its greatest effects is to punish the children too. For those members of the family who were living together before the incarceration, their patterns of contact with each other will be severely disrupted. This may happen at a crucial stage of the children's development, when the damage done to their well-being and development may be irreparable. These effects are likely to be even greater where the parent is to be extradited for trial and likely incarceration in another country. As Lady Hale said in *ZH*, paras 25-26, article 9 of the UNCRC draws a distinction between separation of children from their parents for reasons connected with their upbringing and separation of parents from their children for deportation, detention or imprisonment. But even in decisions of the latter kind, the best interests of the child must be a primary consideration.

51. The intellectual exercise which this principle requires is not to be seen as dictated to in a mechanistic way without regard to the context. In *ZH*, para 44, I said that the starting point was to assess whether the children's best interests were outweighed by the strength of any other considerations. But I agree with Lord Judge that this does not require the decision-taker always to examine the interests of the children at the very beginning of the exercise: *R (HH and PH) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, para 124. It does not, as Mr Gill QC pointed out in his helpful note for the Coram Children's Legal Centre, impose a straitjacket. What it does do, by encouraging a temporal approach, of the kind described by Lady Hale in her judgment in that case at para 33, is ensure that the best interests principle will not be seen as having a reduced importance when there are other important compelling considerations which, on the particular facts of the case, must be respected. The place where the best interests and well-being of any children takes in the list of factors which the Strasbourg court set out in *AA v United Kingdom* (Application No 8000/08) (unreported) given 20 September 2011, para 56, supports this approach. As Lady Hale said in *ZH*, para 26, the strength of those other considerations may outweigh the best interests of the children, provided that those other considerations are not treated as inherently more significant than they are. So it is important to have a clear idea of their circumstances and of what is in their best interests before one asks oneself whether those interests are outweighed by the force of any other consideration. But to begin with the whole exercise must be placed into its proper context.

52. The court was shown an affidavit by William Bryan III, an assistant United States Attorney for the District of Arizona, in which he stated that it is impossible to state with precision how long it would take to bring the appellants to trial following their extradition. While they are awaiting trial the appellants may be released on conditions, but a more realistic assessment is that they will be detained in custody until and throughout the trial. Mail and telephone calls would be permitted during this period, provided those imprisoned have sufficient funds for this. But direct face-to-face contact with visitors would not be possible. The trial itself can be expected to last about two to four weeks. In view of the dangers involved in the manufacture of methamphetamine and the harm that its use can give rise to, the appellants' conviction would be likely to attract very long sentences.

53. The effect of those sentences may be mitigated by the fact that arrangements exist under which the appellants might thereafter be permitted to serve part of their sentences in Scotland under the European Convention on the Transfer of Sentenced Prisoners of 21 March 1983: see para 39, above. But there is no certainty that permission would be given in this case, and is not possible to predict when any such arrangements would be likely to be made even if they are agreed to. The prospect has to be faced that the appellants are likely to be kept apart from their children, and their children apart from them and perhaps from each other, for a very long time.

54. Where do the best interests of the children stand in relation to Mr H? He has been in custody since 26 April 2011. Contact has been maintained by means of prison visits, but the two elder children have made it clear that they no longer wish these visits to continue. Mrs H regards her relationship with Mr H as at an end, so the prospect of his ever living together with her and the children as a family seems remote. Although no regard was paid to it by either of them, one cannot ignore the fact that on 6 September 2004 Judge Bryant ordered that, in the light of his abuse of his daughter J, Mr H was to have no contact whatsoever with Mrs H's three elder children who are all girls. D and E are also girls, and all six children were placed on the child protection register in July 2009 as a result of another allegation of sexual abuse by Mr H, this time of a neighbour's daughter. They were removed from it on 13 December 2011, but they would all be placed on it again if Mr H were to resume contact with the family on his release from custody.

55. The children's family relationship with Mr H has effectively been brought to an end by these events, at least for the time being. The prospect of their ever resuming family life together is remote. The argument that it would be contrary to their best interests for him to be extradited is, at best, very weak. As against that, the offences of which he is accused are very serious and the treaty obligation that requires effect to be given to the request is compelling. Lord Reed said in para 99 that Mr H's case did not come close to meriting his discharge under section 87(2).

I agree with that assessment, and the devolution issue that Mr H has raised falls to be answered in the same way. I would refuse his appeal.

56. Mrs H's case is, as Lord Reed said in para 100 of his opinion, more difficult. But, as he explained in para 101, the court based its decision in her case exclusively upon the law as laid down in *Norris*. The guidance that was to be derived from *ZH* was ignored. For the reasons already given (see paras 47-49, above), I consider that this was a misdirection. As it was on this basis that the court reached a clear conclusion that, having regard to the seriousness of the offences charged, she was not entitled to be discharged under section 87 of the 2003 Act, it is necessary to look at her case more closely to see whether the equivalent conclusion with regard to the Scottish Ministers' powers under the Scotland Act can be regarded as justified.

57. There is no doubt where the children's best interests lie. Their best interests must be to continue to live with their mother. They will be deprived of her care and guidance if she is taken away from them, and it seems likely that the long term effects of a prolonged separation of the magnitude that is in prospect in this case will be profound. She has, of course, been separated from them before. She has already spent two periods in remand in connection with this case, from 31 January 2007 to 31 August 2007 and from 29 July 2011 to 12 August 2011. On both occasions her mother, with the help of other family members and friends, was able to keep the family together. Whether this will be possible if Mrs H were to be extradited is quite uncertain. The sheriff does not seem to have been unduly troubled on this point: see paras 37-38, above. But there must be a risk that the children will be taken into care and, if that happens, that they will no longer be able to live together. Resuming family life together after a prolonged separation is likely to be very difficult. The gravity of the situation is compounded by the fact that the children are, for all practical purposes, now fatherless.

58. On the other hand there is no escape from the fact that these are criminal proceedings and that the crimes alleged, which were persisted in over a substantial period, are very serious. The interests of justice must be given effect to. The treaty obligation requires that Mrs H be sent for trial in the United States, and it points to the conclusion that it is in that forum that her participation in the alleged crimes must be determined. It is well established that extradition may amount to a justified interference under article 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: *Launder v United Kingdom* (1997) 25 EHRR CD67, para 3; *Aronica v Germany* (Application No 72032/01) (unreported) given 18 April 2002; *King v United Kingdom*, para 29.

59. The treaty obligation points to the conclusion too that if there are grounds for leniency, or for mitigation of sentence on the grounds of her family circumstances, it is for the authorities in the United States, not for this court, to make that assessment. The Strasbourg court 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: *King v United Kingdom*, para 29; *Babar Ahmad v United Kingdom* (2010) 51 EHRR SE97, para 172. In *Nunez v Norway* (Application No 55597/09) (unreported) given 28 June 2011, the article 8 right was sufficient to tip the balance in a immigration case. But the fact that the court has not yet decided any extradition case in favour of the applicant, even where those to be extradited are the parents of young children, indicates how high the bar against refusing a request for extradition has been set.

60. The best interests of the children do however suggest that the High Court of Justiciary was wrong to hold, as Lord Reed indicated in para 101 of his opinion, that it was unnecessary to consider the possibility of a prosecution in this country. It will not be necessary to do this in every case. But I would make an exception here. The extradition request extends to both parents, and there are six children, four of whom are under the age of ten. The best interests of the children suggest that we should be satisfied that the interests of justice cannot be served equally well by prosecuting the parents in this country. It is to that issue that I now turn.

Prosecution in this country

61. It was submitted for Mr H that, although there is no reported case where this argument has been successful, the logical conclusion is that, where a domestic prosecution is an option, it ought to be the preferred one and that where the best interests of children were involved the obligation to adopt the least onerous means of meeting the legitimate aim should be adhered to. The same points were made on behalf of Mrs H too. Reference was made to *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, para 121 where Laws LJ said that there might be an instance where such a possibility might tip the balance of judgment in favour of a conclusion that a person's extradition would amount to a disproportionate interference with his article 8 rights and that this had to be accepted if section 87 of the 2003 Act was to constitute effective protection of the Convention guarantees.

62. In *King v United Kingdom*, para 29, the Strasbourg court observed that considerations as to whether prosecution exists as an alternative may have a bearing on whether the extradition would be in violation of one of the rights guaranteed by the Convention. But in *Babar Ahmad v United Kingdom*, para 175 the Court, recalling that there was no right in the Convention not to be extradited

and that, by implication, there was no right to be prosecuted in a particular jurisdiction, said that it was not for the Court to adjudicate on the natural forum for prosecution. Its only task was to determine whether that extradition would be compatible with the applicant's Convention rights. In *Bermingham*, para 126 Laws LJ said that he wished to underline the observations of Lord Hardie, sitting in the Outer House, in *Wright v The Scottish Ministers* 2004 SLT 823, para 28 where he said:

> "Extradition does not and should not depend upon the ability or otherwise of the requested state to undertake its own investigations with a view to prosecuting the case within its own jurisdiction. Such an approach would involve unnecessary duplication of effort, would result in additional delays in the prosecution of suspected criminals and would have an adverse effect upon international relations and international co-operation in the prosecution of serious crime."

63. When *Wright* reached the Inner House the extreme submission that extradition would be proportionate only in circumstances where it was demonstrated that a prosecution in the jurisdiction where the subject lay would be impossible was, not surprisingly, rejected: [2005] CSIH 40, 2005 1 SC 453. The Extra Division also said in para 67 that it found itself in complete agreement with the observations of the Lord Ordinary. In the *Bermingham* case the Divisional Court had little difficulty in rejecting the argument that the defendants should be tried in this country as the case against them had very substantial connections with the United States and was perfectly properly triable there: para 125. In *King* too the Strasbourg court was satisfied that the United Kingdom authorities had given convincing reasons as to why they regarded it as appropriate for any prosecution to take place in Australia, not the least that the applicant's co-accused had all been tried there.

64. In *Norris v Government of the United States of America (No 2)* [2010] 2 AC 487, para 67, having noted in para 66 that there had recently been a string of cases in which the extraditee had argued that he ought to be prosecuted in this jurisdiction of which *Bermingham* was one, Lord Phillips said:

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

In a postscript to his judgment which he wrote in the light of the admissibility decision in *King* he said that he remained of the view that rarely, if ever, was the possibility of prosecution as an alternative to extradition likely in practice to tilt the scales against extradition: para 86. These remarks had the unanimous support of all the other members of the court.

65. On the other hand cases where both parents of young children are at risk of being extradited may be regarded as being of an exceptional character, so as to raise the need to consider the possibility of a prosecution in this country a bit higher than the bar which the observations in *Norris* have set for it. The issue remains one of proportionality. The more compelling the interests of the children the more important it will be for the alternatives to extradition, if there are any, to be carefully examined and brought into the balance to see if they carry any weight. This is not to diminish the importance to be given to this country's treaty obligations. Rather it is to recognise that in cases involving the separation of parents from young children there is another powerful factor which is likely to make the scales more finely balanced than they would be if the children were not there.

66. In its Review of the United Kingdom's Extradition Arrangements, 30 September 2011, para 6.17 the Review Panel chaired by Sir Scott Baker said, with regard to the forum bars in sections 19B and 83A inserted into Parts 1 and 2 of the 2003 Act by paragraphs 4(2) and 5(2) of Schedule 13 to the Police and Justice Act 2006 which has not yet been brought into force, that in its view their effect is that in any case where the forum was raised there would be no alternative to the judge conducting a detailed analysis of all relevant circumstances.

67. There is no statutory requirement to go that far in this case, and Mr Wolffe QC for the Lord Advocate said that the case had not been investigated with a view to prosecution in Scotland. But we do not lack information about the view that was taken about the possibility of prosecution in England. Advice on the jurisdictional issues that had arisen in connection with the investigation of the appellants' activities was given by the Crown Prosecution Service in 2006 following their move to Scotland earlier that year. Section 20 of the Misuse of Drugs Act 1971 provides that a person commits an offence if in the United Kingdom he assists in or induces the commission in any place outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place. In a note dated 5 May 2006 the CPS advised that, where offending had taken place both in England and Scotland, it would be possible to charge the suspects either with a number offences under section 20 with respect the supply of red phosphorus to the United States or with an over-arching conspiracy covering the whole of the period of their operations.

68. In a further note dated 4 April 2007 consideration was given to the possibility of prosecuting for these offences in England – leaving it to the Scottish authorities to prosecute offences occurring within their jurisdiction themselves, of prosecuting all the offences in the English courts or of allowing the United States authorities to proceed with their application for extradition. It was pointed out that a large number of witnesses would have to attend from the United States if the complete scale of the appellants' involvement in drug making activities there was to be placed before the court, whereas the number of witnesses who would need to travel for a trial in that country would be small. A court in the United States would be best placed to deal with the legal issues, and it was appropriate that the appellants should be dealt with in the jurisdiction where the effect of their crimes was felt. The advice was that the public interest was best served by the police assisting, in so far as it was proper and possible, in the extradition of the appellants to stand trial in the United States.

69. There is no indication that the best interests of the children were taken into account in that assessment, although regard was had to the considerations mentioned in *R (Bermingham) v Director of the Serious Fraud Office*. I would however accept Mr Wolffe's submission that the scales are not finely balanced in this case and that taking account of the best interests of the children does not change the analysis. He accepted, of course, that regard should be had to article 3.1 of the UNCRC, which provides that the best interests of the child shall be a primary consideration. But those interests must be assessed in the context of this country's treaty obligations in the suppression of trade in narcotic drugs across international borders (UN Convention against Illicit Trading in Narcotic Drugs and Psychotropic Substances 1988). There are good reasons too for looking to the place of the mischief as the place where the prosecution should be brought: *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, para 36-40; *Clements v HM Advocate* 1991 JC 62, p 71.

70. The United States has a substantial interest in trying the appellants in its own courts and there are strong practical reasons for concluding that that country, where most of the witnesses reside and the degree of the criminality involved is best assessed, is the proper place for them to be tried. As Mr Wolffe points out, the very fact that the basis for a prosecution in this country would appear to be section 20 of the Misuse of Drugs Act 1971 emphasises that the crimes which the appellants are alleged to have committed are really US crimes. I would hold that, taking all these considerations into account, it would not be appropriate for the appellants to be tried here. Nor would it be acceptable for Mrs H not be prosecuted at all for the crimes with which she has been charged. It would not, of course, be sensible to prosecute Mrs H here while sending Mr H to the United States for prosecution in that country. So their cases must stand or fall together on this point. The proper forum in which the prosecution should be brought is in the United States of America.

Conclusion

71. As I have already said, I would refuse Mr H's appeal. I am satisfied that the Scottish Ministers' order that he must be extradited was not incompatible with his Convention rights. For obvious reasons the balance is not so easy to strike in the case of Mrs H. But I have come to the conclusion that the best interests of the children, even when weighed together with her own article 8 right to respect for her family life with them, are not strong enough to overcome the overwhelming public interest in giving effect to the request. I would hold that it was not incompatible with her Convention rights for the Scottish Ministers to order her extradition, and I would refuse her appeal also.

72. I would add one further comment. There have been a number of recent cases, to which much publicity has been given, which have tended to shake public confidence in the current arrangements with the United States. I would not regard this case as falling into that category. Although the conduct that has been alleged against the appellants took place in this country, it is plain that it was in the United States that it had its effect. It cannot be said that the appellants have not had proper notice of the crimes with which they have been charged. Nor, in view of the steps that have been taken here to gather evidence with a view to a possible prosecution in England, does it appear that the allegations that have been made against them are entirely without substance. What is happening in this case is a tragedy, especially for the children. But this is not a ground on which the extradition arrangements which must now be put into effect can properly be criticised.

LORD BROWN

73. I agree, for the reasons which Lord Hope has given, that this Court is competent to decide these appeals. I also agree, for the reasons given in his judgment and the judgments of Lord Judge and Lord Wilson in *F-K v Polish Judicial Authority* and *R (HH and PH) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 delivered today, that these appeals should be dismissed.

LORD MANCE

74. Although it could have been desirable to have the point argued adversarially, I agree with Lord Hope for the reasons he gives that this appeal is competent.

75. The considerations involved in extradition and deportation or expulsion cases differ, but the need to treat the article 8 rights of any children who will be thereby affected as a primary consideration, as well as to evaluate and balance all relevant considerations against each other, exists in each context.

76. In the present case, and for the reasons given by Lord Hope in his paras 50 to 72, I also conclude that the article 8 rights of the children are on the facts of this case outweighed by the pressing public interest in giving effect to the extradition requests received from the United States of America in respect of both Mr and Mrs H.

LORD JUDGE

77. I have read the judgment of Lord Hope. I agree for the reasons that he has given that this Court is competent to decide these appeals, and for the reasons in his judgment and my own judgment in *F-K v Polish Judicial Authority* and *R (HH and PH) v Deputy Prosecutor of the Italian Republic, Genoa* delivered today that these appeals should be dismissed.

LORD WILSON

78. I agree, for the reasons which Lord Hope has given, that this court is competent to decide these appeals. I also agree, for the reasons given in his judgment and in my own judgment in *F-K v Polish Judicial Authority* and *R (HH and PH) v Deputy Prosecutor of the Italian Republic, Genoa* delivered today, that these appeals should be dismissed.