IN THE SUPREME COURT OF NEW ZEALAND

SC 27/2015
[2015] NZSC 47

BETWEEN	KYUNG YUP KIM Applicant
AND	THE PRISON MANAGER, MOUNT EDEN CORRECTIONS FACILITY Respondent

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: T Ellis for Applicant
A F Todd for Respondent

Judgment: 23 April 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The People's Republic of China (PRC) has requested that the applicant, Mr Kim, be extradited to China to face trial on a charge of intentional homicide. Mr Kim arrived in New Zealand from Seoul, South Korea, on 4 October 2010 and the PRC's extradition request was received on 23 May 2011. On 9 June 2011, Mr Kim was arrested pursuant to a provisional warrant issued by Judge Broadmore. Mr Kim has been in custody since that time.

[2] Since June 2011, Mr Kim's case has been before the courts on numerous occasions. Mr Kim's surrender eligibility hearing was set down several times, but then adjourned on Mr Kim's application. Mr Kim has made a number of unsuccessful applications for bail, has brought judicial review proceedings, made applications for writs of habeas corpus and appealed. As Brewer J has said,

"Mr Kim does not want to be extradited to China and has challenged every step of the extradition process".[1] The proposed appeal in this case relates to an application for habeas corpus that was dismissed by Brewer J on 10 December 2014.[2]

[3] The background is that, on 29 November 2013, Judge Gibson found that Mr Kim was eligible for surrender under s 24 of the Extradition Act 1999. This meant that he could be extradited if the Minister of Justice so determined.[3] Mr Kim said immediately that he intended to appeal against that decision. Judge Gibson then issued a warrant under s 70(1) of the Act (which deals with custody pending appeals) for Mr Kim's continued detention. (The Judge was advised by counsel that this was the appropriate course.) Mr Kim filed an appeal against Judge Gibson's eligibility finding on 11 December 2013 but subsequently, on 12 September 2014, filed a notice of abandonment and shortly thereafter discontinued other proceedings that he had on foot.

[4] Then, on 26 November 2014, Mr Kim filed an application in the High Court that the surrender order be discharged, as well as an application for habeas corpus. The basis for the habeas corpus application was that Mr Kim's continued detention under the s 70(1) warrant was unlawful as he had abandoned his appeal, so that the warrant had expired. Brewer J accepted this argument, but did not issue a writ of habeas corpus. This was because Judge Gibson had issued a fresh warrant for Mr Kim's detention under s 26(1) of the Act, in circumstances which we detail at [7] below. Brewer J said that where a person had been determined to be eligible for surrender under s 24, s 26(1) *required* the District Court to issue a warrant for his or her detention pending the person's surrender to the extradition country or discharge according to law.[4] Accordingly, following the decision that Mr Kim was eligible for surrender, a warrant should have been issued under s 26(1) rather than under s 70(1) even though Mr Kim had indicated that he intended to, and did, file an appeal.

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1 *Kim v The Prison Manager, Mt Eden Corrections Facility* [2014] NZHC 3051 (Brewer J) at [1].
2 *Kim v The Prison Manager, Mt Eden Corrections Facility* [2014] NZHC 3152 (Brewer J).
3 Extradition Act 1999, s 30.
4 *Kim v The Prison Manager, Mt Eden Corrections Facility*, above n 1, at [13]. A person detained under a s 26(1) warrant is entitled to apply for bail: s 26(2).

[5] Mr Kim then filed a further application for habeas corpus, this time challenging his detention under the s 26(1) warrant. He submitted that Judge Gibson had no power to issue the s 26(1) warrant as he was functus officio, that he was denied due process in respect of the issue of the warrant and that the validity of the warrant should be determined on a habeas corpus application (rather than an application for judicial review as argued by the Crown).

[6] Brewer J dismissed this application in his 10 December judgment. Mr Kim then appealed to the Court of Appeal. In a judgment dated 25 February 2015, it dismissed his appeal.[5] Mr Kim now seeks leave to appeal to this Court.

[7] Mr Kim identifies two grounds of appeal. First, Mr Kim says that he was detained "arbitrarily without a hearing, without natural justice, without a lawyer, and without legal aid". This is a reference to the way in which the s 26(1) warrant was issued. According to Brewer J:[6]

> [9] Judge Gibson convened a telephone conference on 2 December 2014. Mr Ellis and his junior, Mr Park, participated, although Mr Ellis submits that he did so out of courtesy and as an officer of the Court since he had no instructions from Mr Kim. Mr Park has made an affirmation summarising his notes of the telephone conference and I take the following account from it.
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> [10] Judge Gibson, who had been made aware by Crown counsel of the outstanding application for a writ of habeas corpus, asked whether the new Crown position had been put before me. Mr Ellis informed Judge Gibson that it had not. He also told Judge Gibson that the eligibility hearing having been determined, Judge Gibson was functus officio and, further, that the Judge should not pre-empt the habeas corpus proceeding. Judge Gibson was made aware that Mr Ellis had no instructions from Mr Kim, nor did he have a legal aid grant to cover the telephone conference. Mr Ellis requested that the parties be heard before the Judge made any decision. Judge Gibson is noted by Mr Park as saying that the telephone conference was not a hearing and that he would not hold a hearing because he was simply correcting an error relating to the warrant. The Judge said that he would issue a warrant pursuant to s 26(1).

[8] Second, Mr Kim submits that the Court of Appeal dealt with the inter-relationship between ss 26(1) and s 70 incorrectly.

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5 *Kim v The Prison Manager, Mt Eden Corrections Facility* [2015] NZCA 2 (Ellen France P, Randerson and White JJ).

6 *Kim v The Prison Manager, Mt Eden Corrections Facility*, above n 2.

[9] We emphasise that this case involves an application for the issue of a writ of habeas corpus. The writ provides a "quick and readily accessible means to question the lawfulness of many types of detention".[7] This focussed and abbreviated process is not a mechanism to evaluate the lawfulness of past detentions. On the face of it, the warrant under which Mr Kim is being held was validly issued – indeed, in terms of the Act, the Judge was obliged to issue it. Nothing has been raised which casts doubt on Mr Kim's eligibility to be detained under the warrant, given that a determination has been made that he is eligible for extradition and the issue of the warrant was an obligatory consequence of that. Further, while the reconciliation of ss 26(1) and s 70 is not straightforward, as the Courts below have said, that is not presently of significance as s 70 no longer has any potential application, Mr Kim having abandoned his appeal.

[10] For these reasons we are satisfied that there is no issue of general or public importance in the proposed appeal, nor is there any indication of a substantial miscarriage of justice. Accordingly, the application for leave to appeal is dismissed. We make no order as to costs.

Solicitors:
Carole Curtis, Auckland for Applicant
Crown Law Office, Wellington for Respondent

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[7] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [19.4.8].