NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF MR RADHI'S WIFE AND CHILDREN REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2017
[2017] NZSC 198

BETWEEN	MAYTHEM KAMIL RADHI Appellant
AND	THE DISTRICT COURT AT MANUKAU First Respondent
	THE COMMONWEALTH OF AUSTRALIA Second Respondent

Hearing:	11 October 2017 and 22 November 2017
Court:	William Young, Glazebrook, O'Regan, Ellen France and McGrath JJ
Counsel:	R M Mansfield for Appellant D L Harris abiding for First Respondent M J Lillico and R K Thomson for Second Respondent
Judgment:	21 December 2017

JUDGMENT OF THE COURT

A The appeal is allowed.

B The appellant's case is referred to the Minister of Justice pursuant to s 48(4)(a)(ii) of the Extradition Act 1999.

C Costs are reserved.

REASONS

WILLIAM YOUNG J

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The appeal

[1] Maythem Radhi is a refugee who lives in New Zealand with his wife and three children. The Commonwealth of Australia alleges that in 2001 he was involved in helping asylum seekers sail from Indonesia to Australia in a vessel known as the SIEV-X[1] and seeks his extradition to stand trial for people-smuggling. The SIEV-X sank with the result that an estimated 300 lives were lost. Two others have been tried and convicted for their involvement in these events, one in Egypt and the other (Mr Khaleed Daoed, to whom we will return shortly) in Australia.

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1 SIEV is an acronym for Suspected Illegal Entry Vessel. So SIEV-X is the name attributed to the vessel by the Australian authorities.

[2] After a defended hearing in the District Court and subsequent appeals, the Commonwealth obtained an order from the District Court that Mr Radhi was eligible for surrender.[2] At this point, Mr Radhi applied to the District Court for an order that his case be referred to the Minister of Justice because of compelling or extraordinary circumstances.[3] That application failed. He then applied for judicial review to the High Court, and the application was dismissed.[4] His appeal to the Court of Appeal against that decision was unsuccessful.[5]

The factual context

[3] Mr Radhi is now 41 years old. He was born in Iraq and is a member of a persecuted ethno-religious minority. In early 2000 he escaped Iraq and subsequently the United Nations High Commissioner for Refugees recognised him, his wife and their two children as refugees. In early 2009 Mr Radhi, his wife and their children were accepted for resettlement in New Zealand. They moved here later the same year. Mr and Mrs Radhi's third child was born in New Zealand and is a New Zealand citizen. Mrs Radhi and the two older children are now also New Zealand citizens.

[4] If Mr Radhi is extradited to Australia, his wife and children would have the legal right to go to Australia but there are financial constraints which would make it very difficult for them to do so. They would have difficulty raising the money to visit Mr Radhi and they would have major difficulties supporting themselves in Australia.

[5] Mr Radhi currently holds a New Zealand residence visa and continues to be recognised in New Zealand as a refugee. His residence visa does not allow him to travel, and extradition would cause his visa to expire. But:

(a) It is open to him to apply, before leaving New Zealand, for a variation of his visa conditions to allow him to leave the country for a period not

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2 *New Zealand Police v Radhi* DC Manukau CRI-2011-92-11423, 19 March 2012; *Radhi v New Zealand Police* [2013] NZHC 163; *New Zealand Police v Radhi* [2014] NZCA 327, [2014] NZAR 1019; and *Radhi v New Zealand Police* [2014] NZSC 135.

3 *Police v Radhi* [2015] NZDC 7576 (Judge Moses).

4 *Radhi v District Court at Manukau* [2015] NZHC 3347 (Woolford J).

5 *Radhi v District Court at Manukau* [2017] NZCA 157, [2017] NZAR 692 (Miller, Cooper and Asher JJ) [*Radhi* (CA)].

exceeding 24 months. Under the policy of Immigration New Zealand this application could not be declined.

(b) There is also provision under the policy for a further 12 month extension to the two year period. This is usually only granted if the applicant has been present in New Zealand for a specified amount of time in the 24 months immediately preceding the application for a variation. This presence in New Zealand requirement can be dispensed with, but only at the absolute discretion of the decision maker.

[6] If Mr Radhi is extradited but is acquitted at trial it is plausible to assume that he will be able to return to New Zealand. He would be able to do so as of right if the proceedings take less than two years. And even if they take longer to resolve, it would seem probable, although it is not certain, that the discretions associated with the obtaining of a visa would be exercised in his favour. And if unable to obtain a visa, he would have a right of appeal,[6] although no right of review.[7]

[7] On the other hand, if Mr Radhi were to be found guilty, his ability to return to New Zealand will be uncertain. If he is found guilty it is practically inevitable that he will be sentenced to a lengthy term of imprisonment.[8] If sentenced to imprisonment for 12 months or more, he will be an excluded person under s 15 of the Immigration Act 2009.[9] This section provides that no visa or entry permission may be granted and no visa waiver applied to an excluded person. His ability to return to New Zealand would depend upon him obtaining a special direction from the Minister under ss 17(1)(a) and 72(3). If the Minister refused to grant such a direction, there would be no right of appeal or review against what would be the associated dismissal of the

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6 Immigration Act 2009, s 187(1)(a)(i). The appeal is to the Immigration Tribunal. The jurisdiction of the Tribunal in respect of such an appeal is provided for in s 187(4) with the primary focus being on the conformity of the decision with the relevant residence instructions but the Tribunal has power to recommend that special circumstances of the applicant warrant consideration by the Minister (see ss 187(4)(b) and 188(1)(f)). There appears to be no right of appeal in relation to the decision by the Minister in respect of such a recommendation and there would be no right of review: see ss 187(8)(a) and 187(2)(a).

7 Section 187(8)(a).

8 We understand that Mr Daoed was sentenced to nine years' imprisonment.

9 Section 15(1)(b). He will be an excluded person for 10 years if sentenced to 12 months' imprisonment or more. He will be an excluded person without limitation of time should he be sentenced to five years' imprisonment or more. As noted, Mr Daoed was sentenced to nine years' imprisonment.

application for the residence visa in respect of which the special direction was sought.[10] Conceivably he might have a right of review in respect of the special direction decision, but this is uncertain.

[8] Assuming that Mr Radhi is not able to return to New Zealand, his position in Australia will be awkward.

[9] During the period after Mr Radhi arrives in Australia until the end of the process (including any sentence imposed) Mr Radhi will be lawfully in Australia under what is known as a criminal justice visa.[11] But, at the end of the process, Mr Radhi will be unlawfully in Australia[12] and will thus be mandatorily detained without any entitlement to release except (a) as part of an arrangement to leave Australia or (b) pursuant to a visa granted by the Minister of Immigration. The High Court of Australia has held that such detention is lawful even if removal is not reasonably practicable in the foreseeable future.[13]

[10] I am satisfied that Mr Radhi will not be returned to Iraq in breach of the Commonwealth's non-refoulement obligations. It has not been suggested that any other country is likely to accept him. This means that if New Zealand will not allow Mr Radhi back, he will be subject to mandatory detention which will be brought to an end only by the grant of a visa.

[11] Mr Radhi could apply for an Australian protection visa but, assuming he is convicted of people smuggling, he would have no entitlement to such a visa and my assessment of the evidence is that he probably would not be granted one.[14] Mr Daoed, who was convicted in Australia in relation to the SIEV-X, had previously been extradited from Sweden. After his term of imprisonment ended, he was refused a protection visa.

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10 Section 187(2)(a) and 187(8)(a).
11 See s 38 and Division 4 of pt 2 of the Migration Act 1958 (Cth).
12 As an "unlawful non-citizen" because his permission to be in Australia will have come to an end: see ss 13 and 14 of the Migration Act.
13 *Al-Kateb v Godwin* (2004) 219 CLR 562.
14 See ss 35A and 36 of the Migration Act.

[12] Another possible option for release would be a residence determination.[15] The evidence on behalf of the Commonwealth, however, suggests that such a determination is unlikely to be granted.

[13] The evidence shows that Mr Daoed is now living in the community pursuant to a removal-pending bridging visa. We were not told (a) of the basis upon which the visa was granted; (b) the conditions, if any, to which he is subject; (c) whether he has family in Australia; and (d) how he supports himself. Mr Julian Burnside AO QC, who provided an affidavit for Mr Radhi, expressed the view that it is unlikely that he would obtain such a visa:

> Given the content of the allegations against Mr Radhi and his lack of connection to anyone in Australia (as I understand it), it is my assessment that the Minister would not deem it to be in the public interest to release him from detention.

The Commonwealth challenged the admissibility of this assertion on the basis that how the Minister would exercise his or her discretion is outside Mr Burnside's expertise. I have reservations as to whether this is so. But leaving aside Mr Burnside's assessment, as I am prepared to do, I can see no safe basis for assuming that Mr Radhi would receive a removal-pending bridging visa. The decision of the Minister to grant or withhold such a visa is non-delegable.[16] On the evidence of Mr Burnside a refusal of such a visa would be unlikely to be reviewed by the courts.

[14] More generally, the evidence showed that the process of seeking visas is likely to take a number of years. And during this time, Mr Radhi would remain in detention.[17] The circumstances which would obtain if he were released and the financial practicalities of his wife and children joining him in Australia are uncertain. In the balance of these reasons I will refer to Mr Radhi's position in Australia if not able to return to New Zealand as involving immigration limbo.

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15 See s 197AB.
16 Section 195A(5).
17 See s 189.

Legislative context

[15] Most extradition requests are processed under pt 3 of the Extradition Act 1999. Under this part, the final decision on extradition is made by the Minister of Justice under s 30. And under s 30(3):

> The Minister may determine that the person is not to be surrendered if—
>
> …
>
> (d) … it appears to the Minister that compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person; or
>
> (e) for any other reason the Minister considers that the person should not be surrendered.

As well, s 32(3), (4) and (5) provide:

> (3) Subsection (4) applies if—
>
> (a) the Minister has determined under section 30 that in all other respects the person is to be surrendered; but
>
> (b) in the Minister's opinion, compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person before the expiration of a particular period.
>
> (4) If this subsection applies, the Minister may make an order for the surrender of the person that is to come into effect after the expiration of a period specified in the order.
>
> (5) The Minister may, at any time after making an order under subsection (4), vary any period specified in the order, or may cancel the order.

[16] Pausing at this point, it will be noted that:

(a) The Minister has two relevant powers, the first being to refuse surrender (under s 30(3)(d))[18] and the second to defer surrender (under s 32(3) and (4)).

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[18] The Minister can also refuse on other grounds set out in s 30 of the Extradition Act including the s 30(3)(e) power to do so "for any other reason".

(b) The criteria by which the Minister is required to act are expressed in similar terms, the only difference being that the criteria relevant to the power to defer surrender have seven added words: "before the expiration of a particular period".

[17] To facilitate the discussion which follows I will refer to the s 30(3)(d) power as the "refusal power" and the formulation of the criteria by which it is to be exercised as "short form". I will, in contradistinction, refer to the s 32(3) and (4) power as the "deferral power" and the formulation of the criteria by which it is to be exercised as "long form".

[18] Extradition between Australia and New Zealand is governed by pt 4 of the Act under which the Minister usually has no role. Instead, the surrender decision is made by the District Court. The statutory procedure leading to the making of such an order is as follows:

(a) Section 41 provides that a warrant issuing out of Australia can be endorsed by a District Court Judge in New Zealand. Once endorsed the warrant authorises the New Zealand police to arrest those sought to be extradited and to bring them to court to determine whether they are eligible for surrender under s 45 of the Act.

(b) If the eligibility criteria for surrender under s 45(2) of the Act are met and there are no mandatory or discretionary restrictions on surrender, then the court must immediately make a surrender order.[19]

[19] It is now established that there are no mandatory or discretionary restrictions preventing surrender and that Mr Radhi is in all other respects eligible for surrender under s 45. So, in the ordinary course of events, extradition should follow automatically and as a matter of course. This, however, is subject to s 48 which is relevantly in these terms:

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19 Section 47.

> **48 Referral of case to Minister in certain circumstances**
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> …
>
> (4) If—
>
> (a) it appears to the court in any proceedings under section 45 that—
>
> …
>
> (ii) because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period; but
>
> (b) in every other respect the court is satisfied that the grounds for making a surrender order exist,—
>
> the court may refer the case to the Minister in accordance with subsection (5).
>
> …

I will refer to test in s 48(4)(a)(ii) as the "referral criteria". As will be noted, it is expressed in long form.

[20] The power of the court under s 48 being to refer only, it is left to the Minister to determine if a person is to be surrendered if the case is referred:

> **49 Minister must determine if person to be surrendered if case referred**
>
> (1) If a case is referred to the Minister under … section 48(4) … , the Minister must determine in accordance with the grounds set out in subsections (2) to (4) of section 30 whether the person is to be surrendered, as if the case had been referred to the Minister under section 26.
>
> (2) For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit.

[21] Section 51(3), (4) and (5) provide:

> (3) Subsection (4) applies if—
>
> (a) the Minister has determined under section 49 that in all other respects the person is to be surrendered; but

> (b) in the Minister's opinion, compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person before the expiration of a particular period.
>
> (4) If this subsection applies, the Minister may make an order for the surrender of the person that is to come into effect after the expiration of a period specified in the order.
>
> (5) The Minister may, at any time after making an order under subsection (4), vary the period specified in the order, or may cancel the order.

[22] If a referral is made, the Minister has exactly the same functions as those which apply automatically in pt 3 extraditions. The Minister thus has a refusal power (s 49(1)) to be exercised on the basis of the short form criteria (as s 30(2)–(4) are incorporated in the process).[20] And the Minister also has a deferral power (under s 51(3), (4) and (5)) to be exercised on the basis of the long form criteria which are repeated in s 51(3)(b).

[23] Given that the Minister on referral has both refusal and deferral powers, it would have been logical for the referral criteria to be expressed in terms which encompassed both powers and the criteria by which they are to be exercised.

[24] In *Mailley v District Court at North Shore* the Court of Appeal held that s 48(4) should not be construed as limiting the grounds upon which referral might be made to those which have a temporal limit. Rather the Court construed it as indicating "that surrender might be permitted at a later point in time should the compelling or extraordinary circumstances be no longer operative".[21]

[25] Before us, counsel on both sides argued that the drafting of s 48(4)(a)(ii) was a mistake which is so obvious as to be within the power of the court to correct as a matter of interpretation. So both counsel contended that we should construe s 48(4)(a)(ii) as though an "or" was inserted before "before the expiration of a particular period".[22] Another alternative would be to construe s 48(4)(a)(ii) as if those

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20 The Minister would also have the s 30(3)(e) power to refuse extradition "for any other reason".

21 *Mailley v District Court at North Shore* [2013] NZCA 266 at [64].

22 The same result could be arrived at by construing s 48(4)(a)(ii) as if it concluded with the words "or at all"; compare the reasons of Ellen France and McGrath JJ below at [90].

words were not there; this on the basis that the short form expression of the criteria would encompass referral where the circumstances warranted either refusal or deferral of surrender.

[26] There being no logical explanation for the asymmetry between s 48(4)(a)(ii) if construed literally and the Minister's powers under s 49, I see considerable force in the approaches just identified. As well, on the view taken by Ellen France and McGrath JJ, referral would not be possible where there are grave but intractable humanitarian considerations affecting surrender but is possible where such considerations are less serious. However, for reasons which I will now explain, I do not see the outcome of the appeal as dependent on acceptance of one or other of the interpretative approaches proposed in [25]. That being so, I propose (a) to leave this issue to one side, albeit as warranting legislative review and (b) to determine the appeal on the assumption that s 48(4)(a)(ii) is to be construed as meaning what it says.

[27] Section 48(4)(a)(ii) must be read in conjunction with ss 49 and 51(3), (4) and (5). These sections contemplate a situation in which the Minister might defer surrender on the basis of objections which may or may not be able to be resolved within a particular time period. Where, at the end of that period, resolution has not occurred but remains possible, the Minister may extend the period. If it becomes apparent that the objection will not be removed, the Minister may then cancel the surrender order. On this basis, it seems to me that s 48(4)(a)(ii), even if construed literally, will warrant the reference of a case to the Minister where the circumstances warrant the exercise of the powers conferred by s 51(3), (4) and (5) and thus where the objection to extradition is one which, over time, may be able to be resolved. As will be apparent, I regard the objection advanced on behalf of Mr Radhi as within the contemplation of s 48(4)(a)(ii).

Procedural history of the case

[28] There are two aspects of the history of the case to which I should refer.

[29] Sections 46 and 47 relevantly provide:

> **46 Procedure following court's determination of whether person eligible for surrender**
>
> (1) If the court is satisfied that the person is eligible for surrender, the court must—
>
> (a) issue a warrant for the detention of the person in a prison or other place authorised in accordance with section 52 of this Act or section 169 of the Criminal Procedure Act 2011 pending the surrender of the person to the extradition country or the person's discharge according to law; …
>
> …
>
> **47 Court must make surrender order immediately if case not referred to Minister**
>
> (1) If the court does not refer the person's case to the Minister under section 48(1) or section 48(4), the court must, immediately after issuing the warrant for the detention of the person under section 46(1)(a), make a surrender order in respect of the person.
>
> (2) A surrender order made under subsection (1) does not take effect—
>
> (a) until the expiration of 15 days after the date of the issue of the warrant of detention; or
>
> (b) if an appeal, or an application for review or habeas corpus, in respect of a determination under this Act, or any appeal from such an appeal or application, is pending, until after the date that the proceedings are finally determined and the result is that the person is eligible to be surrendered,—
>
> whichever is the later.
>
> …

[30] The Act provides for a right of appeal against eligibility for surrender decisions but not in respect of surrender orders and s 48(4) referrals. Given the scheme of ss 45, 46 and 47, and particularly s 47(2), we consider that the Judge dealing with a pt 4 extradition request should address surrender (and thus s 48(4)) immediately after determining eligibility for surrender. This, however, was not the process which was followed in this case.

[31] The warrant for Mr Radhi's arrest was issued in Brisbane in February 2011. It was endorsed in New Zealand on 20 July 2011 and executed on 28 July 2011. Mr Radhi was found to be eligible for surrender on 19 March 2012 and his subsequent

challenges to this decision were dismissed.[23] It was only at this point, in April 2015, that Mr Radhi applied to the District Court for referral to the Minister under, inter alia, s 48(4)(a)(ii). The splitting of the eligibility for surrender and the s 48(4) referral issues has resulted in two separate and consecutive streams of litigation and unnecessary but substantial delay in the process. All issues should have been dealt with together in the District Court, a view which was not disputed by Mr Mansfield (who was not counsel for Mr Radhi in the District Court).

[32] A second procedural problem with the case is that the immigration limbo basis on which the present appeal was argued was not squarely identified until comparatively late in the piece. Although some evidence in the District Court was addressed to Mr Radhi's likely post-extradition immigration status vis-à-vis New Zealand and Australia there was no real focus on the likelihood of him continuing to be detained at the expiry of any sentence of imprisonment and no real analysis of the possibility of him winding up in immigration limbo if he cannot return to New Zealand.

[33] Given that the detention and immigration limbo points were not raised before Judge Moses in the District Court, it might be thought difficult to contend that his failure to take them into account was a reviewable error. The Commonwealth, however, has made it clear that it does not wish to make anything of this difficulty and accordingly I propose to address the issues on their merits.

[34] Because detention and immigration limbo arguments were not squarely relied on before either Judge Moses in the District Court or Woolford J in the High Court, there is no point in reviewing the approaches which those Judges took to the case.

The judgment of the Court of Appeal

[35] The Court of Appeal approached the case on the basis that if Mr Radhi is acquitted, he will, in all probability, be able to return to New Zealand.[24] More

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23 See above at n 2.

24 *Radhi* (CA), above n 5, at [46](d).

relevantly, however, the Court also addressed what would happen if he is found guilty:[25]

> If he is convicted, sentenced and imprisoned in Australia for more than two years, he will have the option of applying to Immigration New Zealand to return to New Zealand. His criminal conviction would be taken into account, along with the facts that Mr Radhi held refugee status and his immediate family are New Zealand citizens.
>
> Thus, in terms of Mr Radhi's children seeing less of their father, the position for the first two years would be no different from that of any family separation where a parent of New Zealand children will have to stand trial in Australia. If he is convicted and has to remain in Australia for more than two years, Mr Radhi's ability to return to New Zealand will be less certain, but it is not impossible. There is nothing unjust in that, given the conviction.
>
> We agree with Woolford J that the family circumstances of Mr Radhi do not make it unjust or oppressive for him to be surrendered. His refugee status is an extraordinary circumstance, and the fact that he might not be able to return to New Zealand after serving his sentence might be seen as part of that extraordinary circumstance. However, the second requirement before a referral can be made, of it being unjust and oppressive to surrender the person, is not made out. There are steps that Mr Radhi can take to protect his visa status and reduce the risk of him not being able to re-enter New Zealand. Even if convicted and imprisoned in Australia, Mr Radhi will be able to apply for re-entry, which will be at the discretion of Immigration New Zealand. When weighed against the importance of New Zealand's extradition obligations, these circumstances are not sufficient to render it unjust or oppressive to surrender Mr Radhi.

[36] The Court also addressed the possibility of a referral to the Minister for the purpose of resolving in advance Mr Radhi's immigration difficulties:[26]

> [Counsel for Mr Radhi] submitted that referral to the Minister is appropriate in this case because the Minister has the ability to take steps to protect Mr Radhi's visa status, such as seeking undertakings from Immigration New Zealand … . However, the fact that referral to the Minister may be advantageous to Mr Radhi is not part of the statutory criteria. Section 48(4)(a)(ii) is clear that referral is only appropriate where there are compelling or extraordinary circumstances making it unjust or oppressive to surrender the person. The court has a gatekeeper or screening role. Cases that do not meet those criteria should not be referred. As we have discussed above, we do not consider that the requirement of it being unjust or oppressive to surrender Mr Radhi is met.

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25 At [46]–[48].

26 At [49] (footnote omitted).

My approach

No consideration was given to Mr Radhi's position should he be unable to obtain a visa to return to New Zealand

[37] Nowhere in the Court of Appeal judgment is there any explicit reference to the difficulties which Mr Radhi will face if he cannot obtain a visa to return to New Zealand. As I have noted, once he is finished with the Australian criminal justice system, he will be detained. In the absence of change to the relevant Australian legislation, he will have no right of access to the Australian courts to challenge such detention directly. Assuming he is convicted it is most unlikely that he will be able to obtain a protection visa. While it is at least possible that he might eventually be released into the community, this is likely to take a number of years. Assuming he is eventually released, the practicalities of Mrs Radhi and the children joining him in Australia are uncertain.

[38] Removal from home and separation from family are part and parcel of the extradition process. So too is the risk of being subject to imprisonment following trial. But in almost all instances of extradition, the extradited person will be free to pick up his or her life either at the end of the trial (if acquitted) or, at worst, at the conclusion of any sentence imposed following conviction. It is not customary for such persons, once free of the criminal justice system, to be subject to the risks of (a) indefinite unreviewable administrative detention and (b) indefinite separation from their families. Immigration limbo in this sense is not an ordinary facet of extradition.

Section 22 of the New Zealand Bill of Rights Act 1990 and art 9.1 of the International Covenant on Civil and Political Rights

[39] Section 22 of the New Zealand Bill of Rights Act 1990 provides:

> **22 Liberty of the person**
>
> Everyone has the right not to be arbitrarily arrested or detained.

To the same effect is art 9.1 of the International Covenant on Civil and Political Rights (ICCPR):[27]

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[27] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

[40] *Zaoui v Attorney-General (No 2)* concerned deportation on security grounds under the Immigration Act 1987.[28] Section 72 of that Act provided:

> **72 Persons threatening national security**
>
> Where the Minister certifies that the continued presence in New Zealand of any person named in the certificate constitutes a threat to national security, the Governor-General may, by Order in Council, order the deportation from New Zealand of that person.

Amongst the issues in the case was the significance of the right not to be deprived of life under s 8 and the right not to be subjected to torture under s 9 of the New Zealand Bill of Rights Act and how these rights constrained the decision-making powers of the Minister and Governor-General in Council. As to this, the Court observed:[29]

> Those provisions do not expressly apply to actions taken outside New Zealand by other governments in breach of the rights stated in the Bill of Rights. That is also the case with arts 6.1 and 7 of the ICCPR. But those and comparable provisions have long been understood as applying to actions of a state party – here New Zealand – if that state proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life. The focus is not on the responsibility of the state to which the person may be sent. Rather, it is on the obligation of the state considering whether to remove the person to respect the substantive rights in issue.

And of the application of ss 8 and 9 to s 72 of the Immigration Act 1987, the Court went on:[30]

> As directed by s 6 of the Bill of Rights, s 72 is to be given a meaning, if it can be, consistent with the rights and freedoms contained in it, including the right not to be arbitrarily deprived of life and not to be subjected to torture. Those rights in turn are to be interpreted and the powers conferred by s 72 are to be exercised, if the wording will permit, so as to be in accordance with international law, both customary and treaty-based. In this case those presumptions about interpretation and the exercise of statutory powers are supported by para (b) of the long title to the Bill of Rights which says that it is an Act to affirm New Zealand's commitment to the ICCPR; further, the wording of the relevant sections of the Bill of Rights closely tracks the

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28 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

29 At [79] (footnote omitted).

30 At [90], [91] and [93] (footnote omitted).

> matching provisions of the Covenant. As already recalled, the relevant provisions of the Covenant have been interpreted to apply to the situation where the state party in question takes action by way of removal of a person to another country if that action means that that person faces a real risk of torture or arbitrary deprivation of life. …
>
> Section 72 confers powers on the Minister and the Governor-General in Council. The Minister has the power to certify that the continued presence of any person in New Zealand constitutes a threat to national security. There is nothing in the statement of the broad powers conferred on the Minister and in particular the Governor-General in Council to prevent the Minister or Cabinet having regard to the mitigating factors which the Minister or Cabinet might consider indicate that the person should not be deported. The power conferred by s 72 is to be interpreted and exercised consistently with the provisions of ss 8 and 9 of the Bill of Rights and with the closely related international obligations in the Covenant and the Convention against Torture. Because the power can be so interpreted and applied, those provisions, as a matter of law, prevent removal if their terms are satisfied even if the threat to national security is made out … .
>
> …
>
> It is accordingly our view that the Minister, in deciding whether to certify under s 72 of the Immigration Act 1987 that the continued presence of a person constitutes a threat to national security, and members of the Executive Council, in deciding whether to advise the Governor-General to order deportation under s 72, are not to so decide or advise if they are satisfied that there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

To the same general effect is a substantial body of jurisprudence[31] in relation to the European Convention on Human Rights.[32] Significantly, this approach has been applied where extradition would carry the risk of arbitrary detention, a point which is illustrated by *Sullivan v The United States of America*,[33] to which I now turn.

[41] The offending for which extradition was sought in *Sullivan* was of a sexual nature and was alleged to have occurred in Minnesota. If extradited and convicted, the alleged offender would have been subject to the prospect of civil commitment involving indefinite detention. Of the 600 persons who had been made the subject of

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31 Beginning with *Soering v United Kingdom* (1989) 11 EHRR 439 (ECtHR). Applied, for example, in *Sullivan v Government of the United States of America* [2012] EWHC 1680, [2012] 1 Ex LR 435; and *R (Ullah) v Special Adjudicator* [2002] EWCA Civ 1856, [2003] 1 WLR 770; aff'd [2004] UKHL 26, [2004] 2 AC 323. For an overview of the authorities, see *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 at [61]–[90].

32 Convention for the Protection of Human Rights and Fundamental Freedoms ETS No 5 (opened for signature 4 November 1950, entered into force 3 September 1953).

33 *Sullivan,* above n 31.

orders in Minnesota since 1988, not one had been released by 2012. Detention on this basis would not be in accordance with art 5.1 of the European Convention on Human Rights which corresponds loosely to s 22 of the New Zealand Bill of Rights Act.[34]

[42] Extradition was nonetheless sought on the basis that there could be no certainty that civil commitment would be sought. At the hearing of the request for extradition, the position of the United States (based on a letter from a prosecutor from Minnesota) was that the alleged offender did not meet the criteria for civil commitment.[35] But, by the time the appeal was heard, the position of the prosecutor was that it was too early to say whether civil commitment proceedings would be commenced.[36] There was other evidence introduced on appeal suggesting that if civil commitment was sought, an order would probably be made.[37] The statistics made available to the Court suggested that civil commitment was considered in respect of only 13 per cent of sexual offenders released from prison.[38]

[43] On the basis of this evidence Moses LJ and Eady J had no difficulty in concluding that the alleged offender faced a "real risk" of civil commitment[39] which the Court regarded as a "flagrant denial" of his right not to be arbitrarily detained. As Eady J noted, that assessment of risk was "borne out by the absence of any undertaking up to this point".[40] The determination of the appeal was held over to give the United States an opportunity to proffer an undertaking that civil commitment would not be sought.

[44] The concept of "flagrant denial" of Convention rights which was applied in *Sullivan* comes from the jurisprudence on the European Convention.[41] It encompasses what might be regarded as questions of degree which, for instance, arise where extradition is opposed on the basis that the alleged offender will not receive a fair trial. In *Sullivan* the Court concluded that civil commitment would be a flagrant denial of

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34 At [33].
35 See at [22]–[23].
36 See at [20].
37 See at [19].
38 See at [21].
39 At [28] per Moses LJ and at [37] per Eady J.
40 At [37].
41 See above at n 31.

the right to be free of arbitrary detention but in that case the word "flagrant" had little or no work to do as the conclusion that the denial was flagrant was treated as the corollary of the conclusion that civil commitment was in breach of art 5 of the Convention.

[45] The word "flagrant" usually denotes conduct which is high-handed, brazen or scandalous and, for this reason, I have reservations about its use in this context.[42] What is important is that extradition not be refused for trivial reasons.

[46] Administrative detention of Mr Radhi following the expiry of any sentence of imprisonment would be open-ended in terms of duration. There would be no right of access to the Australian courts to challenge it other than on formal grounds of illegality. This detention would, in all probability, last for a number of years. The United Nations Human Rights Committee has, on a number of occasions, held that the immigration detention to which the various authors had been subjected was in breach of art 9.1 of the ICCPR.[43] On the basis of the Human Rights Committee's decisions and *Sullivan*, it is arguable that sending Mr Radhi to Australia would be in breach of his s 22 right not to be arbitrarily detained.

[47] Section 5 of the New Zealand Bill of Rights Act provides:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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42 Compare the discussion in *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [105]–[112].

43 United Nations Human Rights Committee *Views: Communication No 560/1993* 59th sess UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); United Nations Human Rights Committee *Views: Communication No 900/1999* 76th sess UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*); United Nations Human Rights Committee *Views: Communication No 1014/2001* 78th sess UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) (*Baban v Australia*); United Nations Human Rights Committee *Views: Communication No 2136/2012* 108th sess UN Doc CCPR/C/108/D/2136/2012 (25 July 2013) (*MMM v Australia*); United Nations Human Rights Committee *Views: Communication No 2094/2011* 108th sess UN Doc CCPR/C/108/D/2094/2011 (26 July 2013) (*FKAG v Australia*); and United Nations Human Rights Committee *Views: Communication No 2233/2013* 116th sess UN Doc CCPR/C/116/D/2233/2013 (22 March 2016) (*FJ v Australia*).

Where extradition or deportation is likely to result in extra-legal, but officially inflicted, arbitrary loss of life or torture (which was the argument in *Zaoui*) s 5 does not have a role to play, whether direct or by analogy. Arguably the same is true of arbitrary detention, even if it is lawful under the laws of the jurisdiction seeking extradition. Thus in *Sullivan* the Court did not engage with the merits of the policy considerations which underpinned the civil commitment regime created by the laws of the State of Minnesota. All that mattered was that such a regime would not be countenanced under art 5 of the European Convention. In this respect, however, the structure of the European Convention is not identical to the New Zealand Bill of Rights Act as the Convention does not contain an equivalent to s 5.

[48] Leave to appeal to this Court was granted in terms which did not refer to s 22 and, probably for this reason, Mr Mansfield did not argue that the extradition of Mr Radhi to Australia would breach his s 22 rights. So the Commonwealth has not had a chance to respond to the line of argument just outlined. This is significant. I recognise that administrative detention is authorised under the laws of the Commonwealth and gives effect to what the Commonwealth regards as cogent policy considerations. If given the opportunity to do so, the Commonwealth would almost certainly have argued that such detention is not arbitrary for the purposes of s 22 and may have challenged the applicability of the *Sullivan* approach to the New Zealand Bill of Rights Act, perhaps, as I have suggested, on the basis that there is scope for the application, at least by analogy, of s 5 and perhaps on other grounds.

[49] In this context, I prefer not to express even a tentative view as to whether the s 22 argument would have been successful if advanced. The reasons why I have discussed it in some detail are threefold:

(a) The argument which succeeded in *Sullivan,* founded on art 5 of the European Convention, was closely analogous and the decisions of the Human Rights Committee to which I have referred were also cited to us. Given that I rely on *Sullivan* in a respect which I am about to discuss, it would be odd not to address whether the present appeal should be decided on the basis of reasoning analogous to that of Moses LJ and Eady J.

(b) I see the s 22 argument as one which, if advanced, would have warranted serious consideration. This is material to the interpretation issue as to s 48(4)(a)(ii) because, on the approach preferred by Ellen France and McGrath JJ, the s 22 argument would not be available for consideration. I see this as another reason for not adopting their approach.

(c) Given the result of the appeal, the final decision on extradition will be made by the Minister of Justice and it seems to me that, in terms of *Zaoui*, a decision to extradite Mr Radhi will not be able to be properly made without the s 22 argument having been first addressed.

Is the susceptibility of Mr Radhi to indefinite administrative detention a "compelling or extraordinary" circumstance "of the person" for the purposes of s 48(4)(a)(ii)?

[50] I consider that Mr Radhi's susceptibility to such detention is capable of a being a circumstance warranting referral under s 48(4)(a)(ii). Indeed, I do not see much scope for argument to the contrary. Whether it does amount to such a circumstance depends on an assessment of the likelihood of him in fact being administratively detained.

[51] Since it is practically inevitable that Mr Radhi will be administratively detained if not able to return to New Zealand, the likelihood of him being detained is largely a function of the likelihood of him not being able to return to New Zealand.

What is the likelihood of Mr Radhi not being able to return to New Zealand?

[52] The analysis in the Court of Appeal as to the likelihood of Mr Radhi having difficulties with a return to New Zealand was limited. As will be apparent from my earlier analysis, I am inclined to the view that Mr Radhi would, if found not guilty, be able to return to New Zealand, even if the proceedings take more than two years to determine. On the other hand, if he is convicted, it might be thought to be practicably inevitable that he will be sentenced to at least 12 months in prison which will result in him becoming an excluded person. And if he becomes an excluded person, there must be a substantial risk that he will be unable to return to New Zealand. The corollary of

this is that there is a substantial risk that his extradition to Australia will result in the immigration limbo consequences which I have outlined.

[53] It will be recalled that in *Zaoui* the Court saw ss 8 and 9 of the New Zealand Bill of Rights as applying to the actions of New Zealand:[44]

> … where substantial grounds have been shown for believing that the person as a consequence [of extradition or deportation] faces a real risk of being subjected to torture or the arbitrary taking of life.

A similar approach has been taken as to the compatibility of extradition with the European Convention on Human Rights. Under this approach the courts consider whether extradition would give rise to a real risk of flagrant disregard of Convention rights. This is illustrated by *Sullivan*.[45]

[54] *Zaoui* and *Sullivan* were concerned, respectively, with extra-territorial breaches of the New Zealand Bill of Rights Act and the European Convention on Human Rights. I have recorded the possibility that sending Mr Radhi to Australia would breach his s 22 right not to be arbitrarily detained but, as noted, I am not deciding the case on that basis. That point notwithstanding, the real risk approach adopted in those cases seems to me to be of assistance in determining whether Mr Radhi's circumstances engage s 48(4)(a)(ii).

[55] If extradited, Mr Radhi will, in my opinion, be at real risk of immigration limbo including administrative detention and I regard this as a sufficient circumstance to warrant referral to the Minister.

Can the risks to Mr Radhi be removed?

[56] The risk of arbitrary detention in Australia could be removed by an undertaking from the Commonwealth but such an undertaking would not completely resolve the immigration limbo problem. This latter problem, however, could be completely resolved, as the Commonwealth conceded before us, by the New Zealand Minister of Immigration granting Mr Radhi a visa in terms which would secure his entitlement to

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44 *Zaoui,* above n 28, at [79].
45 *Sullivan,* above n 31.

return to New Zealand at the end of the criminal justice process. Such a visa would also resolve the risk of arbitrary detention.

Disposition

[57] For the reasons given, I am satisfied that the case should be referred to the Minister of Justice; this on the basis that it appears to me that because of the compelling or extraordinary circumstances of Mr Radhi it would be unjust or oppressive to surrender him to Australia before the Minister has had the opportunity to consider the immigration limbo issue discussed in this judgment. Glazebrook and O'Regan JJ being of the same opinion the appeal is allowed and the case referred to the Minister accordingly.

[58] As we understand it, Mr Radhi is legally aided. If an order for costs is sought, application may be made. For this reason, costs should be reserved.

[59] Section 48(5) of the Extradition Act provides:

> If the court refers the case to the Minister under subsection (1) or subsection (4), the court must send to the Minister a copy of the warrant of detention together with a copy of all other documents before the court in the case, and such report on the case as the court thinks fit.

We do not have all the documents which are required to be sent to the Minister. We would, accordingly, be grateful if the Crown Law Office would collect and assemble the documents so that we can comply formally with the subsection.

GLAZEBROOK AND O'REGAN JJ
(Given by Glazebrook J)

[60] The background, legislative context and procedural history is set out in the reasons of William Young J.[46]

[61] We agree that no explicit consideration was given by the Court of Appeal to Mr Radhi's position if he cannot obtain a visa to return to New Zealand.[47]

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46 Above at [1]–[36]. We are in general agreement with those paragraphs.
47 We thus agree with [37]–[38] of William Young J's reasons.

[62] We agree with William Young J that there is a substantial risk that, if Mr Radhi is convicted, he will be unable to return to New Zealand.[48] We consider, on the material before the Court, that if Mr Radhi cannot return to New Zealand, there is a real risk that he will be subjected to the mandatory detention and immigration limbo consequences outlined in William Young J's judgment. We also agree that it is possible for these risks to be removed.[49]

[63] This means that we agree there are compelling or extraordinary circumstances warranting a referral to the Minister.[50] We also agree that the appeal should be allowed.[51]

[64] As it was not relied on, we make no comment on s 22 of the New Zealand Bill of Rights Act 1990.[52]

ELLEN FRANCE AND McGRATH JJ
(Given by Ellen France J)

Introduction

[65] We consider the intended effect of the statutory scheme was to have a narrower impact than those reflected in the judgments delivered by the majority. In our view, s 48(4)(a)(ii) of the Extradition Act 1999 (the Act) deals with existing immediate circumstances of the person, such as ill-health, that make an otherwise correct extradition questionable. The personal circumstances providing the basis for referral to the Minister are to be construed in light of the phrase "before the expiration of a particular period". On this approach, the appellant's circumstances do not come within s 48(4)(a)(ii).

[66] We consider this interpretation is supported by the text, purpose and scheme of the Act. The approach is also consistent with the context including the legislative

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48 See at [52] of his reasons.
49 See at [56] of his reasons.
50 See at [55] of his reasons.
51 At [57] of his reasons. We also agree with [58] and [59].
52 We thus make no comment on [39]–[49] and [53]–[54] of William Young J's reasons, apart from to agree with the last sentence of [54].

history. After setting out some of the background material, we then discuss the reasons for our approach.

Background

[67] As has been foreshadowed, the focus of the appeal is on the correct approach to s 48 of the Act. It is helpful to first explain something of the legislative history to the provision. The first iteration of what later became s 48(4)(a)(ii) originally appeared in the Extradition Bill 1998 as a ground for discretionary restriction on surrender.[53] The relevant clause in the Bill was based on s 19 of the Fugitive Offenders Act 1881 (UK) (the 1881 Act)[54] in force in New Zealand for extradition to Commonwealth countries until the implementation of the current Act.[55]

[68] Section 19 of the 1881 Act provided:

> **19. Refusal to return prisoner where offence too trivial** – Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that *by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period*, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just.
>
> (emphasis added)

[69] The broad power at that point was exercised by the court and encompassed both the ability to defer and to refuse to order surrender.

[70] At select committee stage, the provision now found in s 48(4)(a)(ii) was removed from the grounds for discretionary refusal and placed in two different clauses.[56] The first of these clauses was cl 30(3)(ca) (now s 30(3)(d) of the Act) which gave the Minister discretion under pt 3 to determine that the person should not be

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53 Extradition Bill 1998 (146-1), cl 8.

54 Fugitive Offenders Act 1881 (UK) 44 & 45 Vict c 69.

55 The international context is discussed in the judgment of McGrath and Blanchard JJ in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [134]–[142].

56 Extradition Bill 1998 (146-2).

surrendered if it would be "unjust or oppressive *to surrender the person*" (emphasis added). The second clause, cl 45(4)(a)(ii) (now s 48(4)(a)(ii)), provided under pt 4 that the court may refer the case to the Minister if it would be "unjust or oppressive *to surrender the person before the expiration of a particular period*" (emphasis added).

[71] The record suggests that the decision to relocate the original provision was made on the advice of the Ministry of Justice.[57] Limiting the deferral power to age and ill-health or other personal circumstances also appears to have reflected the Ministry's advice.[58] Finally, the Ministry recommended the Minister, not the court, should make the decision on this ground and on whether or not deferral was appropriate.[59]

[72] Turning to s 48, the first point to note is that the heading indicates the provision deals with the referral of a case to the Minister "in certain circumstances".

[73] It is useful next to explain the circumstances for which provision is made.

[74] Under s 48(1), the court must refer the case to the Minister in the circumstances set out. The case must be referred where "the court is satisfied that the grounds for making a surrender order otherwise exist" but one of the other listed criteria are met. The criteria include where the person to be extradited is a New Zealand citizen[60] and where it appears to the court either that there are "substantial grounds for believing" the person to be extradited "would be in danger of being subjected" to torture in the extradition country[61] or that "the person has been sentenced to death or may be sentenced to death by the appropriate authority in the extradition country".[62] Section 48(3) provides that the court is not required to refer the case to the Minister because

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57 Ministry of Justice *Extradition Bill: Report on Amnesty Submission and Other Matters* (27 November 1998) at 7.

58 Ministry of Justice *Extradition Bill: Proposals for Amendment* (15 September 1998) at 7, where the advice from the Ministry was that the broad ground of "incompatible with humanitarian considerations" which appeared cl 8 in the first reading version of the Bill should be omitted.

59 Ministry of Justice, above n 57, at 6–7. The Ministry's recommendation was that: "The power to refuse extradition on the basis that it would be unjust or oppressive because of the person's age, health or personal circumstances *should be a matter for the Minister to decide, not the court*. The Minister should be able to make a surrender order with a deferred commencement if the circumstances are likely to be transitory in nature": at 7 (emphasis added).

60 Extradition Act 1999, s 48(1)(a).

61 Section 48(1)(b)(i).

62 Section 48(1)(b)(ii).

the person is a New Zealand citizen (as is required under s 48(1)(a)) if Australia is the extradition country or the extradition country is a designated country under pt 4 of the Act.

[75] Section 48(4) describes the circumstances in which the court may refer the case to the Minister. Section 48(4) reads as follows:

> (4) If—
>
> (a) it appears to the court in any proceedings under section 45 that—
>
> (i) any of the restrictions on the surrender of the person under section 7 or section 8 apply or may apply; or
>
> (ii) because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period; but
>
> (b) in every other respect the court is satisfied that the grounds for making a surrender order exist,—
>
> the court may refer the case to the Minister in accordance with subsection (5).

[76] Apart from the present case, there has been limited consideration in New Zealand of s 48(4)(a)(ii). The Court of Appeal in *Chvastek v Commonwealth of Australia* observed that s 48(4)(a)(ii) "is concerned only with delaying the surrender for compelling or extraordinary circumstances".[63]

[77] In *Mailley v District Court at North Shore* the Court of Appeal said that the phrase "simply" indicated that surrender might be permitted at some later point "should the compelling or extraordinary circumstances be no longer operative".[64] The Court was concerned that restricting its application to conditions having a temporal limit "would have the absurd result that a person who was terminally ill could not avail themselves of the provision because their condition was permanent and had no time limit other than death".[65] The inclusion of "age" in s 48(4)(a)(ii) was also seen to

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63 *Chvastek v Commonwealth of Australia* CA281/01, 9 May 2002 at [3].
64 *Mailley v District Court at North Shore* [2013] NZCA 266 at [64].
65 At [64].

support that view.[66] As we will explain, we do not consider *Mailley* is correct in this respect.

Textual considerations

[78] From this brief background, it can be seen that there are a number of textual considerations which suggest the circumstances referred to in s 48(4)(a)(ii) are not intended to be read broadly.

[79] The first two textual matters both indicate that the provision is only meant to apply to particular, limited, cases which are an exception from the norm. As we have noted, the heading to s 48 provides for referral of a case to the Minister in "certain" circumstances. The circumstances are those where the specific terms of the section are met. Further, both of the two situations in s 48 in which referral is envisaged are framed as a carve out or exception. In the first situation (under s 48(1)) the court must refer the case to the Minister and, in the other situation (under s 48(4)), the court may refer the case to the Minister. In both situations the obligation, or the ability, to refer the case arises where the court is satisfied that the grounds for making a surrender order otherwise exist. This suggests that it is intended the referral power will apply in a limited way.

[80] The other textual aspect we note is that the phrase in s 48(4)(a)(ii) is a composite phrase. Therefore the plain reading is that the circumstances of the person must be compelling or extraordinary and it is "because" of those circumstances that "it would be unjust or oppressive to surrender the person before the expiration of a particular period". The reference to "before" and to a "particular" period indicates some immediacy.

The purpose and scheme of the Act

[81] The first point to note in terms of the purpose and statutory scheme is that the Act provides for two separate extradition regimes. The first of these, found in pt 3, is the standard procedure which applies to extradition from New Zealand to certain treaty

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66 At [64].

countries and certain Commonwealth and other countries, not including Australia. The second regime is that found in pt 4, with which the present appeal is concerned, and that deals with extradition from New Zealand to Australia and designated countries. The key difference between the two regimes for present purposes is that pt 4 is intended to provide a more streamlined process for extradition.

[82] Part 4 expressly applies to Australia and any designated country.[67] Designation under pt 4 requires an Order in Council and there are various requirements to be satisfied before any other country may be designated. These are set out in s 40 of the Act.[68] Part 4 then provides for the endorsed warrant procedure, described by one commentator as a "simplified extradition procedure" stemming "from its use between colonies dating back to imperial times".[69]

[83] The pt 4 procedure differs from the general extradition procedure in that a warrant of arrest from the extradition country may be endorsed in New Zealand to enable the person to be surrendered. As is discussed further below, the result is that there is no requirement to establish a presumption that the person sought for extradition committed an extradition offence and is thus eligible for surrender.[70] The procedure relies, as the commentator notes, on the notion, "underpinned by the presumption of legal and procedural similarity", of comity between New Zealand and Australia.[71] The Law Commission described the effect of pt 4 as reflecting "a policy decision … to put Australia in a sub-category all of its own, in recognition of the particularly close and trusting relationship New Zealand has with it".[72]

[84] Section 44(1) of the Act provides that when a person is arrested on a warrant endorsed under s 41 that person is to be brought before a court as soon as possible and their eligibility for surrender determined under s 45. Section 45(5)(b) removes the

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67 Extradition Act 1999, s 39.

68 Essentially, it is necessary that the country complies with the "speciality" rule (the individual may stand trial on the offences for which he or she is extradited but not for pre-extradition offences) and the prohibition on return to a third country.

69 Rynae Butler "Imbalance in extradition: the backing of warrants procedure with Australia under Part 4 of the Extradition Act 1999" [2017] NZCLR 63 at 63.

70 See discussion of ss 45(5)(b) and 24(2)(d) below at [84].

71 Butler, above n 69, at 64–65.

72 Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at [7.18].

requirement, applicable to extraditions under s 24(2)(d) found in pt 3, that the court be satisfied that the evidence produced at the hearing:[73]

> … would, according to the law of New Zealand, but subject to this Act,—
>
> (i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
>
> (ii) in the case of a person alleged to have been convicted of an extradition offence, prove that the person was so convicted.

If the case is not referred to the Minister by the court under s 48(1) or (4) then the court is to make a surrender order immediately after issuing a warrant.[74]

[85] It is in this context that s 48(4) provides for, exceptionally, referral by the court to the Minister in certain circumstances.

[86] Secondly, other parts of the Act recognise that age or ill-health may provide a basis for the Minister to defer surrender but not, specifically, for refusal. Section 51(3), for example, provides for deferral if:

> (a) the Minister has determined under section 49 that in all other respects the person is to be surrendered; but
>
> (b) in the Minister's opinion, compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person before the expiration of a particular period.

Section 51(4) provides that if s 51(3) applies "the Minister may make an order for the surrender of the person that is to come into effect after the expiration of a particular period".

[87] Section 32(3) and (4) in pt 3 are to the same effect. While both s 32 and s 51 include other, broader, powers for refusal the point is that these subsections (s 32(3)

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73 Extradition Act, s 24(2)(d).

74 Section 47(1). See also s 47(2)(b) dealing with time to make an application for habeas corpus. We agree with William Young J that the scheme of the Act envisages that a Judge dealing with a pt 4 extradition request should address surrender, and so s 48(4), immediately after determining eligibility for surrender: above at [30].

and s 51(3)) suggest an order deferring extradition is not inapt in the situations of age or ill-health.

[88] On our approach, which focuses on the immediacy of the situation, the case of the terminally ill person is accommodated.[75] Where, for example, there was a prognosis the person was likely to die in two months, it would be open to the court to conclude that surrender was unjust or oppressive. In addition, the phrase "unjust or oppressive" also has to accommodate trial-related issues which meet the high threshold of "compelling or extraordinary circumstances of the person".[76] In those circumstances extradition of a very elderly person to face trial, for example, potentially could meet the threshold albeit the individual is obviously not going to get any younger. It follows that the considerations that influenced the Court of Appeal in *Mailley* are not decisive.

[89] Finally, it is apparent from the statutory scheme that a policy choice has been made to differentiate between those powers exercisable by the Minister and powers exercisable by the court. For example, under s 30 if the court issues a warrant for detention the Minister must then decide whether the person is to be surrendered. One of the grounds on which the Minister may refuse surrender under s 30(3)(d) mirrors the circumstances of the person as set out in s 48(4)(a)(ii). The legislative history we have discussed also supports the view there was a deliberate decision to give the Minister a broader power and so more flexibility. The fact that the power to refer a case vested in the court is narrower is simply a reflection of the choice made about who is to exercise various powers and in what circumstances.

[90] We add that neither the history nor the statutory scheme support the submission the difference between s 30(3)(d) and s 48(4)(a)(ii) is a mistake.[77] Against this

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75 Contrary to the view expressed by William Young J above at [26].

76 The Court of Appeal in *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [33] (leave to appeal was refused by this Court: *Mercer v Commonwealth of Australia* [2017] NZSC 33) cited this passage form the judgment of Lord Diplock in *Kakis v Governor of the Republic of Cyprus* [1978] 1 WLR 779 (HL) at 782–783: '"Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair".

77 William Young J above at [25]–[26].

scheme, the omission of the words "or at all" from s 48(4)(a)(ii), in contrast to their inclusion in s 30(3)(d), was deliberate.

[91] In conclusion, Rynae Butler makes the point that "[e]xtradition is meant to be expeditious and efficient. At the same time, the process must provide adequate protection to the rights of the person" sought to be extradited.[78] The points we have highlighted suggest pt 4 is intended to tilt the balance towards efficiency in extradition recognising the particular interests in comity with Australia and any other designated country whose system meets the requirements for designation under pt 4. In addition, it appears that the choice of decision maker, the Minister or the court, in particular situations reflects policy considerations about the decision-making processes. This means that there is not necessarily any asymmetry between the court's power of referral and the powers of the Minister but, to the extent that there is, that is deliberate.[79]

Application to the appellant's case

[92] We do not consider the appellant's circumstances comprise a condition of the sort envisaged in s 48(4)(a)(ii). The only temporal aspect is the fact the Minister could bring an end to the circumstances by, for example, giving the appellant New Zealand citizenship or by undertaking to grant him a visa if he has been out of New Zealand for more than two years.

[93] The way in which the case has developed and, in particular, the belated focus on the possibility of detention in Australia after any conviction means there has been limited evidence about what might happen if the appellant was convicted and sentenced to a term of imprisonment, making return to New Zealand within two years impossible. Nor has the potentially more significant evidence on this topic been tested.

[94] On what we do know, we also take a different view from that of the majority as to the effect of that factual material. For example, very little is known of

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78 Butler, above n 69, at 97.
79 William Young J above at [26].

Mr Khaleed Daoed's situation but, although convicted, he is now not detained. It is not at all clear that the appellant would not be treated in the same way.[80]

[95] Further, any current prognosis is necessarily speculative because it requires an attempt to foresee what might happen in anything from over two to 10 or more years. That speculation reflects various factors such as uncertainty as to the outcome of a trial and as to the impact of the passage of time. For example, the relevant legislative regimes in either New Zealand or Australia may alter, as might relevant government policies in either country. The speculative aspect is such that the circumstances cannot be said to meet the statutory criteria.

[96] We add that in these circumstances we do not consider it is appropriate to venture any suggestions as to the possibility of a breach of s 22 of the New Zealand Bill of Rights Act 1990.[81] The issue of whether *Zaoui v Attorney-General (No 2)* applies to arbitrary detention, for example, is an issue of broader significance beyond the present case and it is not necessary to decide the question in order to resolve this case.[82] The submission was not one advanced by the appellant and we heard no argument on it.

[97] We would accordingly dismiss the appeal.

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80 See William Young J above at [1], [11] and [13] for a description of Mr Daoed's circumstances. The assessment of Mr Julian Burnside AO QC, who provided evidence by way of affidavit for Mr Radhi, that the same would not necessarily occur to the appellant is based on his view of the political climate.

81 The extent to which the argument about s 22 of the New Zealand Bill of Rights Act 1990 may be relevant on our approach to s 48(4)(a)(ii) is not something we have considered because it does not arise on the present facts.

82 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.