



**Supreme Court of New Zealand
Te Kōti Mana Nui**

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MEDIA RELEASE

MATHIAS ORTMANN AND OTHERS v UNITED STATES OF AMERICA AND ANOTHER (SC 54/2018)

FINN HABIB BATATO v UNITED STATES OF AMERICA (SC 55/2018)

MATHIAS ORTMANN AND ANOTHER v UNITED STATES OF AMERICA (SC 56/2018)

KIM DOTCOM v UNITED STATES OF AMERICA (SC 57/2018)

KIM DOTCOM v UNITED STATES OF AMERICA AND ANOTHER (SC 58/2018)

CASE HISTORY SYNOPSIS

This synopsis is provided to assist in understanding the history of the case and the issues to be heard by the Court. It does not represent the views of the panel that will hear the appeal in the Supreme Court. Given the breadth and complexity of the issues raised in the proceeding it involves some simplification and addresses only the major points in issue. The synopsis does not comprise part of the reasons for the judgments of the lower Courts. The full judgments with reasons are the only authoritative documents and can be found at www.courtsofnz.govt.nz

The United States of America wishes to extradite Messrs Ortmann, van der Kolk, Batato and Dotcom (the appellants) to face trial for criminal infringement of copyright in that country. Through a business known as Megaupload they are said to have breached copyright in commercially valuable property such as movies, games and music (the works).

The appellants can be extradited to face trial in the United States only if, as a first step, a New Zealand court determines that they are eligible for extradition in relation to the offences for which surrender is sought under the relevant provisions of the Extradition Act 1999 (the Act). If the court finds they are eligible, the final decision as to whether the appellants are, in fact, going to be extradited lies with the Minister of Justice. These proceedings concern the eligibility of the appellants for extradition.

Eligibility for extradition is determined by a four-step process:

1. The supporting documents in relation to the offence have been presented to the extradition court in New Zealand.
2. The extradition court must decide that the offence in question is an extradition offence in relation to the United States.
3. The extradition court must decide whether the evidence produced at the hearing would justify the appellants' trial if the alleged offending had occurred within New Zealand.
4. The extradition court must assess whether any restrictions on surrender set out in the Act apply.

In the District Court in December 2015, Judge Dawson found that the appellants were eligible for extradition.

The appellants brought a wide-ranging appeal to the High Court against the District Court decision. They also sought judicial review of the District Court decision on a number of grounds.

In the High Court, Gilbert J considered there was significant overlap between the grounds advanced in support of the appeal and the grounds advanced in the judicial review applications. Because of which, he decided that he would only consider issues advanced in the judicial review proceedings which were not also replicated as grounds of appeal. In this case, that was only one issue – an allegation of bias and pre-determination on the part of the District Court Judge.

The appellants were unsuccessful before Gilbert J in the High Court in February 2017 in both their appeal and judicial review applications.

In reaching his decision on the eligibility of the appellants, Gilbert J applied (as he was bound to do) a previous Court of Appeal decision – *United States of America v Cullinane* [2003] 2 NZLR 1 (CA). That decision set out that, in determining whether an offence is an “extradition offence”, the provisions of the Act are to be replaced by the articles in the Treaty on extradition between New Zealand and the United States. In *Cullinane*, the Court said the effect of this replacement meant that what is known as the “double criminality” requirement did not apply. The principle of double criminality means that extradition is allowed only for conduct that amounts to an offence in the country requesting extradition if the conduct also amounts to an offence in the country from which extradition is sought. Because the Court in *Cullinane* said double criminality does not apply to the extradition treaty between New Zealand and the United States, Gilbert J did not have to decide whether the appellants' conduct would have been an offence under New Zealand law had it occurred in New Zealand at the relevant time.

The appellants were granted leave to appeal to the Court of Appeal on two questions of law, namely:

- (a) Was the High Court correct to find that the appellants' conduct amounted to an extradition offence?

(b) Was the High Court correct to conclude that the United States did not have to prove that copyright existed in the relevant works in the United States at the time of the alleged offending?

The appellants also appealed against Gilbert J's decision to decline judicial review.

In July 2018, the Court of Appeal answered "yes" to both questions and upheld the finding that the appellants are eligible to be extradited. It also held that judicial review was correctly refused in the High Court. It accordingly dismissed the appeal.

On the first question, the Court of Appeal reached the same conclusion as Gilbert J – that the appellants' conduct amounted to an extradition offence – although for different reasons. Unlike Gilbert J, the Court of Appeal was not bound by the decision in *Cullinane*. The Court decided to overrule *Cullinane*, the effect of which was to reinstate the requirement of double criminality. Accordingly, in order to constitute an extradition offence, the appellants' alleged conduct had to amount to a criminal offence in both the United States and New Zealand.

An important issue in the Court of Appeal was whether copyright infringement is criminalised in New Zealand. The Court of Appeal concluded that the appellants' alleged conduct that was said to amount to copyright infringement in the United States would fall within s 131 of the Copyright Act 1994 which, it found, imposes criminal liability for making or dealing with infringing copies of digital material. It also considered that the appellants' alleged conduct would constitute various offences under the Crimes Act 1961. After detailed analysis of the allegations against the appellants, the Court of Appeal concluded that the appellants' alleged conduct amounted to an extradition offence for the purposes of the Act.

The answer to the second question (b), above, depended on whether the copyright status of the works was an essential feature of the offence with which the appellants were charged. If the copyright status of the works was non-essential, the Court could assume that copyright did, in fact, exist in the works at the time of the alleged offending for the purposes of determining whether there was sufficient evidence to justify committing the appellants for trial.

The Court of Appeal found that copyright status was non-essential when assessing the sufficiency of the evidence against the appellants. It reached this conclusion on the basis that the United States was required to prove in the proceeding to determine eligibility for extradition only that the appellants' *conduct* constituted an extradition offence to the necessary standard. "Conduct constituting an offence" is defined in the Act by reference to the acts or omissions of a person. Here, the Court decided, it could not be said that the copyright status of the works formed part of the acts or omissions of the appellants and therefore it fell outside the appellants' alleged conduct which the United States was required to prove.

The Court concluded that New Zealand law permits extradition for copyright infringement and there was sufficient evidence to establish the appellants' eligibility for extradition on the facts.

In respect of the appeal against the refusal for judicial review, the Court of Appeal considered only the ground of bias and pre-determination. It found that the High Court was correct to refuse judicial review on this basis.

The appellants appealed to the Supreme Court. However, there was a preliminary dispute as to whether matters decided by the Court of Appeal under the Extradition Act are appealable to the Supreme Court. In December 2018, the Supreme Court concluded they are, and that it therefore has jurisdiction to hear the proposed appeals and granted the appellants leave to appeal against the decision of the Court of Appeal.

The main issues that fall to be determined in the Supreme Court are:

- (a) whether the Court of Appeal was correct to overrule *Cullinane* and reinstate the double criminality requirement;
- (b) if *Cullinane* was correctly overruled, whether the Court of Appeal was correct to find that copyright infringement of the kind alleged to have been done by the appellants amounted to a criminal offence in New Zealand (under the Copyright Act and the Crimes Act) and thus an extradition offence for the purposes of the Act;
- (c) whether the Court of Appeal was correct to hold that the copyright status of the works is non-essential and therefore can be assumed for the purposes of the eligibility proceeding;
- (d) whether the Court of Appeal was correct to find that there is sufficient evidence to establish the appellants' eligibility for extradition on the facts; and
- (e) whether the Court of Appeal was correct to dismiss the appeal against the High Court's decision to decline judicial review.

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Supreme Court leave decision : [2018] NZSC 126 [20 December 2018]

Court of Appeal decision : [2018] NZCA 233 [5 July 2018]

High Court decision : [2017] NZHC 189 [20 February 2017]