IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 79/2024
[2024] NZSC 150

BETWEEN	KIM DOTCOM Applicant
AND	HIS MAJESTY'S ATTORNEY-GENERAL on behalf of the New Zealand Police First Respondent
	DEPUTY SOLICITOR-GENERAL (CROWN LEGAL RISK) Second Respondent
	HIS MAJESTY'S ATTORNEY-GENERAL on behalf of the Government Communications Security Bureau Third Respondent

Court:	Glazebrook, Kós and Miller JJ
Counsel:	R M Mansfield KC and S L Cogan for Applicant F R J Sinclair for Respondents
Judgment:	8 November 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondents one set of costs of $2,500.

REASONS

[1] In January 2012, the New Zealand Police executed search warrants at addresses associated with the applicant, Mr Dotcom, and one of his associates, seizing electronic devices storing an estimated 150 terabytes of data. The warrants were issued under

the Mutual Assistance in Criminal Matters Act 1992 (MACMA) in response to a request from the United States of America, which seeks Mr Dotcom's extradition on charges of racketeering, copyright infringement and money laundering.[1]

[2] Initially Mr Dotcom was successful in challenging the warrants in the High Court.[2] They were set aside, and orders and undertakings were given that further items seized would not be handed over to the United States authorities; the devices would be cloned, with clones of "mixed-content devices" (devices containing a mix of relevant and irrelevant material) being stripped of irrelevant personal materials for future disclosure purposes; and Mr Dotcom and the other plaintiffs would provide passwords to the devices in return for access to clones.[3]

[3] But that success was short-lived. The Court of Appeal reinstated the warrants,[4] a decision ultimately upheld by this Court.[5] Following the Court of Appeal decision, but pending the final appeal to this Court, the High Court directed that nominated police officers were to undertake not to disclose the passwords to anyone, and in particular to the United States authorities.[6] In 2015, following this Court's decision, and with the consent of the parties, the Court of Appeal set aside the orders requiring stripping out of irrelevant material.[7] By that point the passwords had already been supplied by Mr Dotcom to the Police.[8]

[4] In 2016 the United States authorities again sought the original devices for evidential purposes. In 2017, after consulting Mr Dotcom, the Deputy Solicitor-General issued a direction under s 49 of the MACMA to send unmodified clones to the United States, but later suspended that direction pending

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1 Mutual Assistance in Criminal Matters Act 1992, ss 43–44.

2 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 (Winkelmann J).

3 See *Dotcom v Attorney-General* [2013] NZHC 1269 (Winkelmann J) at [63].

4 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 (Ellen France, Randerson and White JJ).

5 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 (Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ) [2014 SC judgment].

6 *Dotcom v Attorney-General* [2014] NZHC 1505 (Winkelmann J) at [29]. The concern was that United States investigators would be able to use the passwords to access the (unstripped) devices already in their possession, thereby undermining the stripping order: see at [19] and [21]. See also *Attorney-General v Dotcom* [2014] NZCA 444 (Ellen France P, Randerson and White JJ) at [7].

7 *Attorney-General v Dotcom* [2015] NZCA 309 (Randerson, Stevens and White JJ) at [8]. This Court had held that stripping irrelevant material in New Zealand was not necessarily required: 2014 SC judgment, above n 5, at [193] and [200].

8 See *Attorney-General v Dotcom*, above n 7, at [5] and [7].

determination of Mr Dotcom's eligibility for surrender for extradition.[9] In 2021 the Court of Appeal confirmed Mr Dotcom was eligible for surrender, and this Court declined leave to appeal.[10] The Deputy Solicitor-General consulted with Mr Dotcom again about the original devices. In March 2022, the Deputy Solicitor-General determined—subject to a series of conditions under s 29 of the MACMA—to direct the Commissioner of Police to send the original devices to the United States, together with the clones, under s 49.

[5] Mr Dotcom sought judicial review of that determination, which was heard by Hinton J at the same time as a Crown application for release from the undertakings not to disclose passwords.[11] Hinton J held against Mr Dotcom on both applications.[12] The High Court decision was upheld by the Court of Appeal.[13]

The proposed appeal

[6] Mr Dotcom now seeks leave to bring a second appeal. Reprising the arguments in the Courts below, he submits that the decision to provide the seized devices to the United States authorities breaches his right to be secure against unreasonable search or seizure under s 21 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights); and that the wrong threshold has been applied in releasing the police officers from their undertakings.

Our analysis

Deputy Solicitor-General's s 49 determination

[7] Mr Dotcom submits this ground of his proposed appeal gives rise to two key points of law, which are said to raise matters of general or public importance:[14]

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9 See Extradition Act 1999, s 24.

10 *Ortmann v United States of America* [2021] NZCA 310 (Kós P , French and Miller JJ); and *Ortmann v United States of America* [2021] NZSC 187 (Winkelmann CJ, O'Regan and Ellen France JJ).

11 See above at [3]. The basis for the latter application being that the conditions which led to the undertakings had by then ceased to apply, principally because the stripping order had been quashed.

12 *Dotcom v Attorney-General* [2022] NZHC 1708 [HC judgment].

13 *Dotcom v Attorney-General* [2024] NZCA 270 (Cooper P, Brown and Courtney JJ) [CA judgment].

14 Senior Courts Act 2016, s 74(2)(a).

(a) whether mixed-content devices seized under a MACMA warrant should be treated differently from those seized under a domestic warrant; and

(b) whether s 49 directions to provide seized items to the requesting state follow "as a matter of course" after execution of a MACMA warrant.

[8] The first point involves revisiting the conclusion of this Court a decade ago that where it is not practicable for information to be sorted or extracted in New Zealand, it may be reasonable for devices to be sent overseas to the requesting authority if the Attorney-General so directs, provided Bill of Rights considerations have been taken into account and affected parties are consulted.[15] As the Court of Appeal noted, the applicant's arguments in this respect were based on a misapprehension of this Court's 2014 judgment.[16]

[9] The second point arises from the following observation by the Court of Appeal:[17]

> [32] We agree with Mr Boldt that s 49 directions normally follow as a matter of course after a mutual assistance warrant is executed. Providing seized items to the requesting state is a normal consequence of a MACMA warrant and no separate request for the transfer of seized items is required.

[10] We agree with the Crown's submission that this was a general remark which merely conveyed the obvious purpose of the statute: to enable the lawful transfer of evidence from one jurisdiction to another. It did not suggest s 49 directions may be issued without due regard for s 21 of the Bill of Rights, which the Court of Appeal went on to assess in some detail.[18] Mr Dotcom submits, without elaboration, that ss 27 and 29 of the MACMA ought to have been used to "manage [the] risk" of his rights being breached. But it is unclear how those provisions could or should have been used to that end. As the Crown submits, the possibility that irrelevant material may be sent offshore is the natural consequence of treating a mixed-content device as a single

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15 2014 SC judgment, above n 5, at [200]–[201].
16 CA judgment, above n 13, at [51] and [58].
17 CA judgment, above n 13.
18 At [53]–[63].

"thing", coupled with the reciprocal obligation on the New Zealand government, under the MACMA, to provide assistance.

[11] The fundamental problem for Mr Dotcom is that there is no indication the Deputy Solicitor-General's decision involved a breach of rights or other error of law. He has been given a meaningful opportunity to seek judicial review (and an appeal) with thorough consideration of s 21. Those proceedings have generated concurrent findings that the decision carefully considered and provided for the protection of Mr Dotcom's rights, consistently with this Court's earlier guidance. We are not persuaded that analysis is likely to change with a second appeal.

[12] In our view, therefore, neither point raises a matter of general or public importance.

Release from undertakings

[13] On the second ground, Mr Dotcom submits the police officers should not have been released from their undertakings in respect of the passwords because the provision of the passwords was part of a party-to-party compromise rather than a court order.[19] He says the statutory obligation to provide passwords (now in s 130 of the Search and Surveillance Act 2012) did not exist at the time and he was therefore under no obligation to disclose the passwords; and that he did so "to expedite access to his seized devices and in reliance on the undertakings, which prevented the passwords from being provided to the United States".

[14] We do not consider this ground raises any matter of general or public importance.[20] It turns in this case on highly unusual facts, which do not appear to support Mr Dotcom; and it is of no continuing significance in light of amendments made to the Search and Surveillance Act requiring provision of passwords in comparable circumstances.[21]

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19 A higher threshold of changed circumstances is required to set aside undertakings in the former context, as opposed to the latter, which requires only that circumstances have so changed as to afford good grounds for withdrawal: *Commerce Commission v Air New Zealand Ltd* HC Auckland CIV 2008-404-8352, 3 November 2011 at [17].

20 Senior Courts Act, s 74(2)(a).

21 Search and Surveillance Act 2012, s 130.

[15] Nor do we apprehend any risk of a miscarriage of justice arising from the judgments below.[22] As the High Court found, the record shows that "Mr Dotcom was willing to provide the passwords well before the undertakings were conceived."[23] That appears to have been driven by Mr Dotcom's desire to access the contents of the devices himself to prepare for the extradition hearing.[24] An access protocol was agreed, but a direction was required on password use. The cloning and stripping orders were made to allow access by the New Zealand and United States authorities, and by Mr Dotcom and his associates.[25] The undertakings were in turn directed to preserve the protective effect of the stripping order.[26] Mr Dotcom benefited from prompt access, as the Crown submits; and as to the United States authorities, the High Court found "it was common ground that the [Federal Bureau of Investigation] would be involved in the investigation" and that it "would have been obvious that they would have access to the passwords to access encrypted material" at the time Mr Dotcom agreed to provide the passwords.[27]

Conclusion

[16] We do not consider it necessary in the interests of justice to grant leave to appeal in respect of either ground raised in the proposed appeal.[28]

Result

[17] The application for leave to appeal is dismissed.

[18] The applicant must pay the respondents one set of costs of $2,500.

Solicitors:
Holland Beckett, Tauranga for Applicant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondents

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22 Senior Courts Act, s 74(2)(b).
23 HC judgment, above n 12, at [35].
24 See *Dotcom v Attorney-General*, above n 6, at [8].
25 See above at [2].
26 See above n 6.
27 HC judgment, above n 12, at [36].
28 Senior Courts Act, s 74(1).