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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 57/2019
[2020] NZSC Trans 5

BETWEEN **MINISTER OF JUSTICE**
ATTORNEY-GENERAL
Appellants

AND **KYUNG YUP KIM**
Respondent

HUMAN RIGHTS COMMISSION
Intervener

Hearing: 25 February 2020

Coram: Glazebrook J
O'Regan J
Ellen France J
Arnold J
French J

Appearances: U R Jagose QC, A F Todd and G M Taylor for the

Appellants
A J Ellis, B J R Keith and G K Edgeler for the Respondent
A S Butler, R A Kirkness and C S A Harris for the Intervener

CIVIL APPEAL

SOLICITOR-GENERAL:
E ngā Kaiwhakawā, tēnā koutou. Kei kōnei mātou ko Ms Todd, ko Ms Taylor mō te Karauna.

GLAZEBROOK J:
Tēnā koutou, Madam Solicitor, Ms Todd, Ms Taylor.

MR ELLIS:
Kia ora. May it please Your Honours, Ellis, Keith and Edgeler for Mr Kim.

GLAZEBROOK J:
Tēnā koutou, Mr Ellis, Mr Keith, Mr Edgeler.

MR BUTLER:
Tēnā koutou e ngā Kaiwhakawā, ko Andrew Butler ahau, ko Robert Kirkness ko Calista Harris tēnei ko mātou ngā rōia mō te Kāhui Tika Tangata.

GLAZEBROOK J:
Tēnā koutou, Mr Butler, Mr Kirkness, Ms Harris. Madam Solicitor.

SOLICITOR-GENERAL:
Your Honours, with your leave I intend to present the Crown's submissions with Ms Todd. We will separate the argument.

Your Honours, I have a short road map just because we're going to take the issues slightly out of order from the written submission, if I can hand those up, please, Mr Registrar.

I'll start the Crown submissions with some context setting about why we're here and the important public interests and policy issues at play but I will then begin the submissions proper addressing what is called the preliminary question and why the Crown says the Court fell into error in establishing how the Minister should go about considering whether diplomatic assurances from the PRC reduced the risks to Mr Kim. In the written submissions this is the first issue on appeal.

I'll then cover what the written submissions call the third issue. We say the Court was wrong to find the Minister's conclusions on the risk of torture weren't reasonably open to the Minister and in addressing that issue I will also cover the standard of judicial review the Court should apply which, as Your Honours will know, hasn't been an issue in the Courts below between the parties but the intervener now raises. Reliability of assurances is relevant both to the third and the fourth issues. I will take the Court through what the Minister was advised and what she said in her decision as to why she judged the assurances to be reliable against the risks identified.

Then Ms Todd will address the fair trial question, first what the Crown says the test should be for considering differences between jurisdictions of fair trial matters and then why we say the Court below was wrong to find the Minister's conclusions were not open to her. These are the second and fourth issues on appeal in the written submissions. Ms Todd will also cover the fifth issue, which is related, relating to the impact of time Mr Kim has spent on remand in New Zealand. So we have separated these issues slightly differently because in our submission it is more straightforward to follow in that order because we will follow in the order of what we say the test is and then deal with the torture question and the fair trial questions separately.

As is evident, there is considerable material before the Court. There was even more material before the Minister spanning a considerable period of time from the first decision in November 2015 which Justice Mallon overturned in the High Court to the second decision on the 3rd of October 2016. We want to take Your Honours to quite a lot of that decision-making material so we will be spending some time in the papers.

The parties are agreed and we filed a memo, and the Court is also content, I understand, that the cross-appeal should come second. So we will conduct that part of the hearing as is set out in that joint memo of counsel.

So I come to the context setting. The Crown's argument here is that the Court below has established new tests that do set New Zealand apart from cognate jurisdictions and from the European Court of Human Rights jurisprudence. Now this is important not because those jurisdictions are binding on this Court but because all of those senior Court cases play into the same international context and the public interest factor that weighs heavily in extradition, and the public interest factor is both domestic and international. I won't ask Your Honours to turn up the case of *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR). I can tell you it's at tab 17 and at paragraph 89 the Court said, "As movement around the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition," and we see something of the same sentiment from the Supreme Court of Canada in *Attorney-General (India) v Badesha* 2017 SCC 44, [2017] 2 SCR 127, which is at tab 4 of the Crown's authorities, at paragraphs 35 to 37.

GLAZEBROOK J:

Sorry, the tab of the first case?

SOLICITOR-GENERAL:

Are you in the electronic file, Your Honour?

GLAZEBROOK J:

The tab number, sorry.

SOLICITOR-GENERAL:

4.

GLAZEBROOK J:

No, the previous one, sorry.

SOLICITOR-GENERAL:

17. Just turning to *Badesha* at 35 to 37, a basic principle of extradition law that a person alleged to have committed a crime in another country should expect to be answerable to that country's justice system. Extradition is the process by which one state assists another in putting that principle into practice. The extradition process is founded on principles of reciprocity, comity and respect for differences in other jurisdictions.

I won't read on through but it goes on to point out the pressing and substantial domestic objectives protecting the public domestically and protecting an international order. Of course, the Court goes on to address the competing interests that this Court is going to have to deal with, the rights of the person being sought to be surrendered, and the Court of Appeal set those matters out in its decision at paragraph 8, noting the issues are difficult, noting this is the first case in New Zealand – sorry, the first case in which New Zealand is being asked to extradite a person to the PRC, noting as I've just said processes exist to ensure those who commit crimes can't escape the consequences, should be no safe haven for those who commit serious crimes and, as the Court of Appeal emphasises and the Crown also does, it is alleged that Mr Kim has committed a very serious crime, a crime in respect of which credible evidence has been gathered by the PRC.

Of course, on the other hand, the Minister has been asked to return Mr Kim to a country that has a criminal justice system very different to our own, that has not committed to relevant instruments, international instruments, in the way or to the extent that New Zealand has, a country in which it is reliably reported torture remains widespread notwithstanding procedural reforms in the last 40 years which have reduced the incidence of torture and in which the criminal justice system is subject to political influence. New Zealand has obligations under international law to refuse to return a person to a jurisdiction in which they will be at substantial risk of torture or where they will not receive a fair trial.

With respect, we agree with the Court of Appeal that the issues on this judicial review are difficult.

The Crown submits that the Court below has established tests that would see New Zealand be a soft touch or a safe haven for those wanted to be tried for serious crimes in other jurisdictions. It is not in the public interest either domestically or internationally. This is also a significant case and this is the first time that a Minister has determined to surrender a person under the Extradition Act 1999 using diplomatic assurances to determine whether to surrender that person.

The final piece of context that I just want to emphasise is, of course, that surrender, this decision, the surrender decision, is an assessment of risk to the individual, to Mr Kim, set against the backdrop of the public interest in extradition that I have just mentioned. The Minister's focus was, as it should have been in my submission, on Mr Kim. How he will be treated and the risks to him and of course the issue that we come here on is whether she was right to consider that the way he would be treated, assurances that she had protected him adequately.

So I want to turn to the first issue on appeal, the approach to assurances. The Human Rights Commission as Intervener makes a submission that challenges the use of assurances per se in principle where without them there

would be a substantial risk of torture or absence of fair trial rights accorded to the surrendered person, and as I understand the respondent's submissions they adopt, or at least say that may be a better course for this Court to follow. In the Crown submission, that is wrong and is not a position this Court should take. It is lawful for a Minister to seek assurances in this case, or generally, to meet the risk that she has identified, that absent those assurances, the surrendered person is substantially at risk of torture or ill-treatment or lack of a fair trial. The Court of Appeal decided this point at paragraph 70, the Court saying, "We conclude, therefore, that even if there is evidence of systemic ill-treatment of defendants and prisoners in the PRC, New Zealand is not prohibited by international law from accepting and relying on diplomatic assurances when assessing whether there is a substantial risk that Mr Kim will be tortured, or subjected to extrajudicial killing, or the carrying out of the death penalty." And with respect we agree with the Court of Appeal.

The Human Rights Commission has referred to criticism of assurances per se by the United Nations Special Rapporteurs and the Convention Against Torture Committee. The Minister was aware of these criticism. It was before the High Court and the Court of Appeal, both ruling that despite those criticism there is nothing at international law precluding reliance on assurances in these circumstances. I won't go to the paragraph but in the second judicial review Justice Mallon is at paragraph 25 taking that view, despite strong criticism from some international bodies, Courts have accepted assurance is in order, and so she goes on at paragraph 25.

The Crown takes a different view to the general comment number 4 that has been brought to the Court's attention, so where the Committee Against Torture general comment number 4, when I say, "The Committee considers diplomatic assurances from a State party to the Convention to which a person is to be deported, should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that they would be in danger of being subjected to torture in that State."

ARNOLD J:

Isn't the key issue with assurances really what the backup is. I mean this issue was explored in detail in the *Evans* case in the context of transfers of people, insurgents captured in Afghanistan to the Afghan Government to be dealt with under the criminal justice system, and that criminal justice system had a wide range of defects, given its history, and the Court examined the nature of the monitoring and other steps put in place. So it's not really particularly useful to talk about assurances in the abstract. The real question is what's the backup. What are the arrangements, the interlocking arrangements. What's the nature of them. Are they likely to address concerns that otherwise might legitimately arise.

SOLICITOR-GENERAL:

Thank you Your Honour. I agree, with respect, that is the position the Crown takes, and the Courts below have taken to assurances. You're now being encouraged to take a different view by the Commission. That matter isn't actually on appeal and Your Honours have left that door open, as I understand the minute, that you'll address scope later, so I just want to make sure that it's clear that the Crown's submission is –

GLAZEBROOK J:

Yes, I think maybe you can –

O'REGAN J:

It maybe better to deal with it in reply.

GLAZEBROOK J:

That's what I was going to suggest.

SOLICITOR-GENERAL:

Yes, thank you. So I'll just finish my point then and move on, just on the general comment. The Crown accepts, of course, that assurances can't be used as a loophole but as Justice Arnold has just addressed the – they go into

the whole picture of determining are the assurances sufficient to address the risk that is faced?

So the Supreme Court of Canada, the House of Lords, the European Court of Human Rights, all take the view that assurances need to be considered as against the risks faced and that they are not just part of but an indispensable part of the operation of extradition law, as the House of Lords said in the case that's known as *Algeria*, *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, at tab 16 of our authorities, but it is the precursor to *Othman v United Kingdom* (2012) 55 EHRR 1 (ECHR) in the European Court.

So in summary then, and if I need to I'll come back to this in reply, we say the Court of Appeal's right at paragraph 70 to conclude that assurances were open.

It's set out in the evidence before the High Court by Mr John Adank, tab 13 of the case on appeal, that assurances are moral and political obligations on state parties that have repercussions, both domestically and internationally, in that diplomatic relationship and that they are processes that are conducted by states acting in good faith towards each other. The Extradition Act also anticipates the use of assurances, at section 30(6) invites consideration of any assurances, and also while it's not actually relevant in this appeal any more I just draw your attention to section 30(3)(a) in relation to the death penalty where the Minister is required to consider whether assurances are adequate to avoid a death penalty being imposed.

So what the Crown says the Court got wrong is that we say there should be no preliminary and standalone question as suggested by the Court of Appeal as to the general human rights situation in the PRC which may suggest that human rights aren't valued or understood or that the rule of law isn't sufficient to secure the benefit of any assurances before those assurances are sought and assessed. So that's the error that the Court of Appeal fell into early, we submit, in determining its approach to the preliminary question. It fell right into

what the House of Lords called a paradox or a catch-22 situation in *Othman*, the case is called *Algeria* at tab 16, and I just want to take Your Honours to two of these cases. They are both the *Othman* cases, first in the House of Lords, tab 16 of the authorities, and then in the European Court at tab 13. Tab 16 is in volume 2. Tab 13 is inconveniently in the first volume.

The House of Lords starts at paragraph 106 in tab 16, considering reliance on assurances, and the point I want to emphasise is at paragraphs 114 over the page and 15. Lord Phillips saying there, "I do not consider these decisions," having looked at European Court decisions, "establish a principle that assurances must eliminate all risk…It is obvious that if a state seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights it will need to show there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be subjected to such treatment. If, however, after consideration of all of the relevant circumstances of which the assurances form part, there are no substantial grounds for believing a deportee will be at risk of inhuman treatment, there will be no basis for holding that deportation will violate Article 3." There the Article prohibiting torture and cruel and degrading treatment.

"That said," at paragraph 115, "there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by state agents is endemic. This comes close to the 'Catch 22' proposition that if you need to ask for assurances you cannot rely on them. If a state is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?" So reliability there coming in as a key question of the particular assurances.

Just while we're here can I just point up a point that I'll come to you later, just while you've got it open. Over the page at 117 the Court is considering a

case, which is also in the material before you of *Lai v Canada (Minister of Citizenship and Immigration)* [2008] 2 FCR 3, a claim for judicial review but refers to the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3. "As mentioned earlier, whether there is a substantial risk of torture if *Suresh* is deported is a threshold question… it is in large part a fact-driven inquiry. It requires consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth," reliability, "and, in that respect, the ability of the home state to control its own security forces, and more." So there's the House of Lords saying this is a matter that gets considered in full, in substance, not just thinking about the State's human rights values or rule of law values before assurances are considered.

The European Court of Human Rights in *Othman*, which is where that case heads, is at tab 13, first volume. It starts at paragraph 183, but I want to draw your attention to paragraphs 187 and onwards because this is where the European Court sets out the factors that Minister is advised were relevant factors to consider in determining whether assurances would, in fact, relieve the risks identified to Mr Kim.

So at 187, "The Court will consider the general human-rights situation in that country and the particular characteristics of the applicant.. where assurances have been received… a relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection… There is an obligation to examine whether…" they will actually provide, sorry, that's my own addition, "in their practical application, a sufficient guarantee that the applicant will be protected… The weight to be given to assurances… depends… on the circumstances prevailing at the material time."

I'll come to 188 in a moment, because in my submission, this is the paragraph in which the Court of Appeal falls to error. I just draw your attention to 189 the factors, that the European Court says the Courts will assess the quality of the

assurances, whether they can be relied on given the receiving state's practices and they set out a non-exhaustive list but a detailed list of factors. I won't read them out to Your Honours, in fact we'll see the Minister's attention to those shortly.

So if I turn back to paragraph 188, and I also would like Your Honours to have with you the Court of Appeal judgment at paragraphs 71 through to 74, where the Court turns to assessing the general human rights situation and considers *Othman*. So, Your Honours, you'll see there at 71 in the Court of Appeal they are referring to *Othman* and they refer there, the Court said that the state must address a preliminary question. "That question was whether the general human rights situation…excludes accepting any assurances whatsoever. "But," the Court added, "it would only be in rare cases that the general situation of a country would mean that no weight at all could be given assurances." And there the Court of Appeal is citing precisely what the *Othman* Court says at 188 which you also have open.

Then at paragraph 72 the Court of Appeal says, "The Court cited a number of its own decisions in which the general situation in the requesting state was such that diplomatic assurances were not in themselves sufficient to provide adequate protection against the risk of ill-treatment, each involving proposed extradition to Uzbekistan." It refers to those two cases there.

They go on to say, "We are satisfied," 73, that before determining whether to accept assurances, the Minister has to consider the general human rights situation – sorry, whether it was such that assurances could not be relied on.

Now this is the point the Crown says is wrong. Those cases referred to, those cases involving Uzbekistan, the Court, the European Court itself does not, despite what paragraph 188 appears to say, does not form the view that one can exclude assurances in a vacuum – sorry, not in a vacuum – but solely on the basis of the general situation in that state. In fact, the Court does what we say the Minister did here, was look at the general situation and review what assurances, if any, have been obtained in order to determine the risk to the

individual. To do otherwise, as the Court of Appeal requires, sends the Minister into the catch-22 paradox that the House of Lords have warned us of in a position in which she is unable to emerge. It is not at issue in this case that absent the assurances the Minister could not surrender Mr Kim to the PRC. It is the work that the assurances do, the reliability of those assurances, their detailed and we submit sophisticated nature that give her the basis to lawfully surrender him.

Now the Court of Appeal says but this preliminary question is an important one because skipping it in the process risks sort of breaking up of the risk assessment so that the broader human rights and rule of law context can't be considered. Broken up, the Court says, the process could produce a falsely reassuring picture, but in my submission that is wrong also for the same circular reasoning, that the need to seek them means you can't rely on them. What we say is the right approach is that of course the Minister needs to be aware of the general situation here in the PRC, both in relation to the risk of torture, a mandatory prohibition for her decision-making under the Extradition Act, and as Ms Todd will come to in relation to fair trial rights. But she must be able to move off that general situation and examine closely the assurances, and as Your Honours will know, in this case those assurances came in several parts, including a more detailed series of assurances relating to monitoring and receipt of recordings of interrogations after the first judicial review.

ELLEN FRANCE J:

What do you say then that the Court in *Othman* is referring to when they talk about the rare cases that the general situation in a country will mean that no weight at all can be given to the assurances?

SOLICITOR-GENERAL:

Those would be cases where the giver of the assurance has no control over the conduct that has concerned – the conduct that is – that assurers feared will be visited on the surrendered person. So, for example, where the state who gives the assurance isn't, in fact, the feared organ that might in a torture,

thinking about torture, conduct the torture, or whether state isn't, in fact, in control of the criminal – sorry. Whether state isn't capable of giving – sorry. I'll just say that once more. It is in those cases where the giver of the assurances don't match, or can't control the problem that is complained of.

GLAZEBROOK J:
What about a state, and we can all think of states which aren't part of, one would assume, normal diplomatic relations and therefore while they might give assurances –

SOLICITOR-GENERAL:
You might mean military rule, for example.

GLAZEBROOK J:
Yes.

SOLICITOR-GENERAL:
In a state assurance has no meaning. That would be, in my submission, what the Court is referring to in those sorts of cases, rare cases where you simply can't use assurances, or where the state landscape is so chaotic that there is no control, there's no meaningful ability to give and rely on an assurance.

GLAZEBROOK J:
Of course I suppose you could equally look at that in terms of whether the assurances are capable of meeting the situation.

SOLICITOR-GENERAL:
Yes, well in the *Othman* criteria those are the questions about, are they specific or general and vague, has the person given them, can they bind the receiving state, will local authorities be expected to comply with them, yes.

ELLEN FRANCE J:

Just in terms of whether that's the extent of what the Court is referring to, cases like *Sultanov v Russia* are not necessarily in that category. I suppose you could say that's an example of it's so chaotic.

SOLICITOR-GENERAL:

Well in *Sultanov v Russia*, Application no. 15303/95, Judgment, 4 November 2010, and that's in the Commission's bundle at tab 16, in fact –

ELLEN FRANCE J:

I mean that's slightly different because they hadn't seen the assurances anyway but…

SOLICITOR-GENERAL:

Well, yes, that's right, although except this is the point that I was making earlier, Your Honour, that even in that case the Court said, what's the evidence torture is systematic in Uzbekistan. Pervasive and enduring was their phrase. Uzbekistan gave an assurance there would be no ill-treatment of Sultanov if he were extradited and the Court says the task for us is to examine whether such assurances in practical terms provide a sufficient guarantee. In fact they still did the testing of the assurances, such as there were, against the general situation. So again it isn't an example. In my submission, this is one of the things the Court of Appeal has got wrong, of thinking that those cases are ones where the European Court said the general situation is so bad that no assurance can meet it. In fact *Sultanov* wasn't such a case, nor was *Ismoilov v Russia* [2009] ECHR 348, (2008) 49 EHRR 42 103329, which is also in the respondent's bundle at tab 56, another Uzbekistan case. The assurances were that the applicants wouldn't be subjected to death penalty, torture, violence or other forms of inhuman or degrading treatment or punishment. The Court there wasn't persuaded that the assurances that they looked at offered a reliable guarantee. In particular given that the same assurances had been given in the past by the Uzbekistan authorities and they had proved to be ineffective against the general state of conduct towards – in that case, those people returned. So the point that I want to make to

Your Honour Justice France is that it is still a case where the Court goes into the general situation and assesses the assurances. Sometimes they are rather poor or high level or vague. That's one of the things that *Othman* requires that we look at.

So we accept, as we must, that the evidence of systematic and endemic torture is a powerful factor to be weighed by the Minister and is part of the overall matrix when she assesses the reliability of the assurances. Our objection is to the preliminary question that she can't move off.

But returning to the Court of Appeal at paragraph 73, as will be clear from the Minister's decision – perhaps it's time to take you to these points – the assurances were considered reliable not because, as the Court of Appeal anticipated in 73, there is evidence that the receiving country understands and values human rights or is committed to the rule of law so that such rights are protected to the surrendered person, the assurances were considered reliable on the basis of both Mr Kim's particular characteristics and the basis of the diplomatic relationship between the states.

Can I take Your Honours through the material where the Minister assesses these matters? In the first briefing, November 2015, which is at tab 39 of the case on appeal. So the analysis using the *Othman* principles starts at paragraph 143. See there the advice to the Minister, the general characteristics. This is important to distinguish Mr Kim's case from many of the cases considered in the evidence or many of the criticisms of the receiving country in the evidence that political and religious dissidents or ethnic minorities or human rights defenders may have a worse time than, you know, the high risk group. As you will see shortly, the Minister shorthands that as Mr Kim being wanted as an ordinary criminal. 145, there is a strong prima face case against Mr Kim, which may lessen his risk of torture to extract a confession. So these are going through the *Othman* principles.

Does the general human rights situation exclude assurances? The Ministry's conclusion that New Zealand is not so precluded.

GLAZEBROOK J:
What paragraph firstly?

SOLICITOR-GENERAL:
146. This was before the first, the Minister's first decision.

GLAZEBROOK J:
Yes. No, I understand that. I just lost the paragraph. I was on page, I think, rather than paragraph.

SOLICITOR-GENERAL:
Sorry, beg your pardon. Then going over. Can the entity bind the PRC? Then you get expert advice from the Ministry of Foreign Affairs, entities giving assurances are mandated to do so by the state, by the PRC. They are aware of adverse consequences to the bilateral relationship that would result from not adhering to its assurances, and it will be conscious of the message such non-adherence will send to other countries.

Can local authorities be expected to abide? MFAT again advises that detention laws and regulations are centralised and while practice may vary the Chinese authorities have indicated Mr Kim will be detained and tried in Shanghai. New Zealand can expect the authorities to abide.

Torture is illegal, it goes on to point out in the next paragraph.

Now, is there an effective system of protection, and Your Honours should read through those paragraphs and I don't intend to distract from them by not reading them because they are important because it points out that while the PRC is party to the Convention Against Torture, it isn't party to the optional protocol which requires independent monitoring bodies.

No previous ill-treatment. The bilateral relationship is addressed in paragraphs 155 to 157. Long-standing diplomatic relationship, frequent contact, can compliance be objectively verified. Now we come to, we need to

come to the second sort of set of decisions. The second decision and second set of assurances where monitoring and access to recordings, both proactive and reactive attention to Mr Kim, becomes part of the assurances. So to add to that – sorry. Over the page, 162, experience of other countries with assurances from the PRC. Those two country names, Your Honours, that follow in paragraph 163 and 167 are suppressed country names. But you'll see there that the Embassy provided information about practical experience where assurances were given and met and the Ministry goes on over the page to summarise the advice using the *Othman* framework.

ELLEN FRANCE J:
Just in terms of those assurances, is there any other information from the other countries about the nature and scope of the assurances? Or is that the extent of it?

SOLICITOR-GENERAL:
There is not.

ELLEN FRANCE J:
I just couldn't remember.

SOLICITOR-GENERAL:
I don't think that there is. That is the extent of it. Ms Todd reminds me that the *Lai* decision itself details some of the aspect of the assurances, but that's what the Minister was told.

In the second briefing, which is in the blue case on appeal, so for the second decision, tab 82, this is where monitoring, at paragraph 55 of that briefing paper the Minister is advised that Justice Mallon thought there was, or it was unclear from the material how the arrangements would be put in place and how they would be monitored. Over the page, "NZ is committed to using the arrangements in the assurances to proactively monitor Mr Kim's treatment, and will commit the necessary staff and resources to do so." They refer to the letter of the Minister of Foreign Affairs, which is in the material just behind, at

tab 74. We'll come to that letter, actually, shortly. In fact, providing advice on New Zealand's commitment and competence to monitor. So it sets out there the Ministry's advice. Substantial rights of contact with and access to Mr Kim. Exercised to the full extent necessary to ensure his proper treatment. New Zealand is committed to ensuring the arrangements for monitoring are as outlined in the assurances will be proactively undertaken upon his surrender, and commit necessary staff and resources to do so.

I won't read this all out to Your Honours but I emphasise the third paragraph there in paragraph 59, "The assistance provided to Mr Kim… will be informed by all relevant factors at the time and tailored to Mr Kim's circumstances from the time that he enters detention. Officials will initiate arrangement for a first visit as soon as it is confirmed when Mr Kim will depart from New Zealand… The frequency… will be elevated at the outset and during particular phases of the criminal justice processes, such as the investigation phase. Visits initiated by New Zealand representatives may also be supplemented when so requested by Mr Kim… nature and frequency of the visits subject to ongoing proactive assessment during the course of his detention to ensure Mr Kim's continued wellbeing in detention."

It goes on to advise the Minister that New Zealand does have experience at a consular level of assisting and monitoring in another state and in particular in the context of PRC.

GLAZEBROOK J:
Sorry, I've lost where you are.

SOLICITOR-GENERAL:
59. I'm still going through that rather long paragraph.

O'REGAN J:
The Minister's letter at 59. Tab 82.

SOLICITOR-GENERAL:
So that was one thing that concerned Justice Mallon in the High Court in the first review, monitoring and how the Minister could be assured that those assurances would be met.

The second issue that the Judge found in the High Court was disclosure to third parties. She was concerned that the original set of assurances as is set out at paragraph 64 was that information about Mr Kim's treatment will be used for the sole purpose, sorry, access will be used for the sole purpose of obtaining information on his treatment and information will not otherwise be disclosed to third parties and the Judge was concerned that that left New Zealand unable to do anything if issues arose bilaterally through the consultation mechanism between the states, and so the Ministry then goes and gets further advice from MFAT that in fact if the assurances give rise to issues, assurances – they can be resolved using the consultation mechanism and if the assurances break down New Zealand won't be limited in its ability to provide information about Mr Kim's treatment to third parties.

Now this is important for the reason that Minister McCully advises the Minister of Justice about the reliability of the assurances obtained, and that's at tab 74 of the bundle that you've got there. So you see the Minister of Foreign Affairs advising, well, first that – I've already addressed that point – that MFAT is experienced and resourced to provide the support of the monitoring. The second point he raises, "I offer my views," about the reliability of the assurances. Now this is, of course, the Minister of Foreign Affairs, in my submission extremely well placed to make this assessment and to advise the Minister of Justice as to reliability. "Chinese Ministers and officials have been very motivated on the issue of extradition in recent times. Driven by their desire to extradite persons they refer to as 'economic fugitives', they have sought to convince the New Zealand Government that they can be relied upon to act in accordance with their assurances to us, and their international obligations in such matters." In, "My own clear view…Chinese Ministers and officials will give the very highest priority to living up to their assurances to you in relation to the Kim case." They know at this stage, "Their efforts to

convince the rest of the world of the integrity and respectability of their systems, their performance in relation to the Kim case will have a critical influence on the future attitude of the New Zealand Government, and that of other governments," and that is relevant in my submission to face a challenge put by my friends that New Zealand is this small and reasonably muscular country at the bottom of the world, how can the assurances be reliable? But that international expertise coming from the Minister of Foreign Affairs is that it's not just about New Zealand but also the world stage in which these assurances are being given and watched. China will know it is being watched and their performance in relation to it will have a critical influence on the future attitudes of other international governments.

And of course, just as this Minister was advised that different countries have had successful experiences in obtaining assurances that were met from the PRC, so too will this case become one of those cases that countries look to to identify how China has performed.

Our Minister herself sets out her reasoning for why she thought the assurances were reliable and that is at tab 77 of that same bundle, her decision letter, and again I won't read it all out to you but if you can turn up paragraphs 49 to 51. You see what is influencing the Minister. The authorities will be aware your treatment is being monitored. Mistreatment is more likely to be detected. Repercussions for the bilateral relationship and for the PRC's international reputation. At 51, two countries we've already referred to, indicated that they have had experience, no issues regarding the treat of two individuals they had deported. The Minister says at 54.1, "I am satisfied that the assurances given by the PRC can be relied on," having had regard to *Othman* factors. "Provisions allowing for monitoring… provide a significant deterrent to the PRC committing any act of torture. NZ and other countries have experience where assurances given by the PRC have been honoured… be proactively monitored.

At 63 she addresses fair trial rights, which we will come to. She is satisfied on both the tests that she has set, or that she has to meet, on both the absolute

prohibition on assurance, and the ensuring a fair trial, or at least ensuring that there is no flagrant denial of justice in respect of the fair trial rights, she is satisfied, and those are her, that is her final decision now under challenge.

So the Crown submission is that in fact there was nothing before the Court of Appeal on which to doubt the reliability and strength of those assurances other than the general situation and the Court ignored the Minister's expert advice about reliability.

So that is why we say that the Minister properly considered the assurances and considered their reliability in the round, not to make it sound like she was casual about it, but with the evidence and information about the general situation in the PRC she was right to take that approach rather than, as we say, the Court of Appeal says, and got it wrong, that she needed to make her assessment about whether assurances were reliable before she began considering them.

I want to come to the next point, which is the third issue on appeal, which is why we say the conclusions in relation to the risk of torture were reasonably open to the Minister.

GLAZEBROOK J:
Can I just ask you a question on that, and it's slightly related to the standard of review question, and it is if, and it'[s probably an abstract question in a sense, but it has a factual element to it. So if the Court took a different view from the Minister on whether there was a substantial risk of torture, isn't that an error, wouldn't it find an error of law in those circumstances, and even leaving aside the Bill of Rights in respect of an idea of an error of law, it is actually in the Extradition Act itself under section 30(2)(b), so obviously that assessment is based on a question of fact, and I was going to ask you that when you took us to the *Suresh* issue because of course Canada has a slightly different way of looking at these things. We would, I think, say if there's an error of law that is an error that the Court's intervene on.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

And it obviously would be an error of law that's based on an assessment of fact. So that's the question.

SOLICITOR-GENERAL:

Yes. Sure, thank you, Your Honour. Can I start there?

GLAZEBROOK J:

Well, you can either deal with it where you were going to deal with it or now.

SOLICITOR-GENERAL:

No, I will. Yes, which was now. Yes, and I'm happy to deal with it now because I need to deal with that before I get to saying why we say the conclusions were reasonably open to her and that's what we say the question is for the Court in review.

So I take no issue with Your Honour's proposition as put to me that where the question is a matter of the application of or the interpretation of the statute then the Court is the one to determine what the law is and what it means and, indeed, to conclude if in this case the Minister has made a decision that the Court considers she could not reasonably have reached the view she did, in particular in relation to torture, the prohibition on torture, for which the Minister says, "Absent the assurances, I couldn't surrender him." There's no question that the Crown's position is that if there are substantial grounds for believing that he would be in danger of torture, he cannot be surrendered, and that is a question of law. But the reason that we say the right approach in review is for the Court to take what the Courts below took in without issue between the parties, the heightened scrutiny approach of review.

GLAZEBROOK J:

Well, just so I can be clear, is that the heightened scrutiny of review of her factual determination that there is not a substantial risk of torture with the assurances? Is that the submission, that the Court can't take a different view of the facts? I'm just asking. It's not a loaded question in any way.

SOLICITOR-GENERAL:

Yes, that's right, Your Honour. No, the Court can say on the basis of the material in front of you, on your assessment of the assurances, we don't think you have been able to be satisfied that there isn't the risk of torture. That is the scrutiny. It is not to say, and I agree with Your Honour that the Canadian case, you know, takes quite a different turn from New Zealand on review where the deference is given to the decision-maker even in respect of what the law is. So we take no quibble with that, because the first question isn't actually in dispute. Everybody agrees what section 30 means about torture. So we do say that if the Minister comes to the question and she weighs that the assurances that she has are sufficient to counter that risk, that is a matter for which she should be judged on the question of was it reasonably open to her with the Court giving its detail and its hard look or its heightened scrutiny to her assessment?

GLAZEBROOK J:

So on a question of fact the issue is was that conclusion reasonably open to her with a heightened scrutiny, that's the submission?

SOLICITOR-GENERAL:

Is there in fact a real risk of torture, yes.

GLAZEBROOK J:

Thank you, and it's slightly tricky because the question of fact obviously then goes into the question of law but…

SOLICITOR-GENERAL:

Yes. What the Crown is opposed to in the submissions that might come in, and of course it might be a reply point, is the suggestion that as I understand has been put to the Court that this Court can come to its own view balancing the risks and the assurances that Mr Kim should be surrendered or that he should not, and of course we come back to the statute being paramount, giving the Minister that question. It's not to say this Court should look away and defer to her entirely but if she is wrong and is unable to satisfy this Court that these were reasonably open to her, these conclusions were reasonably open to her, they need to go back to the Minister. These are factual determinations and evaluations she makes. They are matters of fact.

GLAZEBROOK J:

Thank you.

SOLICITOR-GENERAL:

And we don't also, of course, quibble with the proposition that the Minister's decision must be rights consistent, no question there either, but that doesn't mean, couldn't possibly mean, that the Court can then make that decision in what it considers to be a rights consistent way.

Would Your Honour, Justice Glazebrook, want to go to *Suresh* and *Badesha* and those –

GLAZEBROOK J:

No, not at all. I was just saying I was going to ask you the question at that point but you said you were coming back to this question and that's what I assumed you were going to do.

SOLICITOR-GENERAL:

In those cases, from the Canadian Supreme Court, we rely on them not to say that we want this Court to take a different approach to review as the Canadian's do, but rather to point out that those Courts address this

assessment by the Minister as an intensely fact-driven enquiry. That was the point we draw from those cases in regard to the standard of review.

So may I now go through the Minister's decision about what she looked at, and why she concluded that it was open to her to – sorry, that Mr Kim was not at substantial risk of torture if surrendered. I think, looking at the clock, I'm going well against our anticipated timetable. So I'm going to spend a little bit of time but not too much in the decision. I ask that I just return to the Crown's written submissions, paragraph 44 is where this starts. 44, in fact, I've addressed. I don't need to go back through that. Just in 45 we point out in summary that as we set out in more detail, "The Minister's methodology ensured she properly considered the general situation in the PRC before turning to the risk to Mr Kim. She proceeded on the basis Mr Kim's personal characteristics did not sufficiently mitigate the general risk identified, but that the assurances and the monitoring could be relied upon and would be effective to protect Mr Kim."

And I've already addressed that point about the Court of Appeal saying she needed to think about, does the receiving country's rule of law commitment and values of human rights mean that the assurances are reliable. Missing out and not considering those matters of international and bilateral diplomacy which were particularly within the Minister's realm, not to say that the Court should not look at that at all, but they were not considered weighty by the Court of Appeal and, in my submission, they should have been.

GLAZEBROOK J:
Sorry, the expertise wasn't –

SOLICITOR-GENERAL:
Yes. The reason, the considerable reason why she thought they were reliable.

O'REGAN J:
What do you mean by there being "no legal yardstick"?

SOLICITOR-GENERAL:

The question about whether or not two states have a strong bilateral relationship on which reliability can be based, isn't a question of law. There isn't an easy yardstick by which the Court can say, yes there is or no there is not. It does need to rely, to some extent, on the Minister's expertise.

O'REGAN J:

But it's still an assessment based on the evidence before the Minister, isn't it?

SOLICITOR-GENERAL:

Yes, that's right.

O'REGAN J:

I mean if there was nothing to support that –

SOLICITOR-GENERAL:

Quite so, yes. Of course the Court could say well there is nothing that you base that on, but in itself it is incapable, in my submission, of a legal test as to measuring whether that is strong or not. That is what is referenced there, is the legal yardstick.

GLAZEBROOK J:

Well it comes back to your indication that it's a question of fact based on the evidence and whether it was reasonably open based on that evidence to take that view, I suppose.

SOLICITOR-GENERAL:

Yes, thank you, yes it is. So the first briefing to the Minister in November 2015, and Your Honours have had that open, tab 39, you may wish to refer to it again. Tab 39 of the case on appeal. I've actually been thorough some of these so I can move reasonably swiftly through, but at paragraph 54.1 and 67.2. So that goes through the reliability of the assurances. I'm sorry, I don't need to go through this. I've been through this.

I'll stick with the written submission. At paragraph 46, the Minister's methodology. So first she looked at, comprehensively looked at the general situation in the PRC. So she had information about the broad consensus by commentators and United Nations bodies that there is overwhelming credible evidence of routine use of torture and ill-treatment.in the PRC to extract confessions, information as to the PRC's lack of co-operation with international monitoring mechanisms, details about recent reforms to prevent torture and reliance, specific reports by national bodies and NGOs and acknowledgement that the initial period following detention or arrest is when people are most at risk.

So the written submission goes through, in paragraph 46, those matters which led the Minister to the view that absent the assurances Mr Kim could not be surrendered. 47 outlines further.

Your Honours, we don't need to go through it, just to point out that the Appendix A to these written submissions pinpoint the particular references, where they are in the briefing papers, the matters that the Minister considered. This is what comes next in the written submission at 49. So having reached that conclusion, the Minister looked at Mr Kim's particular risk characteristics. She concluded he was not a member of a well know, high-risk group in the PRC to which a greater risk of torture might be visited. She considered material about whether murder accused are at higher risk than ordinary criminals.

ELLEN FRANCE J:

Just in terms of that and how we approach that, there is the material in the Human Rights Watch Report about that, so as a sort of practical example of how you say the Court should look at it, what do we do with that material?

SOLICITOR-GENERAL:

Well, the material shows the Court that the Minister was not unaware of there being a risk of torture. In fact, she was told, as Your Honour points up, and addressed in the briefing papers, that Human Rights Watch had suggested

that murder accused are at higher risk than other ordinary criminals, and it goes to the Minister's conclusion that she couldn't surrender Mr Kim absent reliable and detailed assurances about how he would be treated.

ELLEN FRANCE J:

Well, I suppose it could go to the argument as to whether he is in fact in a higher risk group and therefore an assurance of a different nature might be required. I'm just trying to understand your submission in terms of what the Court is now doing. So we have this evidence that on its face suggests there might be a question about that aspect of the reasoning. How do we, how are you saying we deal with that?

SOLICITOR-GENERAL:

I think it comes back to my answer to Justice Glazebrook that the way the Court should deal with it is with all of this information was it reasonably open to the Minister to form the view that with the assurances these risks would not be visited on Mr Kim? The Court of Appeal, the criticism the Court of Appeal made of some of that material before the Minister was to say that that question was put to one side by the Minister but in our submission because the Minister ultimately concludes that he cannot be, sorry, yes, Mr Kim cannot be surrendered simply absent assurances, our submission is that that didn't need to be resolved, that evidential difference I suppose, as to whether or not he is at a higher risk than ordinary criminals, because she concluded ultimately that he was at risk, absent assurances. So as the written submission says at 51 the Minister did not conclude that these characteristics of Mr Kim reduced the risk to an acceptable level so she proceeded on the basis that assurances were required and at paragraph 51 we set out the following assurances and the monitoring components that were crucial to the Minister's assessment.

O'REGAN J:

I think the question is though if a murder accused is at high risk, then possibly more stringent assurances were required than the Minister thought were necessary. So she did need to resolve it, didn't she?

SOLICITOR-GENERAL:

Well in my submission she didn't need to resolve is it high or higher because she then went on to what we submit is a pretty sophisticated set of assurances with monitoring that can occur at least once every 48 hours, or more often if sought by Mr Kim. So in fact the high or higher question actually doesn't need to be resolved. That is our submission. That the Minister didn't need to resolve that.

FRENCH J:

But the greater the risk, the better the assurance surely?

SOLICITOR-GENERAL:

Well in my submission the assurance in fact is very sophisticated and detailed. The monitoring, in particular, the commitment by New Zealand to continue that monitoring, or to conduct that monitoring by officials with experience in PRC of monitoring people in custody.

O'REGAN J:

So is your case that even if a murder accused is in a higher risk category, the assurances here were sufficient to meet that higher risk?

SOLICITOR-GENERAL:

Yes, I think that is the submission, and I'm tentative about it because it would have depended. There was no question here that Mr Kim was, or the Minister didn't conclude that Mr Kim was of the type of accused who, with a political or human rights defence bent for which there was considerable risk. So just to answer your question, yes that's right. If there is a higher risk of torture then these assurances are sufficient.

GLAZEBROOK J:

So you'd say, you're not saying anything about the very high risk of political or human rights, and whether these assurances would be enough, but it's not suggested that he's in that very high category so even if he's in a higher

category than the ordinary, then they would be sufficient. Is that the submission?

SOLICITOR-GENERAL:
Yes it is, thank you Your Honour.

ELLEN FRANCE J:
You said, I don't want to press it unduly, but if you look at the reasons for decision at tab 77, paragraph 54.3, my question is well could the Court say you, the Human Rights Watch report, and this is just an illustration I suppose to understand the reasoning, the Human Rights Watch report is reliable and so therefore it was wrong to conclude you're personally not a higher risk. You'd accept the Court could do that? Or not?

SOLICITOR-GENERAL:
The Court could find that the Minister too lightly considered the Human Rights Watch information, well she questioned its reliability, and if that's the case the Court might also say, well, we're not sure that you got that right about whether he's an ordinary criminal suspect or at some higher risk because he is a murder accused. Then the Court will have to ask itself, did the Minister, when the Minister said, "I don't need to determine that because the assurances," so she does rely on the assurances, can the Court then say well those assurances are insufficient to meet that heightened risk.

GLAZEBROOK J:
Or just say that was really a mandatory consideration that you needed to take into account and consider in the light of that whether the assurances would be sufficient, even if you thought the Human Rights Commission might be unreliable to actually at least consider that. Sorry, I'm getting myself tied up.

SOLICITOR-GENERAL:
No, I think I have to accept that. That if the Court says, no, actually, you did need to conclude his particular risk profile, and you haven't, go back, decide,

work that out and decide whether those assurances are sufficient yes, I think that must be right. But I can only take you to the point where the Minister gets to of not really nailing down that point. Identifying that he would be at risk if returned absent the assurances.

GLAZEBROOK J:

I suppose in that circumstance would the Court then itself have to – I mean would the Court inevitably have to send it back or just consider itself whether there should be further assurances in those particular circumstances? I.e. then overall to come to the conclusion that despite that error nevertheless the conclusion was reasonably open to the Minister. That might be how long is a piece of string is.

SOLICITOR-GENERAL:

No, well I'll answer that to say it would be open to the Court to say nonetheless in light of the sophisticated and detailed assurances, which is already set out in the written submissions, you know, actually more superior than the assurances that we've seen in the other of the cases. I think it is open to the Court to say despite that the risk, even a heightened risk, of torture is met by the assurances.

ARNOLD J:

Well the Minister –

SOLICITOR-GENERAL:

Or we're dissatisfied and send it back, sorry Your Honour.

ARNOLD J:

I was just going to say the Minister at 54.3 doesn't rely simply on the assurances but she says there are other differentiating circumstances that I've allowed, meaning that you personally are not at high risk, and one of those I guess is the nature of the existing evidence and so on.

SOLICITOR-GENERAL:

Yes, thank you Your Honour. She goes on in .4 and .5 to identify those differentiating factors, prima facie case is relatively strong, role has already been investigated, pre-trial detention is the most – sorry, is the time is most at risk of torture.

GLAZEBROOK J:

And not a police station.

SOLICITOR-GENERAL:

That's right. Most likely to be dealt with in Shanghai, to be tried in Shanghai. It probably is a good time for me to pass over the matter to Ms Todd because what the Minister then goes on to deal with is, at 63, is about the fair trial rights and as the road map indicates we'd like to set that fair trial discussion up first with a question of the threshold test.

GLAZEBROOK J:

Would it be better to take an early morning tea so to give Ms Todd the full run?

SOLICITOR-GENERAL:

Thank you, Your Honour, yes, that would be good and then we can tidy up and be ready.

GLAZEBROOK J:

So have you finished your bit for now so…

SOLICITOR-GENERAL:

I have, thank you. I'm just dealing with the written submissions through to paragraph 55 which you have in front of you but we've addressed the high points, the general situation, his personal characteristics, why the assurances were reliable.

GLAZEBROOK J:

Is there anything in particular you want to say about – I think at one stage you said something like there were better assurances than in other cases. Was there anything you wanted to draw to our attention particularly in terms of them being better than what we know of assurances in other cases?

SOLICITOR-GENERAL:

Well, in particular the monitoring and the…

GLAZEBROOK J:

Is that frequency or the…

SOLICITOR-GENERAL:

The frequency, the commitment from the New Zealand state to provide the resources to that, that they are proactive monitoring, not just awaiting Mr Kim's concern to be expressed. Those are particularly strong features of those assurances.

GLAZEBROOK J:

Did anybody have any other questions specifically on them? We'll take an early adjournment.

COURT ADJOURNS: 11.22 AM

COURT RESUMES: 11.41 AM

GLAZEBROOK J:

Ms Todd.

MS TODD:

E ngā Kaiwhakawā, tēnā koutou. May it please the Court. As the Solicitor-General has explained, I will address the Court on what the Crown says is the correct test for the Minister to apply when considering surrender when there are fair trial concerns. That is issue 2. Having done so, I'll turn to whether the Minister's conclusion on risk to a fair trial was reasonably open to

her, issue 4. Finally, I will cover issue 5 which is whether a potential decision by China not to account for time that Mr Kim has spent on remand in custody in New Zealand would lead to punishment of such severity that extradition should be refused on that basis.

Issue 2, what is the test for non-surrender when there are fair trial concerns? The Crown says that the Minister cannot surrender Mr Kim if there is a real risk of a flagrant denial of justice in China. Now that is the correct test set at a level that recognises the strong public interest in extradition and the fact it is not for New Zealand to impose its domestic standards on other states. The Court of Appeal we say was wrong to formulate a different and new legal test which is whether there is a real risk that China will depart from the standard in Article 14 of the ICCPR such as to deprive Mr Kim of a key benefit of those rights. Now that test does not allow, or does not recognise, that for extradition to function there have to be allowances for differences in criminal justice systems between states.

GLAZEBROOK J:
Doesn't Article 14 in itself do that, because if it sets the minimum standards internationally then it sets the minimum standards that say anything else is not a proper trial, fair trial?

MS TODD:
Well, Article 14, we accept it does set standards which are universally accepted as fair trial standards. The question is the degree of departure from those standards such that someone should not be extradited.

GLAZEBROOK J:
Perhaps it might be easier to look at that in the context of the facts maybe.

MS TODD:
Yes.

GLAZEBROOK J:

In the sense that they're relatively minimalist standards to start with so…

MS TODD:

In my submission it is important to have the extradition context in mind before we come to those facts because the Crown says that this flagrant denial of justice test achieves the right balance between maintaining the public interest in extradition and also ensuring that the most fundamental rights in the criminal justice system are protected.

GLAZEBROOK J:

So there can be an interest in returning someone to an unfair trial because of extradition policies, which are?

MS TODD:

Yes, well, I will turn to that right now in terms of what underpins this test? Why are we talking about this public interest in extradition? As I say, and as Your Honour, Justice Glazebrook, has recognised, that is what's being balanced here. Well, the test originates in the European Court of Human Rights' decision in *Soering* which was in 1989, and the Solicitor-General has taken Your Honour to some of those passages, where the Court emphasises that where movement about the world becomes easier it is in the interests of all nations that suspected offenders who flee abroad should be brought to justice, and having considered that strong public interest in extradition the Court in *Soering* in fact established the test and said an issue might exceptionally be raised by an extradition decision where the person suffered or risked suffering a flagrant denial of justice in the requesting country. Now those –

GLAZEBROOK J:

In terms of justice, are they talking about substantive justice or a fair trial?

MS TODD:

A fair trial.

GLAZEBROOK J:

Because the extradition is for a trial.

MS TODD:

Trial, yes it is. And Madam Solicitor also took the Court to a passage from the Supreme Court of Canada's decision in *Badesha* where the Court says, this is paragraph 35, that extradition is founded on principles of reciprocity, comity and respect for differences in other jurisdictions. Now in my submission it is those public interest considerations that led the Court to set the test at the level that it did because that allows extradition to work. It does make allowances for differences and approaches and systems of criminal justice.

ELLEN FRANCE J:

Does it make any difference in that context if there's no treaty, so if you're operating under the ad hoc?

MS TODD:

In my submission, no. While there may not be a treaty obligation to extradite, which would be an additional weighty factor, it is the fact of extradition, allowing countries to seize people who have either fled or otherwise ended up in another country to try those people in those home jurisdictions. And interestingly, Your Honour, this flagrant denial of justice test has been applied equally in deportation decisions where, of course, there is no treaty obligation to extradite.

And these public interest considerations, they still exist today. They were recognised by the Court of Appeal in *Bujak v Minister of Justice* [2009] NZCA 570 where Your Honour, Justice Arnold, referred to the strong public interest in suspected offenders who flee overseas being returned to home jurisdictions so guilt or innocence can be determined, and that's in order to avoid the, what is known as, "safe haven". And the core part of the Crown's submission here is that that test, the flagrant denial of justice test, does give the latitude to differences in criminal justice approaches but it also recognises that fundamental rights, there is a threshold to which – an entitlement to

fundamental rights which also has to be reached, and the test achieves the right balance between those two. Indeed, it is the test that is consistently used in the United Kingdom and by the European Court of Human Rights and while put in different terms in Canada they also have a very high threshold. The Court refers to not extraditing for humanitarian concerns where it would shock the Canadian conscience.

GLAZEBROOK J:
That's a bit of a different issue, isn't it? That's more like the deportation context, isn't it, because I'm not sure that the conscience of the public may be quite shocked in the way that a legal context would be in terms of fair trial issues. I'm not sure that the conscience of the public is actually what you would look at in terms of fair trial, is it?

MS TODD:
Fair trial. Well, not to the same extent. In Canada everything is wrapped up under the section 7 of the charter issue which is the principles of fundamental justice and that's where they say if something would offend those principles, fundamental principles of justice, and shock the conscience, surrender should not occur. So it's more illustrative of the high threshold.

GLAZEBROOK J:
Yes.

MS TODD:
So I've set out the underpinnings to this test but what does the test in fact mean? Well, we can refer to key United Kingdom and European Court jurisprudence to assist. In *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, which is in tab 14, albeit there's no need to take you to it, that's tab 14 of the appellant's authorities, Lord Carswell explained that the right to a fair trial would need to be completely denied or nullified and he equated this with the concept of fundamental breach. Lord Bingham referred to the test as a high or a stringent one requiring a flagrant violation of the very essence of the right.

Now those concepts feed through into the *Othman* decisions which, of course, went through both the House of Lords and the European Court. Now in the House of Lords, which is tab 16 of the appellant's authorities, Lord Phillips said the phrase cannot require that every aspect of the trial process should be unfair. What is required is that the deficiencies in the trial process should be such as fundamentally to destroy the fairness of the trial. And there is an important passage in *Othman* from the European Court of Human Rights judgment, which is tab 13, where the Court, it emphasises that a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of the Article, Article 6 in that case, occurring within the state itself. What there has to be is a breach which is so fundamental as to amount to a destruction of the very essence of the right.

ELLEN FRANCE J:

What's the best example of something that falls into that category?

MS TODD:

Probably the European Court's examples in their judgment which is paragraph 259 of their judgment. They give four examples: a conviction in absentia with no possibility of a retrial, a summary trial with no regard for a defence, detention without any access to an independent and impartial tribunal and the deliberate refusal of access to a lawyer. So that was paragraph 259 in the Court's judgment and, of course, in *Othman* itself the Court decided that if evidence extracted from third parties by torture were to be admitted at trial, that would be a flagrant denial of justice also.

GLAZEBROOK J:

Perhaps at some stage if you could go through the Article 14 factors. I don't know whether this is a suitable time.

MS TODD:

With Your Honour's –

GLAZEBROOK J:

Well, just in terms of the facts of this particular case.

MS TODD:

Yes, absolutely. I'm shortly to finish the test and then move to the –

GLAZEBROOK J:

No, no, absolutely. I'm not trying to rush you or push you out of sequence.

MS TODD:

So what this case law has shown us and what the Crown says should be also the position in New Zealand is that any breach of fair trial rights in a requesting state must be something much more than would be a breach if it occurred domestically. Now this is where we say the Court of Appeal got it wrong, where the Court has said, the Court of Appeal has said the question is whether there's a real risk of deprivation of a key benefit of the Article 14 rights, but that both doesn't recognise that that strong public interest in extradition and it sets a test that requires something akin to equivalence or compliance with New Zealand's domestic standards.

GLAZEBROOK J:

I would have thought New Zealand's domestic standards go a bit beyond the minimum standards in Article 14, don't they?

MS TODD:

Well, in certain respects they do, Your Honour. There are the working of sections 23, 24 and 25 of the Bill of Rights Act. Yes, they do go beyond some of the minimums in Article 14 of the ICCPR, in particular as to the point at which you are entitled to a lawyer. I would acknowledge that. But nonetheless, my submission, the Court of Appeal's test in effect means that if the Minister identifies a problem in China that would result in an unfair trial if it occurred here the Minister cannot extradite and that does not recognise the distinction that has to be drawn when New Zealand's conduct of trials in New Zealand is at issue as against New Zealand's obligation not to extradite

due to concerns with a foreign state's criminal system, and with that approach it's also inconsistent with the case law that we've just discussed emphasising that to refuse extradition the breach has to be something more than what would be a breach domestically.

So having regard to that underpinning and those public interest considerations the Crown says that this Court should confirm that the flagrant denial of justice test is the appropriate test that the Minister should apply when considering the exercise of the surrender power.

GLAZEBROOK J:
So seeing you've equated justice with fair trial, it's a flagrant denial of a fair trial, is that the submission?

MS TODD:
Yes, a flagrant denial of a fair trial.

GLAZEBROOK J:
I suppose I have a bit of difficulty understanding quite what that is which is why I'm quite interested in the context, I think. It's just really the word "flagrant", I suppose, because it could be a surreptitious denial of a fair trial which would be just as bad as a flagrant one.

MS TODD:
Yes.

GLAZEBROOK J:
But there "flagrant" they're using in terms of a…

MS TODD:
Fundamental breach.

GLAZEBROOK J:

It's just I suppose I'm having a slight bit of difficulty in understanding why there's a difference between the Court of Appeal test and that flagrant denial of justice or whether it's merely saying you're deprived of a key benefit which would then deprive you of a fair trial.

MS TODD:

Yes, well, the Court of Appeal's approach does look at whether or not Mr Kim would be deprived of a key benefit and we say, well, that's not enough. It has to be something beyond that, the flagrant denial and the sort of case where the Court, the European Court in *Othman*, describe what might be a flagrant denial, and they were the examples I've just taken you through in paragraph 259 of the Court's judgment.

ELLEN FRANCE J:

I was just going to say something like refusal of access to a lawyer, that would come under both tests, wouldn't it?

MS TODD:

Yes. Yes, it would. The deliberate – that's right, and that's an example indeed given by the European Court, that deliberate, sustained refusal of access and indeed that would also amount to a breach of an individual part or principle within Article 14. So there may be some particular crossover where if something were to happen that would both be a breach of an individual strand of Article 14 and a flagrant denial.

GLAZEBROOK J:

Well, is the submission then that just as one strand of Article 14 is denied, that's not enough?

MS TODD:

Exactly.

GLAZEBROOK J:

You'd have to look at it either overall – well, sorry – it might be enough if it was something so fundamental that that in itself denies you of a fair trial, denies a fair trial, but otherwise you would have to look at it not just on one strand but on all of the strands, is that the submission in terms of the difference?

MS TODD:

Your Honour, thank you, that is my submission, and that's the standing back and looking at. There may well be differences. This is not how it would work in New Zealand. This would not be sufficient in New Zealand. But, analysing everything as a whole, would this be a flagrant denial of justice? And in fact a very useful example here is what the House of Lords talks about in the *Othman* case. So there where Mr Othman was to be deported to Jordan, he was going to be tried before the State Security Court. Now that was made up of military officers, as were the prosecutors, which was subject to – and where those Judges, military officers, did not have security of tenure and were subject potentially to influence from the executive. Now what the Court of Appeal says is, well, that would not pass muster here. That would not be an independent tribunal for United Kingdom purposes, but that's not sufficient to say that there would be a flagrant denial of justice so as to prevent a surrender. That's perhaps a better example to the question by Your Honour, Justice France.

I now intend to move from the correct test onto issue 4 which is whether the Minister's conclusions on risk to a fair trial were reasonably open. Now the Minister, and a potted summary is to say that the Minister had regard to a wide range of information concerning criminal procedure in China including by reference to each strand of Article 14. She also had information about Mr Kim's individual and personal circumstances, including the assurances and monitoring system. But using her expert judgment the Minister assessed the assurances and monitoring were reliable and she reached conclusions about how Mr Kim would be treated and how his case would be dealt with on return,

and overall she concluded that Mr Kim would receive a trial that to a reasonable extent accords with the fundamental principles in Article 14.

So that was how the Minister approached the matter, but what the Court of Appeal has done is to extract three topics and say no, further information and/or assurances about those three topics are required before the Minister can come to any conclusion about fair trial. So the Court of Appeal said those three and this is in our oral outline, or the roadmap, I'm sorry. Three concerns. The right not to be compelled to confess guilt, they said you need more information about that and an assurance. They said the right to legal representation, the Minister needs more information and an assurance. And thirdly the Court of Appeal said the right to a hearing before an independent Court, the Minister needs more information. Now we say the Court was wrong to make those findings because there was adequate and appropriate information before the Minister about these topics.

I was about to start into the discussion, the first topic, isolated by the Court of Appeal which is the right not to be compelled to testify or confess guilt. Now I'm conscious that what we're talking about are particular principles of Article 14, so we're delving into those principles. So perhaps it might be helpful to have the ICCPR open in front of us. That's in the appellant's bundle of authorities at tab 21.

So we have the rights set out in Article 14 and before we do turn to some particular principles which is where the Court of Appeal said the Minister erred I would take Your Honours to the first briefing paper of November 2015 which is tab 39.

GLAZEBROOK J:
Can I just check? If you were compelled to testify against yourself or confess guilt do you still get a fair trial? Just to go back to the test, would that be a flagrant denial of justice? It would certainly be a flagrant denial of something absolutely explicitly set out in Article 14(2)(g).

MS TODD:

Yes. Well, that…

GLAZEBROOK J:

It may be that you say, "Well, I don't need to answer that question because in fact the information in front of the Minister was that was not the case."

MS TODD:

I do say that, Your Honour.

GLAZEBROOK J:

Well, maybe you don't need to answer it but I'm really trying to get the flavour of that. Is that one of the fundamental rights or is that one that you'd say, well, you were required to testify against yourself but in the round you've still got a fair trial?

MS TODD:

Well, Your Honour has correctly predicted that, say, well, it's not necessary to answer that because the Minister concluded his rights would be protected. But in order to assist Your Honour, and again, although the Minister has said, this is taking a different right, that there will not be political interference in Mr Kim's case, she concludes that. The Crown would accept that if there were political interference in a case that would be a flagrant denial.

GLAZEBROOK J:

Sorry, now I've lost – you were going to take us to the Minister's…

MS TODD:

Yes. The point of taking you to the briefing, which is at tab 39, and starting at paragraph 376, the reason we come here is to show that the briefing and therefore the Minister went through each of these principles set out in Article 14. So they're taken separately and by reference to the equivalent provision in the New Zealand Bill of Rights Act, and what the briefing does is takes the principles and then it says how is this accommodated within

Chinese law? Now this is very important, in the Crown's submission, because the way in which it's accommodated in Chinese law determines or – I'll start that from the other angle. When there is an assurance that China will comply with its domestic law and that assurance is assessed as reliable then the way in which these rights are accommodated in Chinese domestic law is very important. So each principle is taken on its own. The accommodation is set out below, and as you'll see it is with some significant detail by reference to particular provisions of the Chinese Criminal Procedure Law. That's the CPL. And that analysis goes on until paragraph 417.

Now the Minister was well aware of what are these standards. "What am I making an assessment against?" And of course the Crown says that her ultimate assessment was reasonable because what she does in summary form is to say, "There is not only an assurance that China will comply with its domestic law, and I've examined the domestic law and I think that these rights are sufficiently accommodated within them," it's a key part of her analysis. But the other assurances and monitoring are relevant too, highly relevant. So there's an assurance that Mr Kim is entitled to a lawyer. He can meet with that lawyer in private. New Zealand can meet with that lawyer. New Zealand can meet with Mr Kim and take a legal expert. So there are detailed provisions regarding his right to legal counsel, and those visits are also part of that monitoring system. New Zealand's meeting every 48 hours during the investigation phase. That's the direction that the Minister has given, and New Zealand will be attending the trial. That's an assurance. It can attend the trial, or all open sessions, I should say. New Zealand can receive information about the trial. It can speak with the procuratorate. That's the prosecuting body. And also in terms of monitoring and relevant in particular to one of the concerns of the Court of Appeal is access to the full and unedited copies of all pre-trial interrogations of Mr Kim within 48 hours of those interrogations occurring. So New Zealand will see what is happening at the interrogation and it will see what is happening at the trial and it can talk to Mr Kim and his lawyer, and, as the Solicitor-General has explained, that monitoring is a key deterrent to China conducting an unfair trial because if a breach is detected and notified that has significant repercussions, not just for

the New Zealand-China bilateral relationship but also for China's international reputation, and we know from Minister McCully's letter that that international reputation is important here in addition to that bilateral relationship.

So we can see now the approach that the Minister has taken and her reliance upon the assurances and monitoring regime and why she said, "I think these are sufficient to protect his rights."

What I intend to do if it would help Your Honours is to take you to those three particular topics that the Court of Appeal highlighted and to explain, well, what information did the Minister have about these matters and what assurances did she have and how did she reach her conclusions on these topics and does she in fact need more information?

GLAZEBROOK J:
Can I just check beforehand that there was quite a lot of evidence that despite the legal nature of, for instance, allowing cross-examination it just does not occur?

MS TODD:
Yes.

GLAZEBROOK J:
Possibly you're going to deal with that when we get to that,

MS TODD:
I am.

GLAZEBROOK J:
Because under the torture, for instance, it wasn't enough to say torture's illegal and we accept that we'll do this even with monitoring. There had to be something more than that.

MS TODD:

Yes, well, I will come to that but in a nutshell the Minister acknowledged that what is set out in theory is not what happens in practice. She was well aware of that. But the key differentiating factor here was Mr Kim's personal circumstances. That comprises both the extent of his knowledge of a case and also the assurances and monitoring, so, and that is what makes his case different, an assurance that China will comply and expert advice to the Minister as to likelihood of complying and monitoring to check that that's the case and that's the point that takes his case out of the general and into the specific and individual risk to Mr Kim.

Now Your Honour, Justice Glazebrook, will hear me repeat that point when we go through each of those topics but I think it's helpful to have at the start.

So the right not to be compelled to confess guilt. Now this is something that did receive significant consideration by the Minister. Now she was satisfied that Mr Kim's right would be protected. By that she meant that he would not be compelled to confess guilt given the provisions of Chinese law together with Mr Kim's personal circumstances, such as the assurances and monitoring. Now the Court of Appeal said no, that's not right and the Minister requires an assurance that Mr Kim will have a lawyer present, and that's where we say the Court has erred. It's substituted its view for that of the Minister on a question of fact.

The Court of Appeal's, and we are delving into the details here, the Court of Appeal's concern centred around pre-trial interrogations and specifically around the meaning of Article 118 of the Criminal Procedure Law and how it interacts with Article 50. Now these provisions were set out for the Minister in the November briefing. They're at paragraph 408 and we will turn to them. So Article 118 says that criminal suspects must answer investigators' questions truthfully but have the right to refuse to answer irrelevant questions, and Article 50 says that Judges, procuratorial personnel and investigators are strictly prohibited from forcing anyone to provide evidence of his own guilt.

Now Your Honours may be thinking that there is an apparent conflict between these provisions and with that in mind advice on the interaction between these provisions was sought from Professor Fu. Now his advice is at tab 81 of the case on appeal. That's the blue bundle 4. He says that yes, Article 118 does require Mr Kim to answer questions if relevant. However, that –

ELLEN FRANCE J:

We're at paragraph 22, is that right?

MS TODD:

Yes, we are, Your Honour. That's exactly right, thank you. He then goes on to say that that duty to answer questions is qualified by a number of important legal rules and perhaps the most important here is the third, which is Article 50, which prohibits forced confessions. Now Professor Fu also explains that Article 118 is not consequential so –

GLAZEBROOK J:

Can I just, he seems to say Article 50 says if you have a forced confession, which I'm assuming means unlawfully obtained through torture because torture is illegal in China, that is excluded. It doesn't seem to say that he has a right to remain silent, just in terms of what the professor says.

MS TODD:

Well, Article 50, what he seems to intend because what he's talking about here, the specific question he's answering is whether or not Mr Kim is required to make a statement, so that's the question that he's answering and –

GLAZEBROOK J:

If Article 50 only stops if it's unlawfully obtained, it can't be unlawfully obtained if under Article 118 he's got a duty to answer questions, can it?

MS TODD:

I'm sorry, actually, there's two aspects to what he's saying in paragraph 26 and we need to separate them out. So first of all he's saying, Article 50

prohibits forced confessions, and that's because Article 50 says that investigators are prohibited from forcing anyone to provide evidence proving his guilt, and then what he says in the second part of that sentence is that there is a procedure thorough which the Court is duty bound to exclude evidence, and I think that is much more aimed at the torture evidence.

GLAZEBROOK J:

That's my understanding in terms of the code provision – sorry. I suppose my limited understanding of what the evidence said on that.

MS TODD:

I will just go back to the wording of Article 50 which is the prohibition on forcing anyone to provide evidence of guilt, and as that's what he's being asked to talk about, I would really – in my submission Article 50 should be read in that way. It prohibits torture to confess guilt or any other methods of questioning so as to force a confession.

GLAZEBROOK J:

What's wrong in asking for an assurance that says that is the right interpretation, i.e. that Article 50 effectively overrides Article 118?

MS TODD:

Well indeed Your Honour there could be other assurances that could be obtained but the question for the Court is not what assurances could be obtained, but whether those that were obtained are sufficient to protect his rights.

GLAZEBROOK J:

Well I suppose if we don't know what it means, i.e. whether you are obliged to confess guilt or answer questions or testify in your own because there's a seeming conflict between two sections, then it becomes a bit difficult. Of course the answer might be that's not enough to override a fair trial because you're only obliged to answer questions truthfully. I don't know

whether that's the Crown's submission, i.e. that the right to silence can be overridden.

MS TODD:

Well –

GLAZEBROOK J:

I suppose it is overridden to a degree in England, in terms of if you don't say something now –

MS TODD:

It can be –

GLAZEBROOK J:

Yes, so the right to silence isn't absolute –

MS TODD:

Not itself, absolutely. Well I would make that submission, that any potential interference with that is not something, per se, that gives rise to a flagrant denial. But on the question of what this means, I acknowledge the point made by Your Honour but in my submission would say in certain circumstances where this is the question that Professor Fu was asked to answer, how do these provisions interact, in the context of are you obliged to answer questions truthfully, then his comment about Article 50 having relevance should be taken as including prohibiting any confession not simply from torture.

ELLEN FRANCE J:

At paragraph 410 of that briefing paper there's a reference to Chinese officials being specifically asked about this point. They said that a defendant has the right to refuse to answer a question and that there are no adverse consequences if they do.

MS TODD:

Yes. That is a helpful reference, thank you Your Honour, and –

GLAZEBROOK J:

Sorry, what paragraph is this?

ELLEN FRANCE J:

410 of the briefing, so tab 39.

MS TODD:

So, and that something that Professor Fu builds on. The acknowledgement of what the briefing records is that the Chinese officials said that a defendant has the right to refuse to answer a question, and taking a reading of Article 118 and Article 50 in the way that I suggested, would be entirely consistent with that advice from those officials.

GLAZEBROOK J:

Or is it just that there's no consequences if you do refuse to. Which of course might give you the right to refuse to in a practical sense.

MS TODD:

In a practical sense. Well it would because, there are no consequences, is not aggravating factor, yes.

The final point that Professor Fu makes about Article 118 is that it applies only at the investigative stage and not at the prosecution and trial stage.

Now this was all set out for the Minister in the second briefing, in the August 2016 briefing, and the Minister concluded that as a matter of fact the provisions of Chinese law do protect the right against self-incrimination. She referred to the fact there are no legal consequences if a person refuses to answer questions.

GLAZEBROOK J:

You say it's a matter of fact, I would have thought that might – I suppose foreign law might be a question of fact but I'm not sure that she necessarily has any more expertise in that than we do.

MS TODD:

Yes, perhaps that statement was made too early because the matter of fact that she determines is that he will be protected from –

GLAZEBROOK J:

Right, I understand.

MS TODD:

Yes, which of course brings in the assurances.

GLAZEBROOK J:

Yes.

MS TODD:

Yes. Now the other, just before we turn to those assurances, the other difference or differentiating factor that the Minister relied on, was the fact that Mr Kim has detailed knowledge of the case, and he knows what the position is through these proceedings. He will have a lawyer and indeed he will also have New Zealand representatives who can reinforce this to him at each and every visit. So we have the assurance that China will comply with its domestic law, which we've just gone through, and we also have the monitoring visits, and we have that key monitoring assurance, which is access to the full unedited copies of all interrogations within 48 hours. Now that is a deterrent against and also a method of detecting any breach of the right against self-incrimination.

The Minister had regard to these provisions. She had regard to the assurance about compliance and this monitoring system, the access to the full videos, and she said, she concluded that these assurances were reliable.

She emphasised the monitoring, the detection and that non-compliance has these serious repercussions for the bilateral and the international relations. And on balance she recognised there was balance. She said, well despite the absence of a lawyer during pre-trial interrogations, she was satisfied that Mr Kim's particular circumstances, which of course is all she needs to think about, his circumstances and the assurances and monitoring were sufficient to protect his right. And we say, well having examined the evidential basis that we've discussed, and giving weight to the Minister's assessment of reliability, that that conclusion was a reasonable one. And the Court of Appeal was wrong to say that an assurance of legal representation during interrogations is required.

So that was self-incrimination. We then have what the Court of Appeal called, or described as a right to legal representation. Now the Court below was concerned about three particular aspects of that right. The timing and content of disclosure, the position of the defence Bar, and the right and substance to examine witnesses. The Court said again well further information and/or assurances are needed. So it wasn't open to the Minister, they say, to conclude that the assurances met any concerns in this respect.

So if we take that first issue, the disclosure. Now that, as anticipated Your Honour Justice Glazebrook may ask, could be considered as an aspect of the right to adequate time facilities to present a defence. So what information was before the Minister about this, especially in terms of provisions of Chinese law. Well we go back to the November briefing, which should still be open at tab 39, and we have paragraph 400. Now this says, or it sets out Article 38 of the CPL, which is that, "A defendant's lawyer may, from the date the procuratorate receives the case for prosecution, consult and produce the case file materials." So that is disclosure. Further, this is also in the briefing, if the defendant's lawyer considers that the police have not submitted, "Evidence beneficial to the defendant to the procuratorate… the lawyer can apply to the procuratorate or court… to obtain the evidence." The Minister was referred in the paragraph 400 to David Matas' view. He's a well-known and renowned expert in Chinese law. His view was that the

defence would have to have some knowledge of the evidence in order to make the sort of application that we've just discussed. And the Minister was also told that because the procuratorate is responsible for putting all evidence before the Court, it's not usual for the defendant's lawyer to collect evidence. However, the lawyer can do so, and if witnesses do not consent to that sort of approach, the lawyer can apply to the procuratorate, or to the Court, for the collection and obtaining of evidence, and can ask the Court to inform witnesses to appear, that's Article 41 of the CPL.

Now that's not all of the information that was before the Minister because she also had Mr Ansley's evidence. Now that's in tab 16. We don't need to turn to it because I can summarise what he says which is that, yes, there is a right to access the prosecution in court files, but that simply doesn't happen in practice. He says that police prosecutors and Judges hold meetings on the file, that defence counsel are excluded and they're never allowed to see anything in the file which might help the accused.

So faced with that information, what assurances and monitoring are relevant. Well we have the assurance that China will comply with its domestic law. That's what we've just discussed in terms of the provisions for disclosure. We have Mr Kim's right to a lawyer, to meet that lawyer in private. New Zealand's ability to meet with Mr Kim, and his lawyer, and to take a legal expert. So Mr Kim in his meetings with his lawyer can tell him or her about any areas to explore for exculpatory material and that lawyer will be able to enforce those provisions of domestic law.

GLAZEBROOK J:
What about provisions that are unknown. The Mr Matas issue?

MS TODD:
Yes well the different situation that Mr Kim will be in here is that he, in fact, has quite detailed knowledge of the prosecution case through these extradition proceedings so –

GLAZEBROOK J:

I understand that but what say they had a, the police knew about an eyewitness to something that's of significance which Mr Kim has no means –

MS TODD:

No idea.

GLAZEBROOK J:

– of knowing whether, that that eyewitness exists.

MS TODD:

Yes, well, you're right to the extent that defence counsel can make applications. There may be some matters which are simply unknown and –

GLAZEBROOK J:

And unknown to the procurator as well because the police –

MS TODD:

Police have not –

GLAZEBROOK J:

– haven't handed over –

MS TODD:

Yes, that's right. This is certainly a difference within the system, but in my submission when taking those provisions, which allow for these applications and the obtaining of evidence and witnesses, they are sufficient to ensure that proper disclosure will, or adequate disclosure will take place.

GLAZEBROOK J:

And I suppose you would also say that before our proper disclosure regime that could have occurred in New Zealand, yes.

MS TODD:

Could have occured here, indeed.

GLAZEBROOK J:
Probably could and did occur in New Zealand.

MS TODD:
So we were discussing the assurances and the monitoring. We've talked about the access to the lawyer and how crucial that is, and of course New Zealanders can attend the hearing, be given information, and again to perhaps, at risk of repeating myself, New Zealand's presence and monitoring of that trial is the significant deterrent to any unfairness because if it's detected that's what has those significant repercussions.

So take the Court of Appeal's concern, we would say well no further enquiry or investigation about disclosure is required, and the Court is wrong to say that an assurance on disclosure is needed.

So point 2 within the legal representation is the position of the defence bar, and specifically Article 306 of the Criminal Code. Now that's what concerned the Court of Appeal. Now this is part of the right to receive legal assistance and present a defence. So taking the same methodology, what information was before the Minister about this. Well we have at paragraph 390, which is on the same page. The briefing paper refers to the provisions in Chinese law that guarantee a defendant the right to a defence. The briefing paper also refers to the fact that Mr Kim will be able to instruct a lawyer immediately upon arrival if he's extradited because he will be arrested, and that is a compulsory measure which triggers the right to a lawyer. The briefing at 393 refers to the fact that meetings between Mr Kim and his lawyer must be in private, and occur within 48 hours of a request to meet. So in my submission there are reasonably substantial provisions guaranteeing that right to a defence and the ability to meet, and indeed they are bolstered by the assurances here which were discussed in terms of accessing a lawyer and meeting in private. But that's not all the information the Minister had. Again we have Mr Ansley's evidence. This is, as we know, is at tab 16. Now he talks about defence counsel having extreme difficulties accessing and meeting and discussing matters with clients, and getting hold of the prosecution file. He refers to them

as extreme obstacles faced by the criminal defence bar. And it's Mr Ansley who raises the point about Article 306, which is what concerned the Court of Appeal. Now this is at, just to note, is at page 201.0065. He says that, "Article 306… makes it an offence for defence counsel to falsify or suppress evidence or to suborn perjury," and he says, well, on the face of it that sounds fair enough. But the way in which it's in fact applied in China, he says, is that a number of defence counsel are convicted of this offence either because the defendant has pleaded guilty or because the lawyer leads evidence which is, unbeknownst to him or her, different to what a defendant has said in a confession.

So Mr Ansley's evidence was before the Minister and he also had the assurances and monitoring regime, and we know that that's crucial to any assessment of individual risk. We've spoken about his right to a lawyer, to meet with a lawyer in private, New Zealand's ability to meet with Mr Kim and his lawyer. So Mr Kim's lawyer is going to be able to have discussions, full discussions, with Mr Kim about what, if anything, Mr Kim has said during questioning, and that lawyer will be able to understand any potential related risks in terms of leading evidence. The lawyer will have access to the prosecution file, we've discussed that, and Mr Kim and his lawyer will know from these extradition proceedings, and in particular the eligibility phase, what the case is. So the Court of Appeal's concern is not in fact borne out in this case. So the concern relating to a lawyer falling foul of Article 306 doesn't arise because of the particular system and assurances that we have here. And we know of course that the monitoring of the trial can occur and that that's the deterrent. So to the extent that the Court of Appeal has said, well, further information about the position of the defence counsel or defence bar is needed, we say no, that's not right. There was sufficient information about it, but Mr Kim's personal circumstances and those assurances both limit the scope for the application of Article 306 and they mean that no further information is required.

GLAZEBROOK J:

Can I just go back to what Mr Ansley say?

MS TODD:

Yes.

GLAZEBROOK J:

He does say about not knowing the case, but he also says if they're found guilty and they've pleaded not guilty then the lawyer must have known they were lying – if we go to 201.0065.

MS TODD:

Yes.

GLAZEBROOK J:

So I understand your submission on the second way, but I don't know what happens to the first way. So if Mr Kim pleads not guilty, is found guilty…

MS TODD:

Yes, what then happens?

GLAZEBROOK J:

Yes.

MS TODD:

Well, obviously we are making predictions and I understand Your Honour's concern, and this would be wrapped up within New Zealand's monitoring.

GLAZEBROOK J:

Well, no, not really, because if the defence lawyer knows that that defence lawyer is at risk of going to prison if Mr Kim is found guilty –

MS TODD:

Guilty, yes.

GLAZEBROOK J:

– just because he must have lied in some way and the lawyer must have known about it.

MS TODD:

Yes. Well, there are two parts to my response here. One, given the particular circumstances and the knowledge that may not eventuate, albeit actually that's more addressing the second point –

GLAZEBROOK J:

But isn't it more likely, because if the evidence is very strong he more likely to be convicted and therefore…

MS TODD:

Well, there is very strong evidence here, and that's something that the Minister relies upon, the strong prima facie as established at – I'm sorry, actually I shouldn't say a strong prima facie case. Judge Gibson in eligibility said that there was a prima facie case established based on certain evidence, and that evidence that he relied on was the blood, the victim's blood found in Mr Kim's apartment. A quilt which was wrapped around the body being identified as belonging to Mr Kim, and also a statement from a Mr park who said that Mr Kim had confessed to a murder. So we have that strong case and also, to return to Your Honour's point in terms of pleading, perhaps the sometimes forgotten aspect of the assurances is the assurance or the provision that if there are any issues in relation to the assurances then the parties, New Zealand and China, will engage in consultations so as to resolve them. And it maybe that any concern in relation to his defence counsel could well be wrapped up within that consultation mechanism.

GLAZEBROOK J:

There isn't an assurance that's related to, not necessarily immunity from prosecution, but at least an assurance that it won't be merely because of –

MS TODD:

A guilty plea.

GLAZEBROOK J:

Sorry, a not guilty plea and an ultimate conviction.

MS TODD:

Yes, sorry, yes that's right. But as I say, that's something that could well come within the scope of that consultations between the parties.

So the third and final part of the legal representation matter is the ability to examine witnesses. Now that is a specific principle in Article 14 and, as expected, there was information before the Minister about this. This is paragraph 403 of that November briefing. Now this records that, "The evidence of witnesses is usually provided by formal written statement." However, a Court can request the Court to inform a witness to appear and give testimony, that's Article 41, and a witness shall appear in court if the prosecutor or defendant's lawyer has objections to the testimony, it has a material impact, and the Court deems it necessary to ask the witness to appear. The briefing refers to provisions of Chinese law which say that the defence can ask questions with the permission of the Judge, and refers to a somewhat stronger but not entirely consistent provision of Chinese law, which is Article 59, that the testimony of a witness may only be admitted for the purposes of rendering a verdict after the witness has been questioned and cross-examined by both sides.

Professor Fu, that is tab 81, he acknowledges that criminal trials rely extensively on documents. He says, well, a trial is virtually a trial by affidavits and very few witnesses appear, and that is, in fact, consistent with what Mr Ansley says, which was also put before the Minister, which is that witnesses seldom appear in court and it's the norm to be convicted on the basis of written statements. But what the Court of Appeal has said on this issue is that further investigation or enquiry is needed, but we say that's not correct because the Minister was made aware of the prevalence of written statements, but also of the provisions that enable witnesses to be called and cross-examined. So no further information was needed and nor is a further assurance required because there are provisions in Chinese law which allow for the calling of witnesses. And, as expected, I'm going to talk about the assurance or mention the assurance that China will comply with its domestic law, which has these provisions in it. He's entitled to a lawyer who can

enforce them, New Zealand can engage frequently with Mr Kim and his lawyer on these issues, and of course we have monitoring. So New Zealand is entitled to attend and receive information about the case. So that is a significant deterrent, as the Minister said, to conducting an unfair trial.

ARNOLD J:
What about this suggestion that it's not the Court that actually makes the decision but a –

MS TODD:
Judicial committee.

ARNOLD J:
– judicial committee, yes.

MS TODD:
Yes, Your Honour, that is part of the question about the right to receive a trial before an independent tribunal, and that is in fact the next topic that I was going to turn to.

ARNOLD J:
Okay.

MS TODD:
I was just coming to the end of the discussion about witnesses.

So rounding up that witness discussion, the Minister considered, well, these assurances can be relied upon, and she was satisfied overall with the standard of trial that Mr Kim will receive. We say that conclusion was reasonably open to her, given the evidence and the assurances and monitoring system.

GLAZEBROOK J:

Well, if in practice nobody actually does get a compliance with Chinese laws, is something more required than merely a generic assurance of that kind or – so that specific assurances in respect of these specific provisions, this is a question. It's just if the practice is everything by affidavit and people think that's perfectly reasonable but nobody feels able to counter that and there are restrictions on the defence bar, it's a question really, because it's a practice as against a legality because it was felt necessary to have much more detailed assurance in respect of torture, rather than merely a, "We'll comply with the law."

MS TODD:

Well, of course the practice is the general situation, we acknowledge that, and the question here is – for example, there are provisions in Chinese law, detailed provisions, prohibiting torture, in the same way that there are detailed provisions here regarding exactly how your trial will operate. In practice we know that the Minister is aware that they are not adhered to and/or in the case of witnesses, despite provisions very infrequently, not never I emphasise.

GLAZEBROOK J:

I understand.

MS TODD:

And here a compliance with domestic law, we say, well, that's sufficient, that is sufficient. They have the provisions, they simply need to be applied, and that's what will happen here.

GLAZEBROOK J:

I think my question was should they have been less generic than that and referred to actual provisions of the law that relates specifically to these issues?

MS TODD:

We would say no, it is sufficient to have compliance with domestic law which secures these rights, differently to how in New Zealand, but that's how it happens in China, and that that is sufficient.

GLAZEBROOK J:

Sorry, I'm saying should there have been an assurance that in accordance with Article 59 evidence will only be admitted after the person has been questioned and cross-examined by both sides if, indeed, the defence counsel ask for that to happen?

MS TODD:

We say that's unnecessary and it's sufficiently covered by Article 59 and the assurance of compliance, bearing in mind that system of monitoring as to how this is all working and how this is playing out.

I was intending now to turn to the third question or topic that vexed the Court of Appeal, which is a right to a hearing before an independent tribunal. It may be worth making a start on this or similarly we could pause earlier and resume.

GLAZEBROOK J:

Make a start.

MS TODD:

The Court of Appeal considered that without further enquiry the Minister could not reasonably conclude that the assurances met concerns about a trial before an independent Tribunal. They said that further information about the political control of the judiciary and the role of the judicial committee was required. Now the Crown says that's wrong. The Minister concluded that political interference would not occur in Mr Kim's case, and there was sufficient evidence to support that conclusion. And crucially, in terms of that conclusion, in addition to the Minister's finding that Mr Kim was not in a high risk group, she relied on assurances, and she considered that having received

expert advice those assurances were reliable. So what do we know or what did the Minister know about independence and interference. Well Mr Kim, she was told, would be tried in China –

GLAZEBROOK J:
Are you we going to go to – well what specific assurances do you say covered that?

MS TODD:
Yes, in terms of the political interference that, I'm going to tell you right now –

GLAZEBROOK J:
You're going to come to that. If you're coming to it later, that's fine.

MS TODD:
Right now in fact. So Mr Kim is going to be tried in China before a collegial panel of the Intermediate People's Court. Chinese law provides specifically that Chinese courts exercise their powers independently without interference. That's Article 5 of the Criminal Procedure Law and Articles 126 and 131 of the Chinese Constitution. Now that's set out for the Minister in that November briefing at paragraph 186. So that's what the law says. But the Minister was well aware of concerns regarding judicial independence, and political interference. This was set out for her expressly in the briefing, again at paragraph 186. It says, "It is well known that there is political oversight in the PRC's criminal justice system." Then it references Freedom House and Mr Matas and an amnesty report. And the Minister acknowledged that there can be political interference in her decision letter. So she's aware that it happens. But the Minister was also made aware that political interference does not occur in every case, and of course the question for the Minister was whether or not political interference would occur in Mr Kim's case.

So what information was before the Minister about political interference? Well, we can turn to it. We have, in fact, Mr Kim's submissions to the Minister in September 2014, which are at tab 22, and it is worth turning to this, turning

this up in the bundle. Now in their submissions Mr Kim's counsel refer to articles written by Mr Peerenboom and he quotes particular extracts from those articles, and at paragraph 86 of those submissions he refers to Mr Peerenboom as saying that the party's role in the legal system and its impact on judicial independence is generally overstated and assumed to be pernicious. In the next paragraph Mr Peerenboom is quoted as saying that the party becomes involved in political sensitive cases, or cases involving conflicts between the Courts and the procuratorate or Government. Then he concludes, and this is over the page at paragraph 90 of the submissions, there's an extract from Mr Peerenboom who concludes by saying that there is limited systemic interference from party organs in routine criminal cases. And that's consistent with how it was also put in the Ministry's briefing at paragraph 186 of that November briefing. The Ministry says, or it refers to the US Department of State views and David Matas' view that, "The Party's Law and Politics Committee has the authority to review and influence court operations, although is more likely to become involved in politically sensitive cases." And indeed Mr Ansley himself, his affidavit at tab 16, he doesn't say that state intervention occurs in every case. His concern is that the system enables interference to occur, and he says, he refers to such interference occurring in cases which affect the party or Government or affect their interest or policies. That's at paragraph 47 and 79 of Mr Ansley's affidavit.

Now my submission, given this material, and given that the Minister's task is to assess personal risk to Mr Kim, there was a sufficient evidential foundation for the Minister to conclude that Mr Kim is not in the high risk group in terms of political interference, and that interference wouldn't occur in his case. So no further enquiry on that is necessary, and similarly no further enquiry is needed as to the nature and role of the judicial committee –

GLAZEBROOK J:

Perhaps if we move onto that after the break, because I think we probably do have a number of questions about that, and I think it's better if we do that after the break. So we'll take the luncheon adjournment.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.17 PM

GLAZEBROOK J:
Ms Todd.

MS TODD:
Your Honours, I'm conscious not to encroach unduly on my friend's time so I will endeavour to move through these final issues reasonably expeditiously. Before the luncheon adjournment I had set out the evidential basis for the Minister's finding that Mr Kim was not in a high risk group in terms of political interference by the party and the outcome of his case. But we've not yet touched on what the judicial committee is, and what the law allows it to do. Now the Minister was made aware that the collegial panel, which is the body that hears the case, can refer a case to the judicial committee for determination if the case is complex or it's difficult to make a decision. Now that provision is within Chinese law, it's Article 180 of the Criminal Procedure Law and in the November briefing at paragraph 194 there is a reference to the fact that a referral to this judicial committee can take place.

The other important part of the evidence before the Minister was from Mr Ansley. Now he says, and this is at paragraph 58 of his affidavit, which is at tab 16, he says that the real reason for the existence of the judicial committee is for the party to facilitate control of the Courts. Now we've just traversed, or I've made a submission, that the Minister knew that political interference was an issue in China, but she also had a proper basis for saying that, in fact, political control or political interference would not happen here. Now that's both because Mr Kim doesn't fall into those high risk groups where interference usually occurs, and also because there is an assurance about this. So the Minister didn't stop after making her assessment that Mr Kim is not in that high risk group in terms of political interference. That was part of her analysis, but she went on to consider whether the assurances and monitoring would protect Mr Kim. So we have the assurance that China will

comply with its domestic law, and that says Courts exercise their powers independently and without interference. We also have the assurances relating to Mr Kim's access to a lawyer, who he can meet in private, and New Zealand's monitoring of the trial overall.

Now crucially here is what did the Minister have about the reliability of those assurances and monitoring in this particular respect. Well, she had advice from the Ministry of Foreign Affairs and Trade. Now their advice is at tab 80 of the case on appeal and what MFAT say is that New Zealand's bilateral relationship with China is constructive, long-standing, based on mutual trust and respect, and that there's an expectation that both parties will meet those commitments, those assurances in good faith. MFAT also said that any breach of fair trial assurances would have serious repercussions for that bilateral relationship and the international reputation. The Minister also had Minister McCully's view, which the Solicitor-General has taken you to, that's at tab 74. Now he said that his view was that the Chinese Ministers and officials will give the very highest priority to living up to their assurances because they know that to convince the rest of the world of the respectability and integrity of their system, their performance in Mr Kim's case will have a critical influence on the future attitude of both New Zealand and other Governments. And indeed Minister McCully's view is broadly consistent with Professor Fu's advice, which is at tab 81. He says, well China needs international co-operation and mutual legal assistance in criminal matters because it wants to seek extradition of a number of fugitive offenders. China needs to be credible and Mr Kim's case offers the opportunity for China to do so.

So having considered all of this information, the Minister concluded that the assurances, and the monitoring, overcame any risk of political interference in Mr Kim's case. The monitoring provided the significant deterrent to the unfair trial, and she had that specialist advice as to the likely compliance with domestic law, which of course prohibits that intervention. Now we say that the Minister is best placed to make that assessment of reliability, and that her conclusion that there would not be political interference was one that was reasonably open to her.

ELLEN FRANCE J:

Ms Todd, can you just remind me what do we know about what the Chinese law says about reference to judicial committees?

MS TODD:

Yes, so it's Article 180 of the Criminal Procedure Law. There is a copy of that law, it's in the respondent's authorities at tab 52. This is, and also at paragraph 194 of the November briefing, and Article 180 says that, "After the hearings and deliberations, the collegial panel shall render a judgment. With respect to a difficult, complex or major case, on which the collegial panel considers it difficult to make a decision, the collegial panel shall refer the case of the president of the court for him to decide whether to submit the case to the judicial committee for discussion and decision."

ELLEN FRANCE J:

So if the assurance is to follow the law, that doesn't preclude reference to the judicial committee?

MS TODD:

No it doesn't Your Honour, but what Mr Ansley says is that the purpose of that judicial committee is for the party to, it's the mechanism by which the party can influence and control outcomes.

GLAZEBROOK J:

He says it's also resorted to in virtually every case, doesn't he?

MS TODD:

He does. That's what he says. Not every case, but most cases, but then what he emphasises at repeated points in his evidence, and in particular that paragraph 58, is the purpose.

GLAZEBROOK J:

Well it doesn't really matter what the – I mean he says that, but the issue is that it is referred in most cases to the judicial committee which didn't hear the

case, not just in difficult and complex cases, but in most cases. I think he also says that the secretary, who is a Communist Party official, has a lot of influence. I don't know what basis he has for saying that, but that is the person who has the most influence over the judicial committee.

MS TODD:

That's right and here we say, well the need for that control and influence isn't apparent here.

GLAZEBROOK J:

But it doesn't really matter, does it? I'm not sure that's the point, if you're actually not having a decision by the tribunal that heard the case, in most cases.

MS TODD:

Yes, well that's right. That's a slightly separate point is that –

GLAZEBROOK J:

Well that actually is probably the point I'm really interested in hearing from you on.

MS TODD:

Yes, well here he does say that most but not all cases are referred to that committee. But we do need to look at the circumstances in which that occurs. So a complex, difficult or major case, and at this stage there's nothing to indicate that Mr Kim's case would fall into that category.

GLAZEBROOK J:

So most cases are difficult and complex then, because most cases go to the judicial committee, but this is a simple one so we can be sure it won't?

MS TODD:

Well there can be no guarantee that it won't.

FRENCH J:

Couldn't a specific assurance have been sought that it would not be?

MS TODD:

Well as I said earlier, the question really is based on the assurances that the Minister had before her here, is there a real risk of a flagrant denial of justice, rather than well with what particular package of assurances which could be obtained, what the position might be there.

ELLEN FRANCE J:

The Court of Appeal says they weren't referred to any evidence that contradicted Mr Ansley's account. Do you accept that's the position?

MS TODD:

I do accept that.

ELLEN FRANCE J:

So on what basis then can one be sure you don't end up with a decision being made by a trier of fact who hasn't actually heard the evidence?

MS TODD:

Well we don't know exactly what the judicial committee does and how it operates, because it may be the case that the collegial panel resolves all factual issues, and disputed questions of fact, but there is a legal issue upon which it seeks assistance.

GLAZEBROOK J:

Well we have absolutely no evidence of that. In fact Mr Ansley would suggest that they don't do that because they're too concerned about making decisions in cases and therefore will always refer it on. Well, I perhaps paraphrase, but that seemed to me to be the thrust of his evidence, and that once it does gets there, the secretary, who is a Communist Party official, has the most influence over what that decision is going to be, made by those Judges because again

everybody wants to pass the buck in terms of making decisions is what, I'm paraphrasing the evidence but…

MS TODD:

Yes, it's a fair paraphrasing, and I do agree with that characterisation of his evidence, but I would just add that the reason why that occurs is for the party to exercise influence. So in any issues upon which it might have an interest, and the Judges wish to pass the buck, they want that, potentially that guidance or the decision from that judicial committee. So again it's about the control and the influence on the outcome, which we say is not, in fact, a difficulty here.

GLAZEBROOK J:

So it's perfectly all right to have a fair trial where you don't actually get to call any evidence or do anything in front of the actual body that makes the decision?

MS TODD:

Well, we simply don't know what happens before that judicial committee, because they could –

GLAZEBROOK J:

Isn't that a reason to send it back to find out?

MS TODD:

Well, if that is a matter that concerns Your Honours then yes, that is something that would have to go back to the Minister for further information and determination.

GLAZEBROOK J:

Let's just assume that the judicial committee just makes the decision based on the record…

MS TODD:

Yes.

GLAZEBROOK J:

Do you have any submissions about that in a fair trial context, ie, whatever your test is in terms of flagrant denial?

MS TODD:

Yes. Well, I'd say that –

GLAZEBROOK J:

Sorry, I shouldn't have put it that way. I should have said the test that you say is flagrant denial –

MS TODD:

Yes.

GLAZEBROOK J:

– would that come within that?

MS TODD:

Well, we would say no, because without that further information as to exactly what role it plays in terms of the extent of review of written material or any potentially viewing of any recordings that may have been made, it's simply not possible to say that per se a referral to a body in complex cases, in circumstances where there are also for example appeal rights, that referral – and indeed I should say that a public judgment also results from the collegial panel –

GLAZEBROOK J:

Yes.

MS TODD:

– then per se we would say no, that's not necessarily a flagrant denial of justice.

I intend now to turn to the final issue in the appeal, which is issue 5, that's a recognition of time spent by Mr Kim on remand in New Zealand, which is five years. Now here the Court of Appeal found that the lack of a guarantee that a Chinese Court would account for time served would lead to a disproportionately severe punishment. But the Court of Appeal has approached the matter in the wrong way. It's made a finding as to what might amount to a breach of section 9 of the Bill of Rights Act if such were imposed by the New Zealand state here in New Zealand. Now that approach fails to recognise the extradition context which requires a very high threshold to be reached before any potential punishment in a receiving state should halt an extradition. So we say that when this correct approach is applied it can be seen that, if Mr Kim is convicted of intentional homici2de and comes to be sentenced, any potential failure by China, a Chinese Court, to account for time served would not lead to a sentence that's so grossly disproportionate to the offence that it would shock and outrage New Zealand society. So before we turn to the facts I'll go back to the approach or the test.

The Court below framed the issue be saying or asking whether it would be a disproportionately severe punishment if there was no absolute requirement that time served is taken into account on a finite sentence. As a matter of principle the Crown says, well, the issue should be framed by reference to section 7 of the ICCPR which prohibits cruel, inhuman or degrading punishment. But, more fundamentally, the approach must recognise the extradition context. So the question has to be whether there's a real risk of, whether it be inhuman or disproportionately severe punishment, to a requisite high degree such that extradition should be refused?

Now we rely on the House of Lords decision in *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 AC 335 in support of this approach, and I am going to take you to the key paragraphs, there's only a couple. It's at tab 15 of the appellants' authorities. So here the United States had sought from the United Kingdom the extradition of Mr Wellington to face charges of first degree murder in Missouri, where he

would, if convicted, be sentenced to life imprisonment without parole, albeit the State Governor could issue a pardon or commute the sentence. Now a majority of Their Lordships held that, "In cases of extradition Article 3 of the European Convention, which is the equivalent to our section 9 Bill of Rights Act, does not apply as if the extraditing state" the UK, "were simply responsible for any punishment likely to be inflicted by the receiving state," the US – that's at paragraph 22. Rather – and this is picked up in paragraph 24 – the desirability of extradition is relevant, "In deciding whether the punishment likely to be imposed in the receiving state attains the 'minimum level of severity' which would make it inhuman and degrading." And he brings it together in the final part of that paragraph, His Lordship does, by saying that, "Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account." Now we agree with this approach, we say the extradition context is important in assessing whether punishment in the receiving state is of such a severe nature that extradition should be refused, and in *Wellington* the House of Lords settled on a test of gross disproportionality of the sentence to the crime, and we say yes, their similar approach must be taken here and, drawing on language used by this Court in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, the Crown says that the question is whether there's a real risk that Mr Kim will receive a sentence that is so grossly disproportionate to the circumstances of the offending that it would shock and outrage New Zealand's national conscience.

If we take that as the approach, let's look at how that can be applied on the facts of this case. We know, and the Minister was aware, that intentional homicide, which is what Mr Kim is accused of, can be penalised by death, which we can put to one side for the moment, life imprisonment or fixed term imprisonment of more than 10 years, unless circumstances are relatively minor, in which case it can be three to 10 years. Now that's set out in the extradition request itself. Now China in response to queries from New Zealand following a hearing before Justice Mallon explained some further matters in a note in terms of sentencing practices and parole and commutation provisions. Now that note is at tab 21 of the case on appeal, it's

attached to a memorandum of counsel, and what he Chinese authorities tell us is that there is no express provision in Chinese law that requires, permits or prohibits a Court from taking into account time served. A Chinese Court may take into account time served in New Zealand in order to impose a lighter punishment, and the Chinese authorities also say that parole is not available for prisoners sentenced to life or more than 10 years for intentional homicide but all prisoners can have their sentences commuted if they met the standard for commutation.

Given those facts, the Court of Appeal said that the imposition by China of a finite sentence would amount to disproportionately severe punishment if time served isn't taken into account. But that is an unequivocal finding that we can cannot be correct, and there are two reasons. First, if convicted, then even the most severe punishment that could be inflicted or imposed on Mr Kim, which is life imprisonment without parole, we say that would not in this case, an intentional homicide, be so grossly disproportionate so as to cause the shock and revulsion, and I should note at this point that a sentence of life imprisonment without parole is an available sentence within New Zealand.

Now this submission is entirely consistent with the House of Lords finding in *Wellington* that a sentence of life without parole in that case, also that was premeditated murder, life without parole would not be so grossly disproportionate to the offence so as to prevent surrender on that basis. So if life imprisonment cannot amount to a wholly grossly disproportionate sentence then, we say, nor can any shorter sentence, which a finite sentence inevitably will be.

GLAZEBROOK J:
Is that, I mean I haven't really looked at this, I must admit, but I would have thought those shorter sentences are because, well, they must be related to the circumstances as found by the Court, wouldn't they?

MS TODD:
Yes.

GLAZEBROOK J:

Because it would be hard to say that an absolutely deliberate and premeditated act would not necessarily attract the highest of the sentences but something that wasn't in that category may.

MS TODD:

I'd agree with that, and here of course we don't know what sentence Mr Kim will receive. So the purpose of my submission was to say that even if he were to receive the most severe sentence, which would be life without parole, because that would not be so grossly disproportionate as to shock and outrage New Zealand society, then a shorter sentence, which a finite sentence must be, similarly could not shock and outrage New Zealand society, even if time served is not taken into account.

FRENCH J:

But you may not comparing apples with apples. The reason for a shorter sentence could be because it wasn't as bad as the one that, the intention, I think that's what Justice Glazebrook was driving at.

MS TODD:

That justifies.

FRENCH J:

Yes.

MS TODD:

Yes. And of course the difficulty we have here is we have, if the facts were approved, a very serious, offensive murder, and we simply don't know what sentence he might receive. And the Court of Appeal has said that it's likely he will receive life without parole. But there's no evidence upon which that finding is based, we don't know what sentence he will receive and, similarly, we don't know how the Chinese Court will allow for the time served in custody. They're certainly able to take that into account.

GLAZEBROOK J:

Is there anything in the materials that says why you get a particular range of sentence? What I'm really meaning is, say, a five or a 10-year sentence might be our type of manslaughter as against what we call murder or differing degrees of murder in the United States, but we don't know…

MS TODD:

There's not, Your Honour – we don't. I would simply say that he's been changed with intentional homicide.

GLAZEBROOK J:

I understand that, but it may be there's included offences in some way so that if he was found guilty of manslaughter that he might get a lower sentence, but we don't know, do we?

MS TODD:

No, we don't. We have the sentences available for intentional homicide. But indeed, to perhaps round off Your Honour Justice French's point, even when looking at a finite sentence and whether that is grossly disproportionate to the crime, in my submission you would have to look at the ultimate penalty, so the time that is ultimately served. So if Mr Kim was sentenced to seven years or 10 years and time served was not taken into account, so as to take a total of 12 or 15 years, it's not possible to say that that would be so grossly disproportionate to the crime so as to cause abhorrence to New Zealand society.

GLAZEBROOK J:

Well, if you had sentencing regime that said – I'm just thinking of a sort of band thing that says if the crime or the circumstances of the crime are this, it should be 10 years and with time served it would be 15, that's actually third more than under their sentencing guidelines, how far would it have to be to be disproportionate?

MS TODD:

Yes, well, as I say, that's why we emphasise the gross disproportionality. Because this is some which is halting an extradition on this basis and –

GLAZEBROOK J:

So a whole third more isn't a concern, even if actually it should be 10 years in – I'm postulating a system that says if you do this you get 10 years and that's it.

MS TODD:

Yes.

GLAZEBROOK J:

Of course that won't be the case.

MS TODD:

Well, we would say that that, in that sort of hypothetical, no, that would not be grossly disproportionate, because it is nonetheless looking at the ultimate penalty, the ultimate time served. And again, I emphasise that Chinese Courts are certainly able to take into account that time served, so there is a speculative risk that they may not, we say, well, that's not sufficient to foreclose the possibility of surrender on this basis.

Those are the submissions I wish to make, unless I can assist the Court further.

GLAZEBROOK J:

Thank you. Madam Solicitor, do you have anything – you don't have anything further is what I was just checking. Thank you. Mr Ellis. Actually, just before we do, how are we going for our timing?

MR ELLIS:

Well, we've lost half an hour, Ma'am.

GLAZEBROOK J:

Well, I think we've got tomorrow…

MR ELLIS:

Yes, I would think –

GLAZEBROOK J:

So it would be, I'm not sure how much – how's 4.30? – we can sit. Maybe it's better to say that you can have a bit more time tomorrow and we'll just go later in the day, which we've got some possibility of doing. But let's see how we go, Mr Ellis.

MR ELLIS:

Yes, I would have thought that, we stop at four tomorrow. But I would have thought the cross-appeal would be faster than the appeal.

GLAZEBROOK J:

Yes.

MR ELLIS:

So we might have more than that at the end.

GLAZEBROOK J:

Well, let's see how we are at the end of the day and then we can make a decision whether we perhaps start a bit earlier in the morning or…

MR ELLIS:

Yes, okay. Well, what I was going to do – it's probably altered by what's happened this morning – but I was going to address you briefly on our submissions, which probably will have to be very brief, and comment on what was said by the Minister this morning. And then I was going to deal with essentially four points and leave the detail of the response, I was going to be on a high-level plane hopefully and leave the detail to Mr Keith, who I was going to allocate more of my time to than I was going to take.

So what I was going to deal with was the appellants' submission on the facts at paragraph 7, their first submission on the facts, about the prima facie case. I was then going to deal with diplomatic assurances which, you know, have engaged with over the years, including to the Committee Against Torture on the general comment. But I was only going to do it at a very superficial level because the submissions of the Intervener are much more thorough, as they've only got a few points. So I'm supporting what they say rather then going to deal with it in detail so you don't have to hear it twice. And the third point I was going to deal with fair trial as it arises from CAT's general comment number 4, rather than the ICCPR. And fourth, and lastly, I was going to deal with the proposition of dysfunctional states and also the Intervener's proposition in paragraphs 58 and 59 of their submissions on Article 3.2 of CAT. Right, well, that was my plan. I was going to take half an hour to three-quarters of an hour, was my aim.

The first point, the appellants' proposition in their paragraph 7 of their submissions that accepting that the evidence establishes a prima facie case that justifies him standing trial for intentional homicide, Mr Kim no longer challenges that finding. He well and truly does challenge that finding and always has, apart from a misunderstanding when Mr Edgeler was doing a bail application and said he wasn't dealing with the prima facie point that day the then that got misinterpreted and has come back to bite us.

What we do say, and very clearly we say, what happened at the hearing in the District Court before Judge Gibson to determine the prima facie case was that we were faced with 32 witnesses from China who we asked to cross-examine on the basis that it would not be possible to cross-examine them in China, and that was refused, so all their evidence went without the ability to challenge it, whereas my client and his mother gave evidence and they clearly stated respectively that he didn't commit the murder and his mother didn't assist him to dispose of the body, and we got the finding we got, and that was nine years ago and it's unusual, at least it's certainly unusual for me, to have ever got from the District Court to the Supreme Court, and it's taken us nine years, and

our submissions have changed not a great deal, we've always been arguing, well, when we started we were arguing the death penalty, torture and fair trial, death penalty's dropped off but we're still arguing the torture and the fair trial point. So we do not accept that the finding in the District Court doesn't require challenge, because it relates in fact to the discussion that occurred with Ms Todd and Justice Glazebrook about Article 14(3)(e) to examine or have examined the witnesses against him, to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. So the witnesses against him gave sworn evidence that couldn't be contradicted and theoretically he's entitled to do the same. But the reality is in China, as you heard, there's no opportunity to call witnesses, so he would be convicted without any of the witnesses being challenged, and I say that the submission must be that the is a flagrant breach, and so that's point number one. Plus, as I pondered on it yesterday, it also becomes something that we haven't actually formulated in these terms, or probably in any terms, it's a breach of the presumption of innocence too when read in conjunction with the detention he's had for five years, although I say seven years because he was on electronic bail, and certainly the case that he has taken against New Zealand before the Working Group on Arbitrary Detention, their jurisprudence says house arrest can be arbitrary detention, so he's had seven years' detention. And that's a preliminary sentence, an advance sentence, it's outrageous in terms of the public's perception, you serve seven years and you still don't get to the trial, there is something seriously wrong with that, so it's also a breach of the presumption of innocence as well. And in terms of looking at whether it's a flagrant breach, whilst you can look at each subset of Article 14 separately, one mustn't forget that one should add them altogether and look at the totality of the breaches, so that's where we are there.

The second point I wanted to make was in relation to diplomatic assurances, and I wanted to put it in much the same way as the submissions to the Committee Against Torture on the draft general comment, in that really a diplomatic assurance, when compared to signing up to an international treaty, which is binding in international law, must mean that it's really the ultimate

assurance. When you sign up to the Convention Against Torture you are diplomatically saying, “We have agreed that we are bound by this treaty,” and the fact that we then get the Committee Against Torture, and many others, saying there’s still systemic torture in China, when we have to then discount all that, put that all to one side, and said, “Well, never mind that we’re a rogue state, we don’t abide by the treaty we’ve signed but we’re giving you, in this particular instance, an assurance that we won’t torture or we won’t give Mr Kim an unfair trial,” must be a piece of really total nonsense, it’s abhorrent to the conception of the human rights that are supposed to be protected by the Convention Against Torture, indeed Article 21 allows another state to, in simple terms, dob in, so New Zealand could dob in China, and say, “You’re breaching the treaty,” and, given all the material that's collected, one wonders why New Zealand hasn’t done that, if it was a good corporate citizen in the international world, but the literature does say, or at least Nowak says, that nobody has ever resorted to that because it’s seen as an unfriendly act, but I’m not quite sure how it can be seen as unfriendly when the treaty allows for it, and most civilised nations have adopted it. But anyway, that is the reality. So that’s the contrast. And when New Zealand wants to accept the assurances, and I'm intrigued how there isn’t a divergence of views between the Ministry of Justice and the Attorney-General who, the latter is supposed to affirm, protect and promote human rights, is that it’s all right for everybody else to be tortured as long as our one man isn’t tortured, there has to be something wrong with that on a more global scale. But, as I say, the major debate on diplomatic assurances is contained in the Human Rights Commission’s submissions, who are supportive of our position and have developed it more fully as they’ve got 30 pages to do it rather than the few we have, so I’m going to adopt the rest of what they have to say.

In terms of my third point, which is the fair trial right as it arises from CAT *General Comment No 4*, that’s in our authorities at number 68. It’s not an awfully long document, about 12 pages I think, 14 pages, and I wanted to refer to just a few paragraphs, they’re quite short paragraphs. So, paragraph 20 of that document –

GLAZEBROOK J:

If you can just wait a moment it would be…

MR ELLIS:

I'm sorry, Ma'am. It's CAT, *General Comment No 4 (2017)*.

GLAZEBROOK J:

And what tab did you say, sorry?

MR ELLIS:

68, if I've got it right. It is right, yes.

GLAZEBROOK J:

Okay.

MR ELLIS:

So paragraph 20 is in part 4, which just has two paragraphs of nine lines which relate to diplomatic assurances. So paragraph 20 says, "The Committee consider the diplomatic assurances from a state party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement," et cetera, so where there are substantial grounds for believing the person would be in danger of being subject to torture in that state, so we're at the early stages, are there substantial grounds for believing that the person is going to be subject to torture, and deportation in the context of the General Comment means every form of removal, including extradition, so it's deportation, it shouldn't mean literally deportation. So that's the position the Committee took, and that's very recent, that's 2017. And then when you turn the page to VIII, "Duties of the state parties to consider specific human rights situations into which the principle of non-refoulement applies," and the first paragraph is paragraph 27, and Article 3(2), which I said I was interested in, which is set out in the Intervener's submissions, which I'll come to shortly, says, "The Convention provides for the purpose of determining whether there are grounds for believing that a person would be in danger of being subjected to torture if

expelled, returned or extradited, the competent authorities shall take into account all relevant considerations including, where applicable, a consistent pattern of gross, flagrant or mass violations of human rights." So obviously from the discussions that we've had you're very familiar with this concept. But in developing that, if we look at 29, where the Committee wishes to draw the attention of the states parties of some examples, which may constitute an indication of the risk of torture, we get 29(d) on page 7 there, which is just three lines, "Whether the person has been judged in the state of origin or would be judged," in the state to where they're being deported, "in a judicial system that does not guarantee the right to a fair trial." So I'm saying in terms of Torture Committee jurisprudence fair trial is an important issue inasmuch as it is in respect of Article 14 of the ICCPR, so it's a double breach and, as you, well, are probably not aware, the jurisprudence of the Torture Committee is probably 95% non-refoulement cases and a few more with, you know, fingernails and other such things. So that's their major task in practical terms, and it is fair trial as much as it is anything else.

And then lastly in that General Comment on page 9 in (k) of 29(k), where the person concerned, "Would be deported to a State where the inherent right to life is denied, including the exposure to extrajudicial killings," et cetera. In particular you consider (i), (ii) and (iii), and I have, probably in the cross-appeal, said, you know, "Look, China here is a rogue state," and referred to the gross violation of human rights in that there are either 100 or 200,000 extrajudicial killings a year. So it's not an insignificant number. And then if you think of what might happen to Mr Kim in the context of a state where some possibly 200,000 are extrajudicially killed, it's a bit much to say, "Oh, well, you know, the Chinese are going to apply their domestic law." It only moves from 200 to 200,001 with another person who disappeared and is cremated. And I think, I don't think we've got the context of this necessarily right. if we stand back and think how does the Chinese criminal legal system work from the start, we need to face the basic and irrefutable fact that 99.9 percent of people entering the criminal justice system plead guilty. So of approximately one million criminal charges a year, something in the last figures we had, there was, I think it was 1024, it might have been 1042,

managed to get acquitted. So there is a huge incentive in the Chinese criminal system to make sure that one gets a guilty plea, and it's extremely hard not to. And when we heard that the defence counsel might be subject to some disciplinary or worse findings if somebody's acquitted, because they must have known, well, it's worse than that. If there's a not guilty plea the Judge may be disciplined for it too. So the incentives not to return a not guilty plea account for why there's 99.9 percent of people who plead guilty, because you don't want to plead not guilty because the consequences are that you will be subject to the systematic torture that appears in China and which the Chinese government effectively have no control over, which is one of the propositions that my learned friend was saying, "Well, if you don't have control over your officials that's a flagrant breach." Well, you don't have control, otherwise you wouldn't have systemic torture, or you do have control and you condone the torture, one way or the other.

So if we could look at the Intervener's submissions at page – I don't know what page – paragraph 58 and 59 on page 2, if you've been able to find them, right. "Neither position taken in *Othman* should be adopted by this Court," Article 3 of the European Convention is unlike Article 3 of CAT, and in 59, "Moreover, the European Court of Human Rights contains no equivalent of Article 3(2) of CAT," "The Court of Appeal does not appear to have considered the differences between the wording of Article 3 of the European Convention and Article 3 of CAT." "Indeed, when the Court of Appeal quoted the text of Article 3 it only quoted paragraph (1) and omitted paragraph (2)," which is probably my fault rather than theirs by not citing it to them. But nevertheless, I mean, it's a very valid point and I'm grateful to my friend for drawing it to our attention. It is important there is a difference, and you should be following CAT jurisprudence, not European Court jurisprudence. So those were the, well, dysfunction, yes, I'll deal with dysfunction as I go through what submissions remain this morning.

Right, so we started with the Solicitor's, and I think the first question of the day, that would be the important question, which was from Justice Arnold, about, well, what's the background to the monitoring? A very important issue,

of huge importance. I think what I would say, to add to the discussion, is without the Red Cross or the Red Crescent, or somebody like the Association for the Prevention of Torture, for groups who have the experience of observing in an international way and are taken as neutral, it is hard to detect torture in some circumstances, for instance if you're stuck to one of the Chinese tiger chairs and you're strapped to this thing for 24 hours and the Chinese will say, “Well, this is to stop you hurting yourself,” and others may thing differently, including Human Rights Watch, and the soles of your feet are beaten or whatever. It’s quite possible to torture somebody without the physical signs being noticed.

You're even more able to torture somebody psychologically without the signs being detected, and the Minister in her decision says, “Well, yes, the consular officials are experienced with Chinese people in prison.” But what they don’t say, and I know it’s very good that they don’t say it, they don’t say, “We have experience of prisoners in China being tortured,” and one would hope they wouldn't say that, because it would be horrific if they did. But they do not have the experience and they cannot have it, because you need to be exposed to it and you need to be trained. I mean, people like the Subcommittee on the Prevention of Torture who go round various countries, or Professor Nowak, as he did, to make a Special Rapporteur’s report when he was the Special Rapporteur on torture. You need experience to detect torture, and to have these monitoring proposals and to say that the consular officials will be able to go and see him every 48 hours, well, it simply isn’t good enough. You need experienced monitors from mutual respected bodies in the field such as Red Cross or Red Crescent, and rare cases, the Solicitor said, “Or rare cases if there’s no control over the state’s officials then it would be a flagrant breach.” Well, there is no control, as I’ve said, over Chinese officials, they are a rogue state. And if we stand back for a second and look at the principle here, saying, “Well, it’s all right,” and, “We won’t send people to chaotic states where mass violations of human rights occur, but we will send them to states where it’s perfectly organised that we have mass violations of human rights,” then we have lost sight of what human rights are.

If we go back in history, which we did before Justice Mallon, we went back 3500 years and compared the various atrocious states, but let's just keep things simple for today and just dwell on the 20th century. If we took either Hitler, Stalin or Mao, who were very organised in their abuse of human rights, we wouldn't worry about it. But if we had somebody like, perhaps, Syria, where they are today, as we realise, constantly being accused of war crimes or crimes against the Genocide Convention and so forth, these things are not as organised as they were in the mass destruction regimes of Hitler, Stalin or Mao, but nevertheless how can we make a distinction to say that we're going to send people back where there's an organised, a non-chaotic mass violation of human rights? That must be anathema to every human rights international instrument that there is.

And then the Solicitor said, "Well, you know, there's this meaningful diplomatic relationship between China and New Zealand." Well, if we were comparing Adolf Hitler, we'd say, "Well, he's got good diplomatic relations with Mussolini and Franco." Well, I mean, what difference does that make? Does that make things any better or doesn't it in fact make them worse? The conceptualisation that you can send people to a state that systematically and organisedly violates human rights is something totally unacceptable. Consular assistance, I've done that.

There was reports of other countries' experience and there was some blotting out of the countries that were suppressed, and certainly in the Court before Justice Mallon we had an argument about what happened in Ireland when the Chinese gave an assurance that they wouldn't put people to death and then when they got there there were suspended sentences of death and the Irish spent 18 months trying to reverse it. But what became apparent was there had been a selective questioning of various other countries as to whether the Chinese experience was good or bad, and not a very large number of states, it's not a particularly wide analysis of what happens anywhere else. If you've we've got two states it's a, "We're satisfied with what happened," I don't think much weight can be given to that.

O'REGAN J:
Are you aware of any where the opposite's occurred? Sorry, is there any evidence, is more to the point, of states where undertakings were given but breached?

MR ELLIS:
There is a 2008 Article of somebody which says that. I can't recall where it is, I'd have to look it up and get back to you.

O'REGAN J:
You can get it later, that's all right.

MR ELLIS:
But there is a 2008, maybe 2009, Article. But it's not very recent, it's 10 years old.

The submissions of Ms Todd when she started, or she came back to judicial independence later, the point I thought of significant note was, since we've had the hearing in the Court of Appeal, we've had both the President of China and the President of the Supreme Court of China saying, quite unequivocally and very proudly, that we reject the concept of judicial independence. This is an alien Western concept that is contrary to our culture and the Communist Party must prevail and having dismissed the concept of judicial independence, what Article 118 or 180 or any other Article said, is pretty meaningless. The highest official in China and the President of the Supreme Court says we are not concerned with this Western concept, it does not apply. So the proposition of my learned friend from *Othman* at 259 where she said, and I think it was in response to a question from Justice France that, well what are the examples of breach of this right and we got four. Was there a conviction in absentia summary trial where no defence, no independent tribunal and no lawyer and I would say that we've got elements, if not the totality of three of those examples in what happens in the current case. Absentia is obviously not an issue. A summary trial with no defence; well if you can't call any witnesses, your lawyer must be a member of the Communist Party and if he

or she Is brave enough to manage the defence without being disciplined or worse and we don't have an independent tribunal and we have the President of the Supreme Court completely denying the concept of the independent tribunal which seems at odds with the Beijing Principles of Judicial Independence which the Chinese hosted in 1998 where they accepted, but they are completely rejected. So we have very clearly breaches which fit into the flagrant category and just, I think in passing, I find it interesting in Article 14 the unusual wording of the section which isn't reflected in any of the other international or regional instruments. The ICCPR stand alone here. It says, "We are entitled to a fair and public hearing by a competent independent and impartial tribunal established by law" and I have asked myself, well what does the addition of the word "competent" mean, and you will believe there is no jurisprudence on it, but the academic literature seems to suggest it means do you have the lawful authority to be able to do it. Are you competent in that concept, although I have argued it in the context of *Pitcairn* that the President of the Court of Appeal did not read the constitution and therefore wasn't competent so it could mean many a thing. But if we have, if we use it in the context of the judicial committee, then the trial Court is not a competent Court within the meaning of Article 14(1). And we look at, I think Justice Glazebrook said, well let's have a look at the various sub-parts of Article 14. Well we have got that one in 14(1). We've got 14(2), you are presumed innocent and I say well you're not if you are locked up for seven years and ongoing. He's not locked up, he's just on plain bail, a simple reporting clause at the moment. We've got Chinese facilities which Mr Todd mentioned. We must, I think, now have undue delay in terms of this has taken nine years, there must be an undue proposition there. We've got the legal assistance in 3(d) which we have transversed and we have got importantly, 3(e), examination of witnesses. Interpreter wouldn't be an issue, he would get one of those and (g) there was some discussion about can you be compelled to confess guilt. So, there is quite a few issues and you will recollect that all of those things have their equivalent in the New Zealand Bill of Rights Acts. So 14(3)(e), witnesses will be 25(f). So they are all reflected, and they are not something that is unknown to us. In issue four Ms Todd said, in terms of political interference which would be a flagrant breach, that the judicial

committee of the Communist Party and then she read you out what it said, and what the Minister said, that it was very important, the Chinese, that this case went on and I find it a little – I don't know if I can say – it is totally ridiculous, that's a strong submission to make. But what is being said is our foreign minister says that this is very important to the Chinese and then we are being told, that it doesn't give grounds for political interference, or is what the very reverse may well apply. If it so important to the Chinese, it is more likely that there will be interference in the decision from the judicial committee to make sure things go well and that a suitable Judge is picked to hear the matter and in the Court of Appeal decision at paragraph 119 there is just a little comment there of what Professor Fu says. In Professor Fu's view, Mr Kim's murder charge was an ordinary criminal case. Professor Fu did not make any reference to senior Communist Party members' alleged interest in convicting Mr Kim which would make this case outside the run of ordinary cases. In assessing the significance of Professor Fu's statement, the Minister also had to take into account that those who were detained seldom complained of torture for fear of retribution." And Professor Fu, a little earlier in there said, "Allegations of torture are usually only made in cases involving political descent or serious corruption." Well it certainly isn't this but the aspect of, there's no scope for interference, cannot be right. You can't have it both ways. It is extremely important to the Chinese, but they are not going to interfere. It doesn't make sense.

GLAZEBROOK J:

Isn't the submission that it is extremely important to the Chinese to show that they can have a fair trial because that then will mean that other countries may be more inclined to accept assurances or to be assured that if they extradite someone, that that person will have a fair trial?

MR ELLIS:

Yes, that's part of the submission but when it is their desire to ensure that there's the, let's call it the appearance of a fair trial, because for those of us outside China or outside the Communist Party, we are not going to know what happens. I mean there was Mr Lai in Canada who had a thousand million

dollars that he supposedly stole, and we've had Mr Yan here who went back to China and gave them 48 million or something and came back and served no prison time. They're economic criminals or alleged economic criminals and they want to, they have got like the FBI's 10 most wanted, they have got a poster of the 100 most wanted economic criminals, and the amounts of money are enormous and they would like to extradite people for that, so it is important that Mr Kim's trial is a show piece for them to show that the process is fair but any show trial has problems and I am not sure that he should be the guinea pig for extradition of economic criminals to China. There is one final point. I had a quick look at our submissions. I don't think I am going to really have much time to do that, other than maybe five minutes.

The question about my client's mental health and my learned friend's in their submissions for tomorrow, mentioned that there is no leave sought to file the mental health report from Dr Blackwell. Well I had when I filed it, put it that we were expecting some report on the physical health in terms of problems with his liver and kidney which had nodes in them and if you do a quick scientific Google, liver nodes are usually harmless and kidney nodes are quite commonly cancerous but we don't have any update so I have just put it before you because it is an update on his health and I wasn't going to make any submission on it because I was waiting for the physical health report and he is still waiting, despite being on the waiting list since November and he hasn't had them yet so I can't do anything about that.

On my main submissions, I am conscious of the fact that I told Mr Keith I would give him an hour or an hour and a quarter, so I am not going to say much. I just wanted to refer to paragraph 35 in respect of faceless Judges which is a Peruvian case before the Human Rights Committee where Judges had hoods on because they were quite literally terrified of the terrorists who were being tried before them and didn't want to be recognised in case they got assassinated and the Human Rights Committee said, well I am sorry you can't have faceless Judges. But we do have faceless Judges in China because we have the political committee substituted by the people in another courtroom in another day and I think in paragraph 40, when the reference to

the Rwandan Courts. For 10 Courts, no Western nation would extradite anybody to Rwanda because they couldn't get a fair trial and then they joined the British Commonwealth. It always seemed a little strange as they were an ex-Belgian colony but times have changed and it's economics more than colonialism any more, and then they came right and people can be extradited to there. So it's not unheard of to say, right, we shouldn't be extraditing somebody to one particular country for a period of time until they reform their system. And there's 101 things more I could say and I probably wrote more submissions on this case than any in my life in the nine years and unless you want to ask any questions I'll defer to Mr Keith and he can carry on.

GLAZEBROOK J:
Thank you, Mr Ellis. Mr Keith, when you're ready. No rush.

MR KEITH:
Ma'am. My learned junior tells me Mr Kim had eight years in detention, not seven. E ngā mana, e ngā reo, rau rangatira mā, tēnā koutou. May it please the Court. As Mr Ellis has said I will be speaking to, I think, a total of four topics but I think they will canvass a number of things. They are interrelated. The first is the standard of review. The second is the fair trial right. The third is the basis for the Court of Appeal's finding that the Minister erred in not making a preliminary assessment of China's human rights context, and the fourth is the remand time.

I'm conscious, in coming to the question of standard of review, that it is a vexed question. I imagine that some members of the Court, and after I sent it to them, if not before, some of my learned friends, read *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 over their summer holidays too and it's not a beach read. Sorry, Your Honour, I probably shouldn't make jokes.

But the Court of Appeal took a very simple approach. It said, yes, there should be anxious and careful scrutiny and the Minister should be required to have founded her decision in all of the evidence and, and this is an important

point, the evidence reasonably available to her. Those two requirements, all of the evidence and the evidence reasonably available to her, are important. One, the first, is important because the Minister does not get a "can choose" and I'll come to instances of that. The second is that I do not know of a basis, the Crown has suggested none, for this idea that the Minister can make adequate inquiries, that the Minister can decide to seek so much information, decide some of it is uncertain or of uncertain provenance and not do anything else, and that is what the Court of Appeal said, for example, about the Human Rights Watch report, and I will come to the specific points in a moment. And I'm still a little unsure as to quite what the Crown says the standard of review ought to be here. The Solicitor-General said that, well, there should be careful and detailed scrutiny of the record.

O'REGAN J:
I thought the Court of Appeal said there was no dispute about this.

MR KEITH:
There was no dispute in the Court below, Sir.

O'REGAN J:
Why are we having a dispute now?

MR KEITH:
We seem to be having a dispute because in Crown's written submissions, less so today, there was discussion of or an awful lot of recourse to the Canadian authorities where a standard of very high deference to Ministerial decisions is applied. So I'm obliged to answer that.

O'REGAN J:
I don't think the Solicitor-General was suggesting that we should be diverging from the Court of Appeal on standard of review.

FRENCH J:
Advocating.

O'REGAN J:

So –

MR KEITH:

She said two things, Sir. Sorry, I didn't mean to interrupt.

O'REGAN J:

So why are we having any debate about it?

MR KEITH:

I have one point which I think the Solicitor-General did keep this morning. That is, she said, well we are not going towards the Canadian standard of review and the possibility of error within jurisdiction, legal error within jurisdiction which as Justice Glazebrook pointed out, would be a quite different thing from what we do here. But there is a contention that everything the Minister did around these assurances is entitled to deference and particularly her factual assessment of the risk of torture, has no legal yardstick. And those are not my paraphrases, those are the words of the Crown's submissions.

ELLEN FRANCE J:

I must say I did not understand the submission to be that everything the Minister did is entitled to deference.

MR KEITH:

Well the emphasis continues to be placed Ma'am. And I will come to why I think this is probably, I should have just yes to Justice O'Regan about 90 seconds ago. I think it is beside the point, because of the nature of the errors that the Court of Appeal found but the recurrent answer this morning to, "Did the Minister look at this" or "Why didn't he have more information about that." Has been to say, well the Minister believed the assurances, they were credible. It is not for the Court to disturb that finding of credibility and that is why I have something to say about standard of review, as well as talking a little bit about the kinds of errors that the Court below found. The other thing I

will say in an abstract sense about standard of review, given Your Honour's indication. We do say in our written submissions that it might very well be that the Human Rights Commission is correct and the standard is the more straightforward test, rather than trying to pick and choose or filter through the Minister's assessment to find the bits that might warrant more or less deference. I think again it may have been Justice Glazebrook who said, well isn't an assessment of whether or not someone is at risk of torture, that is a legal question and that would invite a correctness standard. That is their argument for later on in the morning, but it is one that we have said, we think may cut through all of this and say, look this is a case about compliance with the Bill of Rights Act and compliance with international obligations. There is not a lot of room for Minister, you may not agree.

O'REGAN J:

Well there is an allocation of the decision-making power to the Minister, not the Court, and a deliberate choice on the legislature's part, so it wouldn't be right for the Court to basically just roll over the Minister's decision and make it for –

MR KEITH:

Well the two points I would make on that Sir. One is, as I say, it may be necessary to parse the Minister's decision into those bits that really are warranting or requiring political judgment in those on which the Court frankly is more expert. So questions – again this came up this morning. The Minister's assessment of what a fair trial might look like or how criminal procedures might work is no better than this Court's and this Court's is probably better and that is consistent with the approach the reviewing Courts have taken to matters related to the conduct of our trials or our Court proceedings. But there may be other aspects and if there really were an issue, for example, about assessment of diplomatic relationships, where the Minister might be entitled to more deference. The only other point I would say about rolling over the Minister, Sir, is if there is only one right answer here, then that is a straight-out question of law, if the Minister could not do otherwise and I will come to, I suspect, in a cross-appeal more reasons why that is.

But if I can turn to the particulars of what we say about the Crown claim to deference. I do have a hand-up. It is short I am sorry. The Crown submissions filed last year had appended two large annexures of what was said to be matters considered by the Minister and they're described, they were described this morning as providing pinpoint references. All that this does is really tie that back to what the Court below found. We didn't spend any time on the Crown annexes this morning and I will only spend a little time on mine. But what the Court will see is that the Court of Appeal, consistent with an approach of anxious scrutiny, did, very carefully, dissect the risks posed to Mr Kim on return to China as shown by the record and given the very heavy reliance placed by the Crown today, in his written submissions, on the assurances given and the Minister's assessment of the credibility of those assurances, we have then set out whether there is an applicable assurance and then, and this is where I was saying the nature of the Minister's errors, doesn't really invite or necessitate a close parsing of whether they were within some scope of expertise or not. And the third column, what was done and the references are to the Court of Appeal decision.

Now I am very happy to speak to any of these but I was only going to go to, I think, four. The first that I was going to go to which is third down, murder accused at particular risk of torture and this is a point that Her Honour, Justice France made this morning about the Human Rights Watch report. So there was evidence, there was also evidence from the expert, Mr Ansley, that those accused of murder are particularly at risk. And the Court said, very simply, and I don't think it involves anything more than ordinary judicial review principles. The Minister presented with that, without anything to contradict it at all, could doubt it if she was so minded but there needed to enquire further and the Court concluded, in the absence of that inquiry, that the Minister made a flawed assessment of risk. Now one particular reason and I think members of the Court already flagged this. But in argument this morning, the appellant said, "Well the Minister didn't actually have to decide whether Mr Kim was at high risk or not or whether" because she moved on to the assurances. And I will just give you the reference to the paragraph in the

Minister's decision letter which I think His Honour Justice Arnold had already got. Paragraph 54.3. The Minister did make that decision, that's just what the record says. It was a factor in her ultimate decision and the reason for that and I think Justices O'Regan and French both pointed to this. It is obvious, the graver the risk, the more concrete the assurance must be and one can't sensibly evaluate an assurance without knowing what it is an assurance against. Is this against something that is likely, very likely, virtually certain. Might happen once in a blue moon. The Minister has to make that assessment and the real point is, the Minister did. She made that assessment. She said he is not a high-risk group member.

GLAZEBROOK J:
I was just going to ask you what assessment? Not a high risk?

MR KEITH:
She said yes. Not a high risk. She mentioned Human Rights Watch but she said it wasn't reliable, you are high risk. I will come to in a moment too, and it is set out in written submissions but this differentiation of people who might be tortured into high risk and regular risk itself doesn't bear much scrutiny. The basis for it, documentary basis for it, just doesn't actually say that but yet the Minister made that categorisation.

The second point and as I say I am happy to speak to any of these, but the second point I wanted to touch on is over the page. The second item down, real difficulties in detection of torture. Now Mr Ellis has already mentioned this. The Court of Appeal also dealt with it, that there are a wide range of torture techniques. Some don't leave any visible mark and there is prospect of concealment, especially as the visits that we've heard something about can't be done without notice. There was uncontested evidence that a Chinese doctor, and that's not a Chinese Government doctor, that's a Chinese doctor, or prosecutor would never report torture. That is what Mr Ansley said and it again wasn't gainsaid.

I do want to on this too, and it's a document we'll come back to a couple of times, at tab 69 of the respondent's bundle are the concluding observations of the Committee Against Torture from 2016, so a few months before the Minister made the impugned decision. So that's respondent's at 69.

O'REGAN J:
I don't think the numbers are working.

GLAZEBROOK J:
No, they're not working.

MR KEITH:
No, we spent a lot of time with the registrar over the break, Sir, but apparently the security here is more stringent than on our devices. It's trying to protect you from dodgy documents.

O'REGAN J:
So what is the name of the document?

ELLEN FRANCE J:
2015 or the…

MR KEITH:
Sorry, Ma'am?

ELLEN FRANCE J:
What year is it?

MR KEITH:
2016. It's the *Concluding observations on the fifth periodic review of China*.

GLAZEBROOK J:
And what number on your…

MR KEITH:

It's 69 on our index, Ma'am.

GLAZEBROOK J:

Not on this actually, but never mind. So *Concluding observations*?

MR KEITH:

On the fifth periodic report.

GLAZEBROOK J:

Okay, should be able to get it up on the Internet.

MR KEITH:

He will, Your Honour. I can give you a – actually, if you Google search that it will pop up, I'm sure. I am sorry about this. We did spend a lot of time but we have a –

GLAZEBROOK J:

It's undoubtedly our problem.

MR KEITH:

You're very kind to say so, Ma'am. I suspect it might be my technical –

ELLEN FRANCE J:

Yes, I was going to say I'm not sure about that myself but…

MR KEITH:

I do apologise. I do have three passages that I do want to touch on in this one document. I'll try not to put Your Honours through any more of probably my technical frailty.

GLAZEBROOK J:

If you can just wait a second, I was hoping I can actually get it up, because I can't on this. I'm not sure whether the…

ELLEN FRANCE J:

It doesn't seem to appear in our index.

GLAZEBROOK J:

No, that doesn't, as far as I can tell, but I have…

O'REGAN J:

This is the fifth periodic report?

MR KEITH:

This is the fifth periodic report. So it's tab 69.

O'REGAN J:

I've got it now.

MR KEITH:

You've got it, Sir.

O'REGAN J:

I Googled, "Concluding observations of the Committee Against Torture PRC" –

GLAZEBROOK J:

Yes, so did I and it purports to come up but then doesn't.

O'REGAN J:

The second item.

GLAZEBROOK J:

Okay, I do have it now.

MR KEITH:

Well, I'll try and make quick work through it, Your Honours. So while Your Honours have got it I will make the three references and then we can put it to one side. First at page 2, paragraphs 7 and 8, the Committee expresses

concern. The Minister had this, by the way. It was in that list of material that the Crown filed last month that went to the Minister, and there was some reference but not to these parts. There were definitional problems. The way that China defines "torture" it turns out is limited in various ways and I'll leave Your Honours to go through the detail of that. The conclusion and recommendation of the Committee, over the page before para 10, is concerned about loopholes for impunity, that is, people would be allowed to torture in China because of those gaps in law and it would not be unlawful under Chinese law.

The second passage that I was going to take Your Honours to, and it arises in a slightly different context that I'll come to but I'll mention it now while we have the document in some form, is paragraph 18 on page 5. Now Your Honours had some discussion with Ms Todd about section 306. This is the offence of perjury that defence counsel can be prosecuted under if their client pleads not guilty and is convicted, and we have lots of evidence just about that. What we also had and what we also rely upon is paras 18 and 19 here. So it's not just that you might get prosecuted. You might get the Chinese equivalent of struck off. You might be detained. You might yourself be tortured, it says half way down paragraph 18. You might disappear. That's in line 4. And the part that is most significant, this is the Committee's expert assessment, something that the Minister was told was highly consequential, the State party should stop sanctioning lawyers for actions taken in accordance with recognised professional duties.

So it is as simple as that. Not only might one be prosecuted for perjury for running a defence, actually doing your job gets you sanctioned, says the United Nations, and that of course goes to the fair trial point. It goes to the worth of the assurance that Mr Kim would have a lawyer in China. He would have a lawyer. He would have a lawyer within this system and that is what the Court of Appeal said.

Third and last point from this document, and I will make up some speed, over the page on page 8, paragraph 26, the bottom three lines, there's a reference

to the so-called interrogation chair. This is something Dr Elllis touched on just before. This is what is called a "tiger chair" by the rest of the world, and I don't only make that point as a point of pedantry, it's that this question of how China defines torture as we saw from the opening paragraphs in this report becomes critical. China says in its assurances it will comply with the Convention Against Torture. The advice to the Minister also says China's overall approach to international instruments is that it interprets them itself. It sees auto-interpretation, as it's called, as the way to give effect to treaties. So if New Zealand thinks being locked into a chair for 24 hours at a time is torture but China does not, there is, in China's view, no breach of the assurance, and I will come to one wider consequence of that too.

Now returning to the three-page table of risks, the last two are on the last page. One Your Honours have had some discussion with Ms Todd about and this is the second item down, "Court verdicts not determined by trial Judges but by separate judicial committee. No judicial independence." It's set out in our written submissions, page 21 and onwards. It's quite important to differentiate between what the evidence said was Communist Party, there is a Communist Party Committee with rights to intervene in any judicial proceeding, Communist Party intervention and judicial committee intervention. One is occasional and that is the evidence. It may occur here because of the profile of this case and that's what the Court of Appeal adverted to. The other, as I think Your Honour, Justice Glazebrook, said, happens in most cases. It happens in any difficult or significant case. It's also opaque. Mr Ansley says we have no idea what the committee does. We don't know when it's decided. There's no indication for it.

And the other point, and this is just in the second column there, the assurance that China has given is that it will, nothing to do with the Judges who will decide the case, will be the people who have actually heard any evidence, heard any submissions, no, China just says it will comply with applicable international legal obligations and domestic requirements regarding fair trial. We say in our submissions there really aren't any of those and the Court of Appeal said, and they were plainly right, no one has gainsaid it. China accepts

no international obligations concerning fair trial. It just doesn't. It's not party to the ICCPR. There is no other instrument that it is party to and when we went to look at whether China might accept that obligation under customary international law, there is a very strong indication of the Human Rights Council denouncing the very idea.

O'REGAN J:
But isn't the assurance that they will do it?

MR KEITH:
They will comply with applicable international obligations. China doesn't have any, Sir.

O'REGAN J:
Yes, but it does not say applicable ones that China has signed up to.

MR KEITH:
Well I don't know what else applicable would mean in this context. China is not going to agree to comply with a treaty to which it has not become party.

O'REGAN J:
Well in the face of it, that is what it has done isn't it?

MR KEITH:
Well no Sir. I don't know what it means because there aren't any. Applicable must mean something. It doesn't say international obligations. It doesn't say the covenant, unlike some other assurances that happen.

O'REGAN J:
Well has this been explored at all?

MR KEITH:

This has been explored Sir, and this was the subject of a specific finding in the Court of Appeal. They said China is not party to any. I am sorry, the question of how you would interpret the undertaking. No, Sir.

O'REGAN J:

Well if they say, "We are complying with all applicable international obligations" and there are none, it is a rather odd undertaking to give isn't it? So wouldn't the more sensible one be that they are agreeing to comply with it?

MR KEITH:

I choose to look at these undertakings, these assurances, in the way that I think we have to. China is, as has been emphasised, making moral and political commitments. The assurances, the undertakings, and I can take Your Honour to them, are very carefully worded. There are all sorts of restrictions and conditions and so on. For example, there is another undertaking that there will be no reprisals against anyone who reports Mr Kim being tortured as long as they are acting in good faith.

O'REGAN J:

It is pretty disingenuous and pretty gormless by the New Zealand Government to accept an undertaking that says, we will comply with nothing and to attribute that does seem a bit odd to me. Why would China give the undertaking if it means nothing?

MR KEITH:

It is far from us to –

ARNOLD J:

What you are saying is, the words comply with applicable international legal obligations. What it actually means is, we will comply with no legal obligations.

MR KEITH:

If you can find one.

ARNOLD J:

Sorry?

MR KEITH:

If you can find an obligation to comply with. If there is something, an instrument that Mr Kim might get, but we just don't have any.

ARNOLD J:

So if it said "relevant" would you regard that as different?

MR KEITH:

It would be easier Sir.

ARNOLD J:

Why would you assume that in this process, these diplomatic channels that we have seen evidence about.

MR KEITH:

Yes.

ARNOLD J:

I mean wouldn't it be bad faith really, for one party to come along and say, we undertake to comply with applicable international legal obligations, when what they really mean is we will comply with no international legal obligations.

MR KEITH:

As I say, I think one has to take this as a very carefully written document. We know, and we have included reference to it, that China is very slow to accept international obligations. It is extremely hostile to any sort of external criticism or scrutiny, including from the New Zealand Government, including from the UN and we have that referenced. In that context, it really does have

to be approached with a very cold eye indeed. The evidence is that China will live up to what it says it will do. That's what Minister McCully says but we can't read in more. We can't look at this thing and say, on a charitable reading it might do something.

ARNOLD J:
It is not on a charitable reading, it is on a literal reading. You are trying to read into it, really that applicable doesn't mean the relevant one.

MR KEITH:
But if it is an obligation that China has not ratified, does not accept arises, what have we got left? What does this actually mean then?

ELLEN FRANCE J:
Well it means they will comply with the relevant international legal obligations relating to fair trial.

MR KEITH:
Which, Your Honour, is my problem. I don't know what these mean.

ELLEN FRANCE J:
The ones in Article 14 presumably.

MR KEITH:
Do we know that? No.

ELLEN FRANCE J:
There's nothing before us to suggest in terms of the evidence that it'd be otherwise.

MR KEITH:
Well, except that China's not accepted this, and I don't think I can take Your Honours further except to make one comment which is, and again it's footnoted in our submissions, there have been assurances given. In the

Othman case, for example, there was a specific assurance by Jordan to comply with Article 6 of the European Convention on Human Rights, so the fair trial right there. So I think in light of the indications Your Honours have given me and the most I can say is this has indeterminate content then. I still think that "word applicable" and "legal obligation" has to be given its literal meaning, but even if I'm not there we've had an awful lot about, well, China may do certain things, China may be in breach of certain things, but we don't know what those are. We don't know what the nuts and bolts are.

GLAZEBROOK J:
Don't we have their criminal code that if it were followed the argument for the Crown is that it actually would be in compliance with Article 14 and so whether or not that means what it says it means, if in fact when they say they will comply with their criminal code that does comply with Article 14, then why would you read "applicable" as meaning "we're going to ignore it"?

MR KEITH:
It's an extremely good question, Your Honour, and it does I think move us forward. The Chinese criminal code does, as we've had some discussion of and I can go back to that too, does make provision for certain things to do with trials. So it says, for example, that witnesses will be called. Professor Fu says that hardly ever happens but the Criminal Procedure Law does say it. It doesn't, on the other hand, say that you have an independent tribunal and that is a key attribute of Article 14 and, and this may be a better answer to the questions that the Court has put to me, at the start of the undertakings it is emphasised that nothing in the undertakings contradicts the law of China. That is, Mr Kim is not exempted from anything by these undertakings. Your Honours have gone through with my learned friends for the Crown earlier that the provision for, for example, the judicial committee to make the decision instead even though they haven't seen the case, that is written into Chinese law.

So, and perhaps this is a less gormless, to take Justice O'Regan's answer, a less gormless but still not I think particularly positive reading of the word

“applicable” is the Chinese law still says what the Chinese law still says. It says that there is a judicial committee and it says that cases can be referred to it and the evidence is that most are and there’s no undertaking not to do that.

Article 14, and you were taken to it and I won’t take your time going to it again, does emphasise that an independent and impartial tribunal in a fair and public hearing is to determine the case. We don’t have that here. As a matter of law in China, we do not have that here, because the Chinese Criminal Procedure Law says that this committee that does not see the witnesses, does not hear the submissions or the case as a whole, can and in most cases will decide the case. Likewise, what we’ve gone through about access to defence counsel and the limitations that they are subject to, the 306 offence is in Chinese law.

So perhaps a happier reading, given the reception of my first one, of this undertaking, is to say, well, they will do what they can with what they’ve got but where it runs counter to Chinese law, the undertakings themselves say China will not do that. It will not go against what the law says.

GLAZEBROOK J:
Of course we would be rather disturbed if, in terms of rule of law, if it said it would override the law, wouldn’t we?

MR KEITH:
It might be a victory for international human rights over Chinese law and I am not sure which side of that debate I would be on. Actually I am pretty sure I am but yes, you are right. It would be extraordinary for a government to say, we will contradict our own law. My point though is in terms of the substantive content of Article 14 in what can be, on the fairest reading I think, put into this undertaking, they are not going to do any of these things. They are not going to suspend the operation of the defence counsel, offence provision.

GLAZEBROOK J:

Well is that an interpretation because on its face there is nothing really wrong with section 306 because here, if you had a defence counsel advising perjury, then it wouldn't be thought of as immune from prosecution, would it?

MR KEITH:

No Ma'am. But we know that section 306 has a wider meaning.

GLAZEBROOK J:

But that's the practical application of it, isn't it?

MR KEITH:

Well it is the case law, it's the law of China.

GLAZEBROOK J:

So you say, although I doubt they have a precedent system, so that might be the practical application of it anyway.

MR KEITH:

Well all of the evidence to the Minister was that defence counsel who run not guilty cases.

GLAZEBROOK J:

No I understand that.

MR KEITH:

I think Your Honour has at least helped me arrive at a different and possibly more enlightened understanding. I will move on to my last point on this and I am conscious of having technological problems and time.

ELLEN FRANCE J:

Just in terms of that. All the letter says is that the assurances don't contradict Chinese laws.

MR KEITH:

Yes. So if China, if the judicial committee for example is written.

ELLEN FRANCE J:

No I understand that. It is just a statement of fact in that sense isn't it?

MR KEITH:

It is the statement of the status of this instrument isn't it. It tells us what it amounts to and it tells us what meaning we can attribute to it, relative to those Criminal Procedure Law requirements.

ELLEN FRANCE J:

Only in the sense that, of course, assurances can't in that way somehow change the laws.

MR KEITH:

No but so far as we attempt at all to rely on the proposition that China will comply with Article 14, the best one can do is to say well they will comply with those bits of Article 14 that aren't contradicted by Chinese law and some very critical ones are. The very first part of Article 14 is.

Now I have already gone through the section 306 matter which is the other point of this page; the fourth item defence counsel are inactive and ineffectual and all of the evidence before the Minister, including the UNCAT report and as the Court of Appeal found is that defence counsel in China operate in an environment of intimidation, prosecution and torture. That is all we have. And as the Court of Appeal said, "An assurance that someone will have a lawyer, when it is a lawyer under those conditions, is no reassurance but the further point from that is when we look to whether the Minister had turned her mind to how to deal with this." No, it didn't happen.

GLAZEBROOK J:

I am sorry, what was that last point?

MR KEITH:

Whether the Minister dealt with this problem. She didn't. So the record before the Minister in considering this extradition request, in considering whether these assurances illustrate the risk to Mr Kim of an unfair trial, the evidence, including the UNCAT papers, including that Mr Ansley was that this is the condition of defence lawyers in China, the Minister does not address it.

GLAZEBROOK J:

The Crown I think said the involvement of New Zealand in terms of being able to talk to the lawyer and visit and monitor at the trial, as I understood the submission, that that was designed, whether effectively or not and obviously you can make submissions on that, to deal with Mr Kim's particular right to have a lawyer in the particular case, as I understood that was the Crown's view, the Crown's submission that that was what the Minister had to address and the fact that no one else would have a lawyer, which I think Mr Ellis found rather upsetting but in any event is not relevant to this particular decision.

MR KEITH:

There are two questions, two points there, Ma'am. One is about whether or not Mr Kim has a lawyer while under interrogation and so there's that aspect.

GLAZEBROOK J:

Obviously, that's not, yes.

MR KEITH:

And the Court of Appeal said, well, there's no question he can't have one. They also said the Minister should seek an assurance that he can have one. They did, just to qualify something that was said to Your Honours this morning, also say, "We can see other ways in which the right to silence could be," or, "We can conceive that there may be other ways in which the right to silence can be protected but we don't know any. He should have a lawyer present." So that's the interrogation/lawyer side of things.

The particular point, the wider point here, and I think it is a useful question again to raise, Your Honour, the Crown says, "Well, there's monitoring. There can be consular people there." We don't really have any exposition because the Minister didn't deal with this problem of ineffectual defence counsel either. We don't have any exposition of what the consular people are going to do, how that could possibly work. I'm not sure it's an entirely easy thought experiment but if there were a consular officer in Court today assessing whether or not defence counsel were doing a good enough job, what are they supposed to do? One might get some glaring breach, defence counsel just isn't there, if defence counsel is not allowed to talk at all, but beyond that? What does a fair – to come back I think to Justice Arnold's very first question, the infrastructure, what is the carrying out of an assurance that someone will have a lawyer and have a fair trial involving that lawyer, what does the carrying out of that look like? Is the consular officer supposed to challenge either the defence counsel's applications to access evidence or the Court's determinations of those applications? We don't know. It's hard to imagine. In any case, it's not in the record. The Minister didn't have that.

GLAZEBROOK J:
As I understood the submission to a degree it was China will make sure, because there will be a monitoring and observance at the trial, that in fact the right that is actually in the Code to call evidence and cross-examine to the extent that the defence counsel wants to will be undertaken, and I guess the other thing is observing trials is actually a method that human rights bodies use all the time in order to assess the structure of a criminal system.

MR KEITH:
Yes.

GLAZEBROOK J:
So one can discern quite a lot from how the Court process actually is working or else there wouldn't be much point in having those observances, or not working I think is usually the case.

MR KEITH:

Yes. I agree with Your Honour that trial observation can pick up gross problems. That's clear. But Your Honour said just then the Court can tell whether or not the – or, sorry, the observer, the consular officer, can tell whether or not the defence counsel is applying for evidence and getting disclosure of it, for instance. Well, that presupposes two things, Your Honour. One is that the defence counsel is willing to go out on a limb like that and the indications we have are that they are not. The Committee Against Torture says defence lawyers get sanctioned for carrying out their professional duties. The second is that all the evidence we have is that, as I think Your Honours canvassed with my learned friends this morning, even being able to apply I think was Your Honour Justice Glazebrook's example. Police know of an eyewitness; the Court and the procurator may not even know of that and the defence counsel certainly won't and that is the evidence. What is a consular observer supposed to do with that? They can ask defence counsel; well did you get any disclosure? If the answer is, I would have asked for some but I don't know what to ask for. That is the evidence and unless you know it is there, you cannot get it. So the wider question that Your Honours have, I think, opened is, what does a fair trial assurance. What does monitoring, rather, of a fair trial assurance look like except at the extreme margins. In particular if one is looking to China being concerned to a Court, for example, prosecution disclosure, what does that look like? How is that enforceable? Certainly how could one place China in breach of it?

Now that was all I was going to say about the table. I am in your hands as to time. I can make a very brief start into fair trial and then we can be rather quick early tomorrow morning, as Your Honours would suit.

GLAZEBROOK J:

How much longer?

MR KEITH:

I have three other points to make.

GLAZEBROOK J:
I am really more interested in the time you think that would take?

MR KEITH:
My estimate would be 20, to 25 minutes total but I certainly would not stem the questions. I am conscious we started rather later than we planned.

GLAZEBROOK J:
I understand that. We will sit on perhaps until 5 pm and then let's see how we go and is that then the end of the submissions for Mr Kim. Let us see if we can finish although we will give you some time in the morning if there is something that we might have rushed you through.

MR KEITH:
I have been very grateful so far Ma'am. The second question and it is rather simpler is what the Court of Appeal did about fair trial. I do want to go to the written submissions and particularly at page 18, paragraphs 28 and following and I will really just touch on this, on the high points but again I think it is rather important. The appellants have said in written submissions and have said a great deal today, that the Court of Appeal applied a standard of compliance with New Zealand domestic law with problems that would be a breach of their trial in New Zealand law and it has said, and it would be right if the Court of Appeal had done it, that that is wrong in an extradition context.

But no matter how many times it is repeated, and it has been repeated a lot and it is just not what the Court below did. Yes they framed the test as whether there was a key, deprivation of a key benefit of the right in question. But, and I think several members of the Court this morning, were trying to and were saying they wanted to get a handle on quite what this meant. What do you lose? If you lose your right to silence, is that a flagrant denial of fair trial? If you have no defence counsel, is that a flagrant denial or if the defence counsel, as I have touched on, is intimidated and hamstrung every which way. I say that the standard of destruction of the right is relevant here, useful here in two respects.

One and my learned friends probably took you to the categories in *Othman* that would be a flagrant destruction. A summary trial without regard to the defence, a trial without recourse to an independent tribunal. Those would be flagrant denials but the point beyond that, and this is what the Court of Appeal said about words like "flagrant" possibly being a distraction, the strength of the deprivation of key benefit standard that they have put is that it has some concrete content. One looks at what the criminal procedure system in the requesting country does or doesn't do and looks at each of those things and says, "Is that a key benefit?" So there is allowance for the extradition context. We're not just treating this like a fair trial in New Zealand.

FRENCH J:
Do you consider the tests postulated by the Court of Appeal to be a lower or higher threshold or is it co-extensive?

MR KEITH:
I think it's co-extensive. It's just I was trying to avoid, come up with something more dignified than user friendly. It's applicable. It is concretely usable as a standard. We aren't looking at whether or not this is a destruction of the essence of the right or something like that.

FRENCH J:
So adoption of this test would not put us out of kilter with other comparable jurisdictions?

MR KEITH:
Not at all, Ma'am, and the particular reason, so I think Your Honours have the reference to European Court of Human Rights in *Othman* from this morning, I can dig it out if we need to, but it's earlier in these submissions too, but they said, for example, a summary trial conducted without regard for the defence, they said not having recourse to an independent and impartial tribunal, those things would be flagrant denials. All I think the Court of Appeal has done, or what I say, not for me to speak for them but the way that I read the judgment

is to say what is the description of those kinds of losses, and those kinds of losses are, in the Court of Appeal's terms, key benefits. So it's not the niceties or it's not the local variations or it's not chapter and verse of section 24 and 25 of the New Zealand Bill of Rights Act. It's what are the really critical attributes? And an independent and impartial tribunal is one. Actually having a defence of some sort is two. These are not complicated concepts. And I go on to explain how, at paragraphs 29.1 through .3 and 4 –

FRENCH J:

As I understood the Crown's argument, they were saying that there was a difference because the Court of Appeal approach requires you to isolate each of the rights whereas the approach used in other jurisdiction enables a more global assessment.

MR KEITH:

Yes, Your Honour, I think that was the submission, but when one looks, for example, at *Othman*, these are specific examples. It's not a legal system in which one doesn't have recourse to an independent and impartial tribunal. In the round there's a flagrant denial of justice. It is that attribute. So it has to have a level of severity, and one could have more than one and in China's case we do. We've got multiple ways in which it does not provide key benefits. But I don't think that puts us out of step. The submission, I think, and they'll tell you in their reply, but when one looks to the older decisions like *Ullah* in 2004 in the House of Lords there is a great concern not to create a ground for non-reform or non-return because of some nicety as to a difference between two legal systems. You can't say France has a civil system and that's abhorrent, or something, no matter what one might think. But you can't do that, and nor can minor irregularities or speculation that, you know, it's not quite as good as we would have here, that's not going to reach a threshold in an extradition context, and the answer to that is to say, well – and bear in mind that *Ullah* and the other early decisions were all doing this in the abstract. They didn't find a breach. They said theoretically if you had a denial of fair trial, if you had a flagrant breach, you would have a ground to resist return to the other jurisdiction under the fair trial right. What's moved on since

then, and *Othman* in 2012 is a nice concrete example with their four or five, five in fact, categories, they say here are things that would be.

So one criticism that we make and the Court of Appeal made of the Minister's decision is this was done in this very general sense. Would the trial accord to a reasonable extent with fair trial rights?

But what that doesn't do, or at least what that can't account for, is how can you meet that test if you don't have an independent and impartial tribunal, for instance? You can't, and this test in the Court of Appeal, the test in *Othman*, give that answer. It's not the loose thing that the Crown or at least the Minister sought to apply.

Now I was going to take Your Honours to paragraphs 34 through 36 of the respondent's submissions but this is just about the judicial committee and also the Chinese Communist Party Political and Legal Committee. The one thing I would say about that, and I think I may have mentioned this very briefly in opening, there is a difference. The Party Political and Legal Committee has a legal right to intervene in proceedings but it is more uncommon. As the Court is already aware, the judicial committee is not. The real point here is, and this is getting back to the undertakings, if China is complying with Chinese law, well, the short point is Chinese law allows those two bodies to make judicial decisions.

GLAZEBROOK J:
Can I just check, is it accepted that the Minister could reasonably have come to the conclusion that the overall party body was unlikely to intervene in this case?

MR KEITH:
The Court of Appeal didn't think so. They said that Professor Fu was not actually asked. He said the party takes an interest in high-profile cases. He doesn't think this is one, but he wasn't asked this case that China really, really thinks is important is one or not, so we just don't have evidence.

GLAZEBROOK J:

So yours was a lack of evidence rather than –

MR KEITH:

No, no probative evidence, Ma'am, yes.

GLAZEBROOK J:

Because there was evidence as to the type of cases that the party, looking at that in a broad sense, was going to be interested in which were, one might say, more political cases.

MR KEITH:

Political and high profile I think were the descriptions, Your Honour, and so I agree with you that there were those descriptions but the difficulty in this is what the Court below felt hadn't been explored was isn't it possible that this is such a case, and we just don't know because no one was asked.

GLAZEBROOK J:

So we don't know whether this would be one of the occasional cases that they intervene in?

MR KEITH:

No. Well, my point is, Ma'am –

GLAZEBROOK J:

Is that the submission? Sorry, I'm just checking.

MR KEITH:

Yes. We don't know. The Minister didn't find out if this is one of those cases. That's what the Court of Appeal drew from the lack of a question to Professor Fu. Could've asked. Could've said, "But hang on, isn't this one of them?"

The last passage on fair trial that I did want to point back to, and again we're just in the written submissions, paragraphs 44 through 44.4 and 45, the Minister placed heavy reliance on the reforms. The evidence was that they were ineffectual. The Ministry wrongly, and this is in the Court of Appeal and it's not contested by my learned friends, advised the Minister to treat that evidence as outdated. And so the Minister didn't know, didn't enquire further. She said in her decision, well, these 2012 reforms have worked. There's some evidence they are not strictly followed. Well, no, actually the evidence was that they were inconsequential. They hadn't made anything better, and in the submissions we point to had the Minister made further enquiries, looked further, and that's consistent with the academic commentary too.

ELLEN FRANCE J:
Just going back to your previous point.

MR KEITH:
Yes, Ma'am.

ELLEN FRANCE J:
The briefing paper, the November one, 426.1 says, "Mr Kim is not a member of any of the well known groups that face a high risk of interference by the Government or Communist Party in the judicial proceedings." Are you saying there was no evidence to support that?

MR KEITH:
There's evidence to say that there are these particular groups who attract particular attention. So Falun Dafa people. There are corruption cases, for example. But to show the negative, the inquiry just wasn't made. But a high profile trial, criminal trial, on which the Crown evidence is this is very important to China, no one asked, "Doesn't this make this into one of these high-profile cases that the party may well care about?"

ARNOLD J:

Well, that really depends on the question that Justice Glazebrook put to you, that it's, I understood, important to China for the reason of showing that procedurally they could conduct fair trial, that was the point that was important from their perspective to establish. So are you saying if there was some intervention by the Government to ensure that the trial was fairly run that that would be problematic in some way?

MR KEITH:

More that China will decide if – the evidence is that the party will decide whether a case warrants intervention and it will decide what form that intervention might take. It's possible, one has to accept it's possible, that the party might decide that an acquittal here would be a good thing. It's possible. We don't know. But our point as to trial fairness is whichever direction that intervention is in, and we don't know, it's an opaque thing, if there is that intervention provided for in law it destroys the trial's fairness. It might be that it destroys by compelling an acquittal against the evidence because that's what the party thinks would play best but we just don't know, and this is where the Court of Appeal said, look, this is how the system is designed to work. It's hardwired in. It's in the Criminal Procedure Law. It's in the Constitution. These things aren't interference. They're provided for in law. That's the problem. Past that we can't tell what it's going to do.

ARNOLD J:

Just while I've stopped you, the judicial committee, one of the points that came out earlier is that we don't really know the basis on which matters are sent to it but the mere fact that a trial Court sends something off to another decision-making body won't necessarily render the trial unfair because you have questions of law reserved and case stated, things like that.

MR KEITH:

You could have a case stated.

ARNOLD J:

So it's the character of what happens when it's referred that matters.

MR KEITH:

Well, I think there has to be a dividing line, doesn't there, Sir, between case stated on a question of law does not involve a Court before whom the parties do not appear making a decision? This does, and what we also – well, we do know a couple of things about how cases get referred and we know most cases get referred. We know that the statute says, I think Justice Glazebrook had the phrasing and I can find it if need be but it's in the Criminal Procedure Law in section 180, major cases, difficult cases, and we know how that's interpreted because it applies to most, and then Mr Ansley also says that Judges refer things because they don't want to be scapegoated in a case that might be controversial. The judicial committee has the advantage of being invisible and from the look of things also, well, as Your Honours were exploring with my learned friends, it has the party's backing. The Judge on the bench may be, well, Mr Ansley says is more exposed. So that's the problem, I think, Sir.

And the last point, just 44.4, we really have no indication of how a fair trial assurance would be monitored or enforced. I caveat that in light of Justice Glazebrook's very good point, in an extreme case it would be if it were a trial in absentia, if it were a trial with closed doors throughout, but we're concerned at a – not only at that extreme level.

ELLEN FRANCE J:

Just in relation to that, the assurance says if the hearing is closed those periods shall be as short as possible.

MR KEITH:

Yes. I don't –

ELLEN FRANCE J:

And they are to be recorded.

MR KEITH:

Yes. We haven't taken issue with that part, Your Honour. I mean the recording aspect we could. The other evidence from Mr Ansley from the UN and so on was that recordings can get tampered with, but it's not really critical. Our point is more even sitting in open Court there's an awful lot of uncertainty as to what the ability to monitor, to contact people, actually does.

I think that was everything I had to say about fair trial. The third out of my four, and I'll be as quick as I can but I am very much appreciating Your Honours' questions, is this preliminary assessment to which the Crown objects. That's addressed at paragraphs 14 onwards of the written submissions. And the Court of Appeal had said while there needs to be this preliminary assessment, and the Crown has taken issue with that or said, "Well, maybe they're not objectionable but it only applies in cases of basically chaos, gross state dysfunction."

The two quick points I will make about that, one is there's no authority at all for this idea that when the European Court talks about states from whom assurances can't be taken having to be dysfunctional, I think Mr Ellis has already said one could have a totalitarian regime controlling everything very efficiently, and China is one of those regimes, doesn't mean you can or it doesn't mean at least that the Minister wouldn't first turn her mind to whether this is a country whose assurances can be accepted at all. In particular, I say there are two good reasons for that. One is a point also made by the Human Rights Commission and this is at footnote 42 on page 11. The Convention Against Torture itself, which is the instrument interpreted here rather than the European Convention, specifically says, well, you must look at whether there is a consistent pattern of gross flagrant or mass violations of human rights. "The competent authorities shall take into account," says Article 3(2).

So that rather calls for the general inquiry. Now the Crown may well say the words "take into account" don't differentiate between doing it as a preliminary assessment and doing it in relation to the individual, but that comes to two points, I think, which are of some importance. One is that there's a good

reason for requiring decision-makers to look at the country as a whole as the European Court does and we set out in footnote 43 instances in which the European Court has required and found wanting that exact assessment, and that is, to take an example from this proceeding that the Court of Appeal felt could be taken into account, China is engaged to very large scale human rights violations of a number of different parts of its population, whether it's Falun Dafa or Uyghurs, and we have reference to both of these. That's not state dysfunction. That is state policy, and the virtue of what the European Court says is you've got to look at all of that. You have to make – and looking at all of that in the way that the Court of Appeal and that *Othman* say you should is a useful perspective. It is instructive. You can say before we get into the nitty gritty of consular visits this or fair trial that, is this a Government whose human rights assurances are sincere or fickle or what, or, to take Mr Ellis' earlier point, is it a Government from whom a human rights compliant rule of law abiding country should accept an assurance or is it just too atrocious a country? And that's not an abstract thing. It's not an abstract proposition. We've had it in two respects, and again this is footnoted at 43, the *GS v Bulgaria* (Application 36338/17, 4 April 2019) decision quoted on page 12 at footnote 43, the European Court of Human Rights said that Iran, another totalitarian country that tortures people, could not give credible assurances, and it had a particular reason for that as well as that general criticism. Iran doesn't believe that flogging people as a punishment is torture but it also said "and" the general human rights situation there," and then at footnote 44 – sorry, there's a cross-reference to note 27. This is exactly what the Supreme Court of Sweden said last year in the *PRC v QJ* Ö 2479-19, 9 July 2019 (Swedish Supreme Court) decision that we've put in the bundle, that –

GLAZEBROOK J:

Have we got the English translation of that?

MR KEITH:

We have an English translation, Your Honour. We got one made. It's certified and so on.

GLAZEBROOK J:

It's certified?

MR KEITH:

Yes.

GLAZEBROOK J:

Is it actually in the – what we can't get at the moment?

MR KEITH:

It's in the respondent's authorities, Your Honour. The Crown submissions it said very properly we need to get a translation. We got a translation. Cross-appellant's authorities at tab 25 Your Honour.

FRENCH J:

We'll need a hard copy of that, won't we, because we won't be able to Google it.

MR KEITH:

No, you won't be able to Google it. We'll get some copies made Your Honour. I really am sorry about the hyperlinking thing. We have spent quite a lot of hours with some very long-suffering court officials to try to overcome whatever it is, but we can't make something that copes with the security at this end or something. So we'll make sure you have a copy of that and anything else, but what they did say is, because of the way China works, because it does not have effective independent monitoring of torture because it does not have, it doesn't accept international scrutiny –

GLAZEBROOK J:

Can we perhaps leave that until tomorrow when we have a copy of it.

MR KEITH:

Of course.

GLAZEBROOK J:

And can you also deal with whether it actually sets out any assurances that were thought not to be sufficient, because obviously we haven't seen that translation at all. All we've seen is that summary which was relatively small.

MR KEITH:

Yes Your Honour, I'll go through that. The point we're citing for though is that this wasn't about particular assurances, this was upstream of that. In line with *Othman* they are saying you can't accept that at all. But I will come back on that point and with accessible copies this time.

ARNOLD J:

There's one thing I just want to raise about that. That is in the *Evans* case as you know this whole question arose in the context of Afghanistan.

MR KEITH:

Yes.

ARNOLD J:

Which was very much a dysfunctional state, and yet the Court did accept understandings and monitoring arrangements and a whole bunch of things, notwithstanding the dysfunction within the Government structure and the Government's inability to control people, particularly at the extremities of the country. Now I suppose you might say, well that's different because even though it was unable to control all its agencies, the Government itself expressed a commitment to human rights laws, even though it couldn't live up to them. Your argument is that, as I understand from what you've just said, that the Chinese policy towards certain groups does not recognise fundamental rights.

MR KEITH:

Yes Sir, and I would say two more things, one about *Evans* and one about China. I don't think we put *Evans* in the voluminous authorities that we've inflicted on the Court, but what I can say, having spent some time with that

decision, the Court, this is the High Court in England and Wales, on whether or not the Ministry of Defence could lawfully transfer detainees into the custody of the Afghan paramilitary forces, because those paramilitary forces operated detention facilities in which torture occurred, and I will go and read it overnight again Sir, but the thumbnail sketch I can give you is that the Court found that in respect of some detention facilities there was sufficient and verifiable assurances that those detention facilities would not torture, there were others were those were lacking, so it divided up the country on a factual basis. One can't do that with China because of two things. One, we have nothing like that degree of insight in evidence. We don't know. We've got some stuff. We have the Minister's primary reference here was a Special Rapporteur's report compiled in 2006 from a fortnight long visit, and the Special Rapporteur complained that he hadn't been able to go everywhere he would have liked. In 2010 I think Your Honour, thinking about the environment in Afghanistan, and what the British Government has responded in that case were able to produce, there's voluminous evidence about what was being done, what was on the ground, what commitments and monitoring and so forth there really were, and they weren't depending upon consular offices. They were depending upon entirely relationship, prisoner transfer agreements and the like, between the NATO forces or the ISAF rather forces, and the Afghan Government. But even then they were checking to see, to come back to your very early question today, checking to see what the infrastructure was like.

ARNOLD J:

But they were checking, I mean the point that I took from it was that even within a very dysfunctional country that A, one could get assurances, enter into memoranda of understanding, that sort of thing, and a number of countries did, but there was an obligation to monitor and to monitor closely, and the Court in that case looked very closely at the monitoring arrangements that had been made, and the way they were carried out, and as you say in some respects said, yes, you can keep going here but you need to improve your monitoring, the rest of it's fine, this one you've got a moratorium, you're not sending anyone there, and that's, we think, right. So it does tend to

suggest that the very absolute position that's being advanced doesn't actually reflect the sort of approach that Courts have adopted elsewhere.

MR KEITH:

I don't think anyone I saying that what the Courts have adopted elsewhere, what the Court of Appeal said is you have to ask the general question before you get to the specifics. Now *Evans* pre-dated *Othman* in its enunciation of this, and I don't think there's any discussion of this pre-cursor question there, perhaps in part for that reason, but one couldn't call the whole of Afghanistan dysfunctional, and I realise Your Honour knows an awful lot more about Afghanistan than any of us ever will or possibly want to, but there were clearly functioning systems. There were clearly day-to-day, on the ground operational relationships and so on, but the prior question, the upstream question which the Court of Appeal said the Minister needed to ask here, this is the Government, that is committed to sincerely engaging with its human rights obligations or not. We don't have an answer on that because the Minister didn't ask the question. There was some advice about it saying, oh, is it so bad, but the way that the Court of Appeal said that advice was a little obscure, certainly we have no Ministerial finding that taking into account everything China does, and doesn't do, we get past that first hurdle, and I think the point I'd make, Sir, about *Evans*, if one viewed it through that lens, is the British Government probably would have been able to show to the English and England and Wales Court that there was a sincere commitment. That there was an awful lot of the Afghan Government, many, many, flaws, was sincerely trying to do these things. They wanted the detainees handed over. They wanted to stay engaged with ISAF and so on. So the answer there would probably be, well, there's not a preliminary objection, but all we're saying is not in an absolute way but you have to ask the question first, because it does allow you to take that overall view, and like the Court of Appeal said, it avoids you focusing on the trees are missing the, that's a terrible metaphor actually, missing the overall sweep of human rights compliance or not.

ARNOLD J:

And you say you have to do more than simply look at the changes made to the law in 1996, 2012 and so on.

MR KEITH:

I think you have to look at, is this a country that is carrying out systematic human rights violations and what do we take from that. Quite apart from the CPL and so on, quite apart from Mr Kim is, yes.

ARNOLD J:

Thank you.

ELLEN FRANCE J:

I was just going to say, doesn't that run the risk of getting away from what the statutory test is, that the Minister is actually looking at?

MR KEITH:

It doesn't in this sense, Ma'am, in that the *Othman* Court, this is the Grand Chamber of the European Court of Human Rights, is saying before you get to accepting an assurance, in order to rely on it you must carry out this first, and so if the Court of Appeal is right in imposing that preliminary question, and *Othman*, and the Minister asks that, and the answer is, well, this is a regime beyond the pale, then you don't get to an assurance. So the Minister's question is, the risk to Mr Kim is what the risk is. You don't get to the particulars of the protections of the assurance because it's not an acceptable assurance, says *Othman*.

ELLEN FRANCE J:

Well you're asking whether there is substantial grounds for believing the person will be in danger of being subjected to an act of torture, and if you don't think that's the position because of the assurances, I'm not quite sure how having a formal preliminary question fits in with that.

MR KEITH:

If the person's not at risk you don't need the assurances, and I know that's not the point Your Honour was making. The person's not at great risk, you don't need an assurance. In order to get a person from grave risk, something to which they cannot be returned, or real risk rather, down to a permissible return, you need to add in a gloss already that there's such a thing as an undertaking from the other Government that will mitigate that risk, and so what you're left with is just the risk unmitigated if the assurance is not credible for this threshold reason.

GLAZEBROOK J:

It mightn't be – you might have a credible assurance that has absolutely nothing to do with a commitment to human rights or the rule of law, but merely one, because it's totally in the self-interest, I think this is partly what's being said here, so much in the self-interest of China to showcase this as a showcase trial because of wanting international credibility, that you can accept that, and I think the second point is the Crown doesn't say you don't do that country specific view because you have to assess whether an assurance is acceptable against that background.

MR KEITH:

In answer to that –

GLAZEBROOK J:

Which are two points I'm sorry.

MR KEITH:

No, in answer to the first, Your Honour, the reason why in *Othman* and some of the other cases you make this initial assessment, the reason why in fact the Human Rights Commission is saying you can't have assurances at all, is that they are a very difficult thing to do in an individual case. It's true we have evidence saying that China very much wants co-operation and wants to have this case as a precedent, and we have assurances, and there are consequences if those assurances are breached, but it does beg a couple of

things. One is if it's breached, and we get to those consequences, it's done Mr Kim no good at all. Yes, there's a disincentive, yes, there's a deterrent factor, but there's no actual safeguard. You're giving a person into the hands of people who, on other days of the week torture people, and I don't mean that flippantly, they do. So that's why this is a complex thing in the first place. You're tolerating people who torture by giving someone they want into their custody. So it is a fraught enterprise, and it is not a hermetic enterprise, it is not a guarantee. We don't know. Things go wrong. The message isn't carried through. Or things are done but are undetectable. So that is why in *Othman* this Court has hedged that around to say, well, before we take you down this complicated path, are you a Government with whom we can do this at all, and they've said Iran is not, they've said, I think it's Uzbekistan in some of the other cases it's not, and that's not about dysfunction, it's just that there is contempt for human rights in those countries. So that's the first.

The second about taking it all in the round, I think again the reason for the singling, for the separating out in *Othman* is one looks at, you are, the Minister would be making a measure of the Government as a whole, not just what would happen in a particular prison or a particular Court procedure or something like that. It is outside that, and that's why we have this reference to wider human rights situations, wider violations.

GLAZEBROOK J:
Even the comment – sorry, perhaps run that past me again?

MR KEITH:
I'm saying it does serve a different purpose. You can't, to look at an individual assurance and say, knowing what we know about what you do to groups of your population can we trust you to answer that, to keep to this, or can we accept, better put, can we accept this specific assurance from you. It's conceptually quite a difficult things, saying well because you in a rounds case are this totalitarian state, we don't accept this because you don't have any effective monitoring and so forth as the Swedish Court said, and I'll come to

that tomorrow, we don't accept this per se. You are not a Government that we can accept an assurance from.

O'REGAN J:
That is effectively saying you can never accept them, because it's only those sort of Governments you need them from.

MR KEITH:
No, it's a really good question, possibly (inaudible 17:04:05) answer, I don't know, or I'll keep going as Your Honour's wish, but the catch-22 that was talked about well before *Othman*, and that my learned friends brought up this morning, no. There are two different questions here. You can be a Government that engages in torture here and there, or that engages in other human rights violations in some places, and that may be able to be corrected. His Honour Justice Arnold's example of Afghanistan is a good one. There were parts of the Afghanistan prison system you could deal with, and there were parts you couldn't, and you could provide assurances and undertakings to manage that. The question that *Othman* says you ask is country as a whole, not – so there's a difference between saying here is a country with sporadic or even quite common problems, and what do we do about that, as opposed to a country that as a whole has systemic problems.

The best example I can give for that actually, when I think about it, is *Kapri v Lord Advocate* [2013] UKSC 48, [2013] 1 WLR 2324, the United Kingdom Supreme Court talking about Albania, and it's in the submissions and the Court of Appeal dealt with it. So the concern there was not torture, it was fair trial rights and particularly the allegation was, or the evidence was there was very widespread corruption in the Albanian judiciary but the two Governments, the United Kingdom and Albania, had worked out assurances that were able to get through that. That there would be various safeguards. The Supreme Court was also comforted that Albania was party to the European Convention on Human Rights, so ultimately its conduct could be hauled up there. So this is a case which needs assurances, but where there isn't the systemic contempt for human rights that is the trigger for that

preliminary question. That's the difference Sir. I'm in Your Honour's hands really.

GLAZEBROOK J:

I think, because we're going to hear from you tomorrow on the Swedish case, so I think we'll adjourn for the evening.

MR KEITH:

Ma'am, I should say I'm very nearly finished on everything else. I've got the one point about remand time, and the Swedish case, and I will check my notes but I think I'm otherwise done. So I'm most grateful to the Court.

GLAZEBROOK J:

I think we can probably just sit at the normal time at 10 o'clock tomorrow.

COURT ADJOURNS: 5.06 PM

COURT RESUMES ON WEDNESDAY 26 FEBRUARY 2020 AT 10.05 AM

SOLICITOR-GENERAL:

Your Honours, might I just take a few moments to correct a matter from yesterday. I've asked my friends, they're happy for me to take a moment to do that now. It's better that the Crown raises this now than in reply, while Mr Kim's case is still ongoing, and it relates to the exchange with Mr Keith yesterday about the applicable international legal obligations on the PRC relating to a fair trial and Your Honours will recall that exchange. I want to clarify that the Crown's case is that presently there are no applicable international legal obligations on the PRC in relation to fair trial. That was what the Minister was advised. While PRC has ratified the connection against torture, and signed but not ratified the ICCPR, which is where the fair trial obligations are sourced at international law, the Minister's assurances were that the PRC would comply with domestic legal obligations as to fair trial. And if Your Honours want to turn it up I can give you the reference to where she is told that, at tab 39. You might not need to turn that up, paragraph 368, Minister advised –

GLAZEBROOK J:

Paragraph what sorry?

SOLICITOR-GENERAL:

368. The Minister advised, just as I said, "The PRC signed the ICCPR but has not yet ratified it." So presently there is no such international obligation, but I'll just point out briefly that the following paragraphs of that briefing identify that the domestic law, as originally enacted, didn't contain a number of internationally recognised fair trial protections but now it does and so the Crown's case is that its compliance with those domestic legal obligations as to fair trial rights that currently apply, and you've been taken through them in some detail by Ms Todd.

Your Honours, I feared that yesterday were out on a position that the record didn't bear and I needed to correct that before the case ends for Mr Kim.

GLAZEBROOK J:
Thank you. Mr Keith.

MR KEITH:
If it please Your Honours, and I'm most grateful to my very learned friend for that clarification. I had said today that we had two further points to cover. One was the *QJ* judgment from Sweden and the other is the time served, or time in custody here point.

Now we've provided the Court with paper copies to be sure, and those have been handed up to Your Honours, I think, already, of the *QJ* judgment and I do want to, I think they're recorded, asked several questions about it and I do just want to answer those briefly, with reference to the judgment.

The first point that the Court had asked was whether there were assurances in that case and what the nature of those assurances were. Those are listed on page 3, towards the top of the page of the translation, the four bullet points down that page, so this is para 4, continuing from the previous page, recording what are evidently called in Swedish guarantees. And the Court will see that, as with the assurances we have here, there is a death penalty assurance. There is a right to counsel and a right to effective defence and fair trial. The effective defence is actually more emphatically put here than in the New Zealand assurances for Mr Kim. There is protection against torture and then there is the Swedish Consular authorities will be allowed to inspect. We don't have the detail in this judgment, we could try and find out, if the Court required, what the mechanics of that inspection were, how they resembled, but this is what we have.

The other point that we had canvassed, and this is set out at page 12 of the respondent written submissions, is how the Swedish Court dealt with the assurances in light of China's overall human rights record including in light of *Othman. Othman* is cited by the Court and the standard in *Othman* at page 10 of the translation. And I should note that the Court also recited the European Court of Human Rights caselaw about breach of their trial right and

that's continued at the top of page 10. But in terms of the assurances the two points to make there, one, and simply an observation, the respondent in this case QJ was an alleged very large scale fraudster and party member and his claim, this is made at paragraph 11 of the judgment, it is discussed at paragraph 59 on the page before you, was that as a party member he would not be subject to the ordinary criminal justice system but to the party disciplinary system. That's not determined in the case, the application wasn't made in those terms but that was his fear. The Court assessed that to be most likely and that there was a particularly great risk to him of torture and of unfair trial.

Now the point in terms of the assurances, and this is paragraph 61 and following on to the next page, paragraph 63 the Court makes the systemic assessment of the kind that we were talking about yesterday from *Othman.* So they are saying while the judicial system is not independent but subordinate political power and one has reason to doubt guarantees, as they are described.

FRENCH:
Can you explain what the last sentence in paragraph 62 means?

MR KEITH:
What I take from it is that in our record here we do have a formal document, an instrument from the Supreme Court saying that Mr Kim will not be subjected to the death penalty, here they don't seem to have had that document before them. They were told there was one but they are saying it hasn't been put before them.

ELLEN FRANCE J:
And in terms of the guarantees.

MR KEITH:
Yes.

ELLEN FRANCE J:
As I understand it the guarantees hadn't actually been given, this is what the Prosecutor-General said they should be, am I right from reading from paragraph 4 and 63?

MR KEITH:
Yes.

ELLEN FRANCE J:
Because they are described as possible guarantees.

MR KEITH:
Provided that they give acceptable guarantees, yes. So this is what the prosecutor is saying would be the condition so it may be that having the judgment on these terms they would have to go and get them, I think that's right, Your Honour.

FRENCH:
Which would explain this sentence that I was –

MR KEITH:
Yes, that they don't have it. I mean they are told there is one of these death penalty pronouncements.

The two further points left on *QJ*, one is that the Court does make this assessment about China's overall system and its lack, carrying on down paragraph 63, its failure to accept the jurisdiction of Article 20 of the Torture Convention or the optional protocol. So that again allows for inspection of prison facilities in China is not signed up to that and then they say in paragraph 64, "Possible guarantee cannot hold much weight as a consequence."

The one other point, the last point from *QJ* and I've handed copies to the registrar. Justice O'Regan yesterday asked my learned friend Mr Ellis about

instances in which China hadn't complied with assurances that it had given. The article cited here, Professor Bloom, I've handed up – can I have that handed to Your Honours. And I'll just take Your Honours to page 196, it's a very specific point. 196 of the article, bottom of the page. So this is describing non-treaty extraditions, as we have here, and the instance given by Bloom and cited by the Swedish Court is at the bottom of the page. "In January 2000 there were promises made by the Chinese Government of less than a 10 year sentence, but instead he was put to death."

And also just following that point in Justice O'Regan's question, if I can refer Your Honour to paragraph 148 and following of the Court of Appeal judgment. "The other instance of non-compliance, temporary in the case but for a particular reason, which I'll come to, is 2015, an assurance given to Ireland over, I think it was actually a mutual assistance case, it wasn't an extradition, they hadn't done one of those, but that the death penalty wouldn't be imposed. It was. There were then some months of consultations and it was commuted. One can take two things from that. One is these consultations can work. The other is that works for a death sentence, it doesn't work for someone being tortured.

Unless Your Honours have any questions on that I was going to come to our last point this morning, which is the taking account of time spent in custody. Now, the appellants have urged on the Court that failure to allow for time served could only be unlawful if it amounted to treatment that would shock the conscience and members of the Court asked about what that actually means, whose conscience and how shocked. And the appellants also said that that threshold, citing the Wellington judgment of Lord Hoffmann, has to be adjusted. That what might be shocking or disproportionate and what might be shocking or inhuman under Article 3 of the European Convention, in a domestic context, wouldn't necessarily be shocking in an extradition context.

I have three responses to that in addition to what is said in the written submissions. One, as the Crown points out New Zealand is unusual in that section 9 provides not only for cruel, inhuman and degrading treatment and

torture, it also provides for a prohibition on disproportionately severe treatment or punishment. The Crown has suggested well that's exceptional, we shouldn't be too much influenced by that. I say the contrary. The fact that our section 9 guarantee is stronger is a further reason for the Court to pause here.

GLAZEBROOK J:
Just if I can check. Is that a submission that there's a direct application of section 9 in the extradition context, or sorry, a direct application of section 9 that's not overridden by the extradition context?

MR KEITH:
Yes, Ma'am, and following this Court's decision in the second *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 282 case so it is a breach of that right for the New Zealand Government for a Minister to expose Mr Kim to a disproportionately severe sentence even though that sentence is carried out by a Chinese Court. And what I'm saying about that disproportion, its severity is there is no reason to read it down or read it out as somehow not applying in an extradition context, there's no reason for that. I'm also not quite sure how it works something that is appalling here isn't appalling somewhere else.

The second point though, and this is in the written submissions, the reference to the Court of Appeal judgment is given there, that Court noted and will also have noted in an unhappy case cited by Professor Blume just now, there have been specific instances of both extradition treaties and extradition assurances with China in which provision four times spent in custody is specifically provided for.

O'REGAN J:
Sorry, is what provided?

MR KEITH:
Is specifically provided for so that the Treaty said or in the case of the executed person from Canada, there was a limit on what the sentence would

be in the case of the Extradition Treaty cited by the Court of Appeal there is provision for that time spent in detention. There is an agreement by China to do that thing.

GLAZEBROOK J:

How are those agreements done because obviously a sentence is a judicial sentence? Is it more that the prosecution, the guarantee is that the prosecution would not seek or would actively promote that or what is the guarantee?

MR KEITH:

I don't have the full, the precise terms of them, Your Honour. We just have reference to there being such treaties in the record. We could try and find one and provide it to the Court.

GLAZEBROOK J:

Well, it just seems a bit odd especially in terms in judicial independence for anybody to be guaranteeing what an independent tribunal will do rather than what the prosecution will put forward. The death penalty may – there's a systemic thing in terms of the death penalty where the Court provides those guarantees presumably.

MR KEITH:

Yes and it may be the same sort of thing –

GLAZEBROOK J:

It could be the same sort of thing. It's not important. I'm just …

MR KEITH:

No, no, it is an interesting –

GLAZEBROOK J:

Sorry, it is important but not vital for …

MR KEITH:

Ma'am, I think, I mean, we can infer that there is a mechanism whether it's prosecutorial or formal through the Court, but there is that provision to do it.

And so the last thing I was going to say about not making that provision, the Minister not seeking the undertaking that, additional undertaking that the Court of Appeal felt that the then Minister should've done and could've done is that that we say is either shocking; why is someone being deported, sorry, extradited, why is someone being extradited from New Zealand without allowance for a very long time spent without conviction in prison and then in home detention, a total of eight years, why is someone being extradited without something that is available in those other cases. I could go as far as saying it also makes the Minister's decision unreasonable. I think that's fair too. Whichever ground one supports it on, the Court of Appeal were plainly right. Justice Mallon was also troubled by this point at first instance and did in the first judicial review seek further information, but there wasn't anything more.

Unless Your Honours have any further questions, those are the respondent's submissions on the appeal.

FRENCH J:

Have the Canadian Courts deported or extradited other people since this, what seems to be a very shocking incident in January 2000?

MR KEITH:

So there's one instance, the *Lai* case. It's discussed in the briefing paper to the Minister. I can find the reference if Your Honour needs it, but there was a case. It was a deportation not an extradition and it took place over many years. The first attempt to deport was invalidated in 2007, he eventually went in 2011 under a number of assurances and there is evidence too. Actually there's a suppressed matter I can't say, but in any case that is the other Canadian instance and all we say of that is as Justice Mallon observed and as the Court of Appeal I think approved, we have a very small sample

here on record and as we say in submission, the only instance we can find in the last decade of any democratic country extraditing to China as an extradition not deportation and I think there is a difference, is a clump of Spanish cases over the last two years and we footnote and explain why we think that is. The Spanish Court said that they could not look at systemic issues including in light of an extradition treaty concluded between the two Governments.

ELLEN FRANCE J:
Just following up on your reference to *Lai*.

MR KEITH:
Yes.

ELLEN FRANCE J:
In that case, as I understand it, the monitoring involved an independent body.

MR KEITH:
Your Honour may well be right. I'd have to turn back to the –

ELLEN FRANCE J:
Well my question is, I can't remember whether it's the Red Cross but one of those organisations, whereas here, and I'm talking about the torture aspect, here that's not provided for. One approach I suspect is possible as well given the arrangements that have been made the theory might be there will be an opportunity for Mr Kim to speak out if anything was happening and I just was interested to know whether you, and it may be Mr Ellis I should have directed my question to him but is there anything you say about the nature of the monitoring that if monitoring was permissible.

MR KEITH:
Yes, I have two answers but I will just check with Mr Ellis just in case there is something else. If you would bear with me for one moment. Thank you Your Honours. I think Dr Ellis adverted yesterday to the difficulty of detecting

what can be very subtle torture practices. Certainly I will take Your Honour's indication about *Lai* but certainly, for example, in the *Othman* case the monitoring was to be done by a very well regarded NGO and that is a common mechanism. Clearly that's a better mechanism to have expert and independent people do the monitoring. The terms we have here are that the monitoring will be a consular official, a Chinese admitted or registered doctor and that any medical examination may also have a Chinese Government doctor present. So that's on the NGO point, it's clearly not as good and it does also have the difficulty to take one part of the equation out. It does have the difficulty that there is then a diplomatic decision which is not straight forward for the consular monitor to do anything. The advice in response to queries from the Court was that the New Zealand Foreign Ministry is subject to restrictions in the undertakings about making any disclosure of any information obtained. So the undertakings say well you can visit, you can access information but it is only for these purposes, it is not any other. The MFAT advice, and we can find the reference if need be, but the MFAT advice was that that didn't preclude making information public if the agreement were breached, if there was some basic breakdown. At that point they would no longer see themselves as bound. Our point about that is that comes a little too late. Yes, there's a deterrent effect but it doesn't do Mr Kim any good. And Your Honour's last point I think was the possibility of Mr Kim speaking out. We don't know really anything about what he may or may not be able to do.

ELLEN FRANCE J:

No, I was just thinking of that in terms of the presence of the doctor, for example.

MR KEITH:

Sorry, speaking to the doctor? Yes.

ELLEN FRANCE J:

Yes, I wasn't suggesting anything other, I was just looking at it in terms of the actual arrangements that were to be made and how that might work.

MR KEITH:

Yes, Your Honour. In that respect I think it is just that one could have far more confidence in a NGO provided monitor than say a doctor under these ad hoc arrangements.

GLAZEBROOK J:

And that's both independence and expertise one assumes in terms of the –

MR KEITH:

Independence, expertise and I think just basic trust. Someone comes with an NGO attached as a detainee. You might have slightly more faith that what you say to them is not going to come back to harm you or at least that that's going to be dealt with in some way, that the doctor side of things is already complicated because of the Government doctor being required to be more and able to be present under the assurance. That is at odds with what NGOs will do, standard monitoring you don't have a Government representative present when you speak to a detainee for obvious reasons.

ELLEN FRANCE J:

There are other cases, I think *Badesha* is an example where the Court has approved consular monitoring.

MR KEITH:

Yes.

ELLEN FRANCE J:

But I suppose you would say well that depends on the factual situation in the particular country perhaps.

MR KEITH:

I think it is fact, well, there are two points I think, aren't there. One is there is a clearly better alternative so why not and it is normal, it is commonplace, the NGO thing, NGO practice. The other, yes, Your Honour I'd agree, I mean monitoring two detainees who are in part concerned for their health conditions

and that sort of thing although there was also allegation of ill treatment in the Indian prison system but it is a different order and there isn't, I don't believe, I would have to go back to *Badesha* to check and my learned friends will be able to if I'm wrong, I don't believe there was any suggestion about not having access to independent lawyers and the like, it was purely that there was a prison system in which torture and ill treatment did occur. Our point is you have someone much, much more isolated.

ELLEN FRANCE J:
Thank you. Any other questions?

GLAZEBROOK J:
I just wanted your comment on two issues. I think I know what the answer to them is but it's better I think to have the out there. The appellant stressed very strongly the extradition context and the safe haven issue.

MR KEITH:
Yes.

GLAZEBROOK J:
Tied to that, leaving aside the extradition context, is the fact that we have a dead young woman here who obviously had the human right to life so the issue about the victim as well which is tied to the extradition content and the safe haven context although much more human rights focused on the actual victim.

MR KEITH:
Yes, I will deal with that second point first, Ma'am. Of course the death of anyone is a tragedy. We have a purported prima facie case against Mr Kim. I say “purported” because of everything that we have on the record about the nature of criminal investigation in China. That is, it is directed towards the collation of evidence towards the conviction of an identified suspect. So we can acknowledge that death but we cannot be too swayed by the claim that this prosecution is necessarily connected to it, and –

GLAZEBROOK J:
Was there a particular – we know about the nature of criminal investigation in China. Was there anything specific about this investigation you wanted to outline?

MR KEITH:
The only evidence we have, Ma'am, and there wasn't a request to cross-examine deponents because the prosecution file or the dossier was in part a lot of witness statements. There were applications here to cross-examine. There was also a request for Mr Kim to be interviewed in New Zealand which has not been taken up. All we do have on the record is that evidence is routinely contrived and exculpatory evidence is either not sought or supressed. I can't take it further than that, Your Honour. And that there are difficulties in obtaining any other evidence. There is specific reference in the material that you have to forensic evidence, being no –

GLAZEBROOK J:
To what, sorry?

MR KEITH:
Forensic evidence which is substantially relied upon, there was reference to it yesterday, blood and so forth, that that is no more safe. Mr Ansley I think says that one can rely on nothing that the Chinese prosecution authorities as necessarily being true, and there isn't an answer to that.

The second point, this question of safe haven and of the public interest in extradition, of course there is a public interest in extradition but, and this is something we'll come to in the cross-appeal, this language of safe haven has to be, as the Court of Appeal said but the responsible Minister commenting on the judgment didn't, there are two problems. One is extradition is about surrender for fair trial. It's not about surrender at any cost. It's not about surrender no matter what happens next. And so there is a limit and I don't regard that as an exercise in balancing. These rights, particularly the right not to be tortured, are fundamental. One can't read them down. The Crown

initially said when seeking leave, well, there were conflicting obligations. There was an obligation to extradite and these human rights obligations. As I think was said in answer to Justice France yesterday, there isn't an extradition treaty here. So there isn't under international law an obligation to extradite. That's not to say there's not a good public policy reason to extradite but there isn't a conflict in that way. We have these human rights obligations and we must meet them.

The second point about safe haven in relation to China is Hong Kong is a safe haven from China. Sweden is a safe haven from China. It's not because of want of recognition of the public importance of extradition. It is because China is not a country to whom one can safely extradite, or at least those jurisdictions have said so. The Australian Parliament declined to approved an extradition treaty for the same reason. There aren't, other than the Spanish cases I mentioned, extraditions to China in the last decade.

So yes, there is a safe haven being created on the terms of the assurances given here, says the Court of Appeal, but it is not that Court or we would hope this Court's doing. It is China's doing.

Unless Your Honours have anything further, and thank you for your questions, those are our submissions.

GLAZEBROOK J:
Thank you, Mr Keith.

MR ELLIS:
Might I just try and answer Justice France's question? The *Lai* case, as far as I can remember and I may be wrong – after you read so many cases one merges into another and there's a lot of *Lai* cases but I had a feeling that the monitoring group was whatever the French was for Doctors Without Frontiers.

ELLEN FRANCE J:
Yes, that could be right. It was certainly one of those organisations.

MR ELLIS:

It was important in that context because Mr Lai's brother and his accountant had died without explanation in Chinese prison, and Mr Matas who you've heard, he's an expert, his submission was there was no assurance for an autopsy or even to view the body which there isn't in the current circumstances we have. Thank you.

ELLEN FRANCE J:

Thank you.

GLAZEBROOK J:

Mr Butler.

MR BUTLER:

Thank you, Your Honours, if I can just have a moment to set up, please?

GLAZEBROOK J:

Can I, just while you are setting up, indicate that while we will hear you on everything, we do have your submissions on the issue of whether one can extradite to China at all. We don't think we'd be exceedingly helped by oral submissions on that as well but not to stop if there is a few points you wish to make, but just suggesting that you may want to concentrate on some of the other parts. I think possibly the standard of review as well is possibly not something we necessarily to hear major submissions on given that the parties seem to be in relative agreement on what that is.

MR BUTLER:

Certainly. Your Honour, thank you very much for that helpful indication. What I thought I might be able to do to assist the Court, bearing in mind what my position is before the Court, I'm not a party, I'm just simply an intervener, is deal with what we consider, the Human Rights Commission considers to be some of the big picture issues which arise on the case before you.

As you know, our submissions address broadly three areas: the standard of review, the approach to torture and in particular the appropriate role for diplomatic assurances in that space, and then the approach to fair trial, guarantees in the extradition context, and again one aspect of that is the role of diplomatic assurances in that space.

What I'd propose to do just reflecting on yesterday and bearing in mind the relative amount of time I've got allocated to me, with Your Honour's leave, was to actually just take you to a number of the authorities which you actually haven't been taken to thus far. They are referred to in my submissions but I think there's a real value in actually looking at the material and see what that's got to say. So with Your Honour's leave I was going to propose to do that, just work my way through the relevant authorities and touch on a number of the points as I go along and then invite Your Honours perhaps at the end of that hopefully brief Tiki Tour to engage with me then on particular items along the way. So I don't know whether that sounds an acceptable way of dealing with things but it seemed to me, in the hour I've got, seemed to me to the best, most efficient way of me being able to set out the position of the Commission on a number of the issues and I absolutely take on board the steer I've had from Your Honour.

GLAZEBROOK J:
We're fine for doing that, thank you.

MR BUTLER:
So I've given to Madam Registrar three additional authorities. I'm not sure whether they've been handed up to Your Honours. I apologise. I know you don't like that but there are reasons –

GLAZEBROOK J:
Well, at the moment seeing we can't get the respondent's submissions we're grateful for anything in paper.

MR BUTLER:

So the three additional items are an extract from the latest edition of Professor Manfred Nowak's book on torture. I simply need to mention Professor Nowak's name. I know Your Honours know he is the tōtara in the area of torture. His latest edition of his book is just out. It came out very recently, just some time after our submissions were filed, and I'm pleased to say on my reading of his book his view of how, in particular, diplomatic assurances operating in this field aligns with the submissions advanced to you by the Commission. That's why I would like to take you to those extracts. So that's the first thing.

The second item I've put in front of you is a speech by Lord Sumption. It relates to the issue of standard of review and I hear exactly what Your Honour has said to me. I just want to make some very quick points in relation to that and then I will move on but it needs to be registered from the Human Rights Commission's perspective and I will suggest a way in which the Commission's views can be registered so are heard and whether Your Honours wish to tackle them or not in this case or park them for another day it's obviously something for Your Honours.

And then the last authority I have handed up is the *Evans.* His Honour Justice Arnold yesterday made some reference to that and I think that *Evans* is actually quite helpful in a number of the points that arise for determination here. It's relevant, I say, to standard a review. It's relevant also to what risk is in this face and it's relevant also to diplomatic assurances and how they operate and the sort of exercise the Courts and cognate jurisdictions feel comfortable undertaking.

I just wanted to raise one last point before I get into the authorities and that is the cross-appeal. Obviously there is a cross-appeal to be heard shortly. We don't really engage with the cross-appeal although you will hear me very briefly touch on one or two submissions made by my learned friend the Solicitor-General in her submissions on standard of review where she repeats her position for the Crown in relation to what the standard of review is that is

applicable here. So that will be the only reference I will make to her submissions in the cross-appeal so I just wanted to inquire from the Court whether you require the Human Rights Commission to stay once the appeal proper is being dealt with or whether we have Your Honour's leave to withdraw at that stage. I'm in Your Honour's hands, I'm not asking for an answer straight away, it may be something you want to think about.

GLAZEBROOK J:
I think it's up to you, Mr Butler, in terms of what you feel comfortable with. If you deal with any points that you wish to deal with that arise out of the cross-appeal in your submissions now then the parties will be able to follow on from that to the extent they need to.

MR BUTLER:
Thank you.

GLAZEBROOK J:
I'm assuming there's no particular objection from the parties on that.

MR BUTLER:
No, I'd indicated that to my friends that I would be raising that as an issue with Your Honours.

Your Honours, with that outline I just wanted to move very briefly if I may then to the first issue standard of review. I hear what Your Honours have said, that the parties appear to have agreed in the Court below and the Court of Appeal appears to have accepted the agreement between the parties that the applicable standard is heightened scrutiny.

From the Human Rights Commission's perspective, we are concerned about the application of a test of that type. The point of drawing Your Honour's attention to the speech given by Lord Sumption and it's not something I expect to do everyday to draw on Lord Sumption's speeches but it is a very good speech because what His Lordship says in that particular article is that

words like “anxious” “scrutiny” and “heightened scrutiny” actually obfuscate what the actual exercise is that is being undertaken. They allow is to not say what it is that in fact we are doing and that then allows in a case like this my learned friend the Solicitor-General to come along and say that the review in Court does its job, not by stepping into the shoes of the minister with the benefit of everything that's been in front of the minister but simply by checking to see whether the conclusions reached by the minister were ones that were reasonably open to her.

And there are a number of problems it seems to me that's associated with that and that bite in this particular case. My learned friend the Solicitor in answer I think to a question from Your Honour Justice Glazebrook agreed that whether or not there are substantial grounds to believe, et cetera, is fundamentally a question of law.

GLAZEBROOK J:
I think she might have agreed but we can look at the record not that it was substantially a question of law but that if the Court came to the view that there were substantial grounds or that the minister should have come to that view then as a matter of law, well this was the way I put it to her anyway, as a matter of law leaving aside the Bill of Rights but looking just at the Extradition Act then extradition couldn't take place which is a slightly different issue given that then the issue will be what’s the standard of review, or how does one review a question of fact, which is whether there are or not substantial grounds, just to give the subtleties. I’m not actually certain what the answer to that is. I know the answer that the Madam Solicitor gave but…

MR BUTLER:
And so that’s why I’m just trying to expose this issue, because it seemed to me it was left open, because I recorded on at least three occasions the Solicitor-General reverting back to saying that ultimately the test to be applied by the Court is whether or not it was reasonably open to the Minister to conclude as she has. So, in other words she was using the language of review, the classical language of review.

GLAZEBROOK J:

But that would be reasonably open to conclude, as I understood the Madam Solicitor, reasonably open to conclude, on the facts, that there was not a substantial risk, given that it is her decision, or the Minister's decision, whether to extradite.

MR BUTLER:

Yes, of course it is her decision, at least initially it's her decision because somebody's got to make a decision in this process. Nobody's going to be extradited or surrendered if somebody doesn't make a decision so I suppose just that point having been raised, I think it is important to remember that there's not necessarily any magic about the fact that it is the Minister who is making the decision. My learned friend, obviously I understand why, was putting quite some weight on the fact that Parliament has allocated the decision to the Minister.

GLAZEBROOK J:

No, but the Act does split decisions between the Courts and the Minister.

MR BUTLER:

And the Minister, yes, I accept that.

GLAZEBROOK J:

So I would have thought, quite rightly, putting some weight at least on whose decision it is.

MR BUTLER:

Because?

GLAZEBROOK J:

Because it's been allocated under the Act. Because it could have been allocated, and I suppose it's allocated under the Act because ultimately it is a political decision and especially in circumstances where there isn't an extradition treaty.

MR BUTLER:

Correct, there's no doubt that there are political elements to the exercise that's got to be undertaken, but the important point I'm trying to make on behalf of the Commission is that just because the role has been allocated to the Minister does not mean that the exercise which we're engaged in is a political one. It's a legal standard that's got to be applied –

GLAZEBROOK J:

Yes, I understand that.

MR BUTLER:

– and all we're looking at here is one aspect of that decision making process, which is the consistency with the relevant human rights standards, domestic and international. All other considerations that will also have a political element or dimension to, we're not interested in those.

FRENCH J:

So how would you formulate the ultimate test then?

MR BUTLER:

So the ultimate test, we would say, is it's a correctness standard. It's a correctness standard.

FRENCH J:

I don't find that – no.

GLAZEBROOK J:

I don't find that terminology in the least bit helpful I'm afraid, because it's Canadian terminology. They have a totally different view. I would prefer if it was looked at in terms of the standard. Is there an error of law which will be one, is there an error of law, and that is a correctness standard if you like.

MR BUTLER:

Correct, it is. That's exactly what I was trying to convey, yes.

GLAZEBROOK J:

Or a lack of a mandatory factor, et cetera.

MR BUTLER:

Yes. So, what I'm trying to say, for me to be clear, because there are so many labels in the same one. I'm using the language of correctness. What I'm trying to do is to draw on the distinction, very helpfully made by Professor Hickman in his book, extracts from which are in our bundle of authorities and which I can direct you to, it's tab 42 of the Intervener's bundle, where he draws the distinction between standards of review, which are directed to the Courts, telling the Courts how you are to approach your review of administrative decisions, what standard you should apply. And then standards of legality on the other side. And if you look at the Sumption lecture and if you look at the Hickman extracts you will see what I consider to be very useful discussion of the distinction between the two. So when I'm using correctness, what I'm really trying to say is legality. There is a legal standard which must be applied.

O'REGAN J:

There's a legal standard in every administrative law case, I mean, that's just words really.

MR BUTLER:

No, because in terms of legality, when you're looking at legality, what you're saying is it's hard-edged. It's not about saying that there's reasonable grounds and people can reasonably differ. It's about saying there is actually a right answer.

O'REGAN J:

Well, on a question of law there's not, but on a question of fact there is.

MR BUTLER:

That's gets us into different territory in terms of how one assesses or evaluates.

O'REGAN J:

I'm just wondering, why did the Commission wait until the Supreme Court to come and make these arguments? I mean this case has been going on for seven years. If this was an important point in the case, it should've been made a lot earlier than now.

MR BUTLER:

Well, of course, one assumes that the Human Rights Commission is alerted to these issues on a regular basis and we've got a hotline where people let us know that these important issues are coming up. Unfortunately, there isn't such a thing, Your Honour, so we're here, you know, we're here and we're trying to help and if we're not being helpful then obviously the Court will tell us that, but I'm trying to explain why the issue's an important one and I just wanted to show that the view that we've got is not one that's peculiar to us, and that's why I thought if I took you to the *Evans* case, it just illustrates what's going on in that particular space, so could I briefly take you to the *Evans* –

GLAZEBROOK J:

Well, you said a question of law, in fact, is a different question but, in fact, what the discussion that I had with the Solicitor-General was on the basis that, yes, if there was a substantial risk, there was no extradition, that was a question of law and, in fact, you didn't need to go to any Human Rights Standards, you just went to the Extradition Act and obviously the reason it's in the Extradition Act is because of New Zealand's international obligations and the Bill of Rights but it is in the Extradition Act so we don't need to go any further.

MR BUTLER:

Correct.

GLAZEBROOK J:

But there is an issue as to whether there is a substantial risk of torture which is a question of fact or do you say it's not a question of fact?

MR BUTLER:

I say it's not only a question of fact. It's a question of evaluation that needs to be undertaken in terms of understanding what the significance or otherwise of the facts is and –

GLAZEBROOK J:

Well, on judicial review, what does the Court do because the Court is not remaking the decision? I think the Human Rights Commission would have to concede that. It is a review on standard judicial review grounds, so a review of a question of fact is what's standard.

MR BUTLER:

Well, that's why I wanted to take you to *Evans* if I can.

GLAZEBROOK J:

Okay, well, if that's going to answer it that's fine.

MR BUTLER:

Yes, it gives you a perspective on it which aligns with where the Human Rights Commission is coming at the issue from, so if I could ask you to turn to that authority. It's a decision of divisional court and the relevant paragraph I would want to refer Your Honours to is paragraph 240, "Mr Eddy, for the Crown Secretary submitted that since the Court is engaged in an exercise of review, the relevant question is strictly whether the Secretary could properly have concluded that there is no real risk," so a line very similar to that which is put to you by my learned friend, the Solicitor-General. "He accepted, however, that the Court would apply anxious scrutiny in answering that question and that it would make no material difference in practice whether the Court proceeded by way of review of the Secretary's conclusion or made its own independent assessment of risk on the evidence before it as it would in the case under Article 3. In our judgment, the question whether the Secretary's complies with this policy requires the Court to determine for itself whether detainees transferred to Afghan custody are at real risk and it is therefore for the Court to make its own assessment of risk

rather than to review the assessment made by the Secretary of State." That is how we have proceeded. All right, so that's just why –

ELLEN FRANCE J:

Could I just take you back to the point about the allocation of roles because it does seem to me that the Act makes quite explicit decisions about who does what and that was an issue considered by the Law Commission in their report, so just what do you say about that that we ignore that division of responsibility?

MR BUTLER:

Of labour? No, I don't see it's a question of ignoring it. It's about contextualising it when looking at the relevant decision that is in question. Here, the question is compliance with obligations in respect of torture. We say, the Human Rights Commission, we say that is an intensely legal issue. One of the most important human rights is at stake and when looking at who it is who is making the decision and what the purpose of review is, if there is to be judicial review because there's no appeal, the nature of the decision tells against giving much of any weight to the allocation of the decision to the Minister. And I say when you look at a case like *Evans*, that's the, to use the phrase from *The Castle*, that's the vibe.

GLAZEBROOK J:

Well, then the answer to the question, which actually was fairly similar to the answer that I got from Madam Solicitor but in a slightly different manner, was that if the Court did come to the view there was a substantial risk of torture then there was a legal error.

MR BUTLER:

Yes.

GLAZEBROOK J:

There's a difference between you in terms of that factual legal divide.

MR BUTLER:

And the implications. So, for example, Madam Solicitor has suggested to you, for example, when we come to the area of diplomatic assurances, that to a significant extent as I understood her submissions that is an area of significant political judgement and there is, the phrase she uses, no legal yardstick that can be used to determine or to operate in that space. It's like a big no-go zone.

GLAZEBROOK J:

Well, I think she said in fact that it was effectively a factual decision in terms of those things which do require political judgement in terms of the strength of bilateral arrangements, et cetera.

MR BUTLER:

Correct, and she said that those things were not capable, she said, I wrote it down, exactly, "The Minister's assessment of these matters of international and bilateral diplomacy for which there is no legal yardstick," was what I wrote down, and then she came back to that theme later saying, well, it's not capable of legal measurement was another phrase that she used, to which the Commission says, and this is anticipating an argument but I may as well make it since we've come here, if the context is a situation as it is here that all parties accept that there are substantial grounds to believe, et cetera, without the presence of diplomatic assurances. If the Crown is relying on diplomatic assurances as a way of dealing to those concerns, surely it can't be, and those concerns are ones which we've agreed are capable of legal measurement and for which there is a legal yardstick, surely there must be some concern about the idea of the ultimate question as to whether there are substantial grounds to believe, et cetera, turning on something which in the Crown's submission there's no legal yardstick to measure by reference to. In other words, we can accept that there's a legal assessment as to whether or not there are substantial grounds to believe, all other things being equal in terms of the general and the particular. When it comes to diplomatic assurances, sorry, because it's not susceptible of a legal yardstick you've got to step out and accept our assessment, the context being that diplomatic

assurances are, to use a phrase, exculpatory, ways of getting around the obligation of non-refoulement.

ELLEN FRANCE J:
Well I'm not sure.

MR BUTLER:
In circumstances that would otherwise stick.

ELLEN FRANCE J:
I'm not sure this submission went quite that far in the sense of I thought the focus was more on the sort of strength of bilateral relations that those sorts of aspects as opposed to something like what was inadequate monitoring arrangement as part of the assurance but I might be wrong in my recollection.

MR BUTLER:
Well I think that might be something worth testing my learned friend on because part of what she is saying is that when you are coming, as I understood her case, when you are looking to assess the effectiveness or otherwise of those monitoring mechanisms, issues like the strength of the bilateral relationship and the diplomatic relations between the countries more broadly are relevant and the person who can assess that is the minister because of her expertise. Thought bubble on the side, the minister we're talking about here is the Minister of Justice not the Minister of Foreign Affairs. I'm not sure the Minister of Justice very regularly deals with diplomatic assurances and so on but let's just put that to one side.

ELLEN FRANCE J:
No but she was acting on advice.

MR BUTLER:
Of course she had some advice but it's her evaluation and judgment that's in issue here.

GLAZEBROOK J:

Obviously assurances are not going to be of any use whatsoever if they are not going to be abided by.

MR BUTLER:

Correct.

GLAZEBROOK J:

And so one has to first of all assess whether the assurances if they were abided by would actually take away the substantial risk of torture and if you come to that conclusion the only question left is will they be abided by which can be answered in part by the monitoring because that is one method of ensuring they are abided by and then one would have to look at whether there is any will on the part of the person giving the assurances actually to abide by them and it has to be relevant, doesn't it, the strength of the bilateral arrangement and whether there are international reasons why a country might want to abide by it.

MR BUTLER:

If it's relevant, if it's relevant then it can only be relevant on condition that the Court is provided with sufficient information in order to be able to genuinely check the conclusion reached by the relevant ministers as to the strength of the bilateral relationship. Remember the proposition put to you by my friend the Solicitor is there is no legal yardstick.

GLAZEBROOK J:

Well we've certainly got information from the Minister of Foreign Affairs, the Ministry of Foreign Affairs and from other cases and of course go both ways. So what do you say the exercise of the Courts – I can't quite see what else that one could have, the question is whether that's sufficient on a heightened scrutiny or whatever the test is.

MR BUTLER:

Exactly, agreed if that's the approach that one is using as a heightened scrutiny. The point I'm trying to make is part of the disagreement that the Commission has with the approach of Madam Solicitor is that within this concept of heightened scrutiny are a number of things are hidden. One of the things that has popped up, helpfully we say, is this issue about legal yardsticks and which aspects of the decision need to be approached in a particular way through a particular lens. Her submission is that when the Court is considering the material that Your Honour Justice Glazebrook has made reference to that really you should just accept it. The assessment made by the minister is an assessment that you should just say, well if that's the minister's assessment then that's what we've got to go with, right. Now that doesn't sound to me like heightened scrutiny at all.

GLAZEBROOK J:

On what basis would we take a different view?

MR BUTLER:

On the basis that the reasons for accepting and that are not sufficiently well explained, that it's not clear to you as to why those should be accepted.

GLAZEBROOK J:

Perhaps you can tell me why, or perhaps the better submission from you then is to tell us why we shouldn't accept the evidence that we have at the moment on that and is it, well –

MR BUTLER:

Why don't I move at this stage then to the second issue that I wanted to raise, and I'm just conscious of time, which was just going to the authorities in relation to torture and to my case in relation to the appropriate role for diplomatic assurances in the field of torture?

FRENCH J:

Just before you do, can I just double check something?

MR BUTLER:

Certainly.

FRENCH J:

At one point you seemed to be about to say that you didn't think that the strength of the bilateral relationship was even relevant but you didn't actually articulate that and it looked as though you were going to.

MR BUTLER:

Yes, because remember part of my theory of the case, Justice French, is that in a case like this where there are substantial grounds to believe, et cetera, and/or there is a systematic pattern of torture in the country, the Human Rights Commission's position in accordance with that of the Committee Against Torture is that diplomatic assurances are not available, in which case who cares, frankly, about the diplomatic relationship and the bilateral relationships between the two countries?

GLAZEBROOK J:

We were probably asking you to concentrate on a back-up submission to that.

MR BUTLER:

Yes.

GLAZEBROOK J:

But if you don't wish to concentrate on a back-up submission then we –

MR BUTLER:

My take is that my friends for Mr Kim have said as much as can be said in that space in terms of the nitty gritty of the detail around the diplomatic assurances and suchlike. I do touch on aspects of that in my written submissions and if I could at the end I would like to say something just a little about monitoring and independence.

GLAZEBROOK J:
All right, well, it's up to you.

MR BUTLER:
But I'd felt it was probably, bearing in mind the position the Commissioner has got, it's probably better use of my time to focus on what are our primary submissions if I may do that with the leave of the Court.

So before I move to that, I just want to talk to about the standard. I had indicated that there is of course an obvious solution to the Court in relation to this issue of standard of review and it's simply this, that if the Court is of the view that, well, the parties had agreed to deal with the matter on the basis on which they have and you form the view that in fact you are able to dismiss the appeal on the basis of the agreed approach being heightened scrutiny, from the Commission's perspective it would be sufficient to note that the Commission had raised the question as to whether heightened scrutiny is the right way to be thinking of these issues and the issue is left open for another day, for argument on another day, and I am sure that will ensure, Justice O'Regan, that we will be on the hotline and will appear in a timely fashion in the next case.

O'REGAN J:
It's quite difficult for us to deal with things as a first and last Court. That's the reason that I raised it.

MR BUTLER:
I understand. I do understand, Sir, I do. We find ourselves in a not dissimilar situation.

So I wanted to then just move if I could to the primary submissions in relation to torture. Your Honours have the written submissions where I've outlined our primary position and what I'll refer to as our back-up position. What I wanted to do, if I may, is just take you to what we consider to be relevant material to show you what our submissions are based upon. So the first one I want to

take you to is the extract from Professor Nowak's book. And the only reason I'm squinting, Your Honours, is I've managed to lose my glasses and the print here is very small.

O'REGAN J:
It's tiny.

MR BUTLER:
I do apologise for the smallness of it. It's not done to torture you or me. If I could take you to page 158 at paragraph 200. Diplomatic – Professor Nowak, I don't need to outline Professor Nowak's qualifications or anything of that sort, do I?

GLAZEBROOK J:
No.

MR BUTLER:
200. "Diplomatic assurances are a useful tool in extradition cases for the purpose of ensuring that the requested state will refrain from subjecting the person concerned to the death penalty. In relation to torture the situation is different," and I just wanted to touch on that point just simply to remind ourselves that when you're looking at section 30(6), for example, of the Extradition Act and trying to understand, well, what role may there be for undertakings broadly in respect of surrender decisions, it's of course important to recall that the utility reliability of diplomatic assurances or undertakings, to use the language of subsection (6), will depend not only, for example, on the nature of the requesting state and the situation there, but also the relevant right or interest that's in issue. This theme that diplomatic assurances are well suited to death penalty cases but less suited to torture cases is one that you see throughout the literature. So I just think it's very important that that point is acknowledged.

And a number of reasons are noted by Professor Nowak. I will leave you to read those. Some of those have been touched on by friends for Mr Kim

yesterday but whether there's authority to give the secrecy that surrounds torture, occasional visits, even ones he knows that take place on a daily basis, you see that, and being insufficient and not a watertight safeguard against torture. And then the point he makes states: "Which seek diplomatic assurances in countries known for their torture practice have a keen interest to expel, render or return," and suchlike.

He notes at 201 that the committee does not categorically reject diplomatic assurances as a guarantee in extradition or deportation procedures and that's the case.

He then notes, and this is an important point and something that sheets home in the case that the receiving state does not comply, for example, with the diplomatic assurances. It has however consistently argued that diplomatic assurances do not absolve ascending state from carrying out the risk assessment mandated by the non-refoulement principle. That goes to the idea of the risk assessment process it must take.

If we look at 202. The committee stands as unequivocal in rejecting diplomatic assurances as a means of securing protection from states, "Where there are substantial grounds for believing that a person would be at risk of torture or ill treatment upon return to the state concerned. Where a state has been found to violate international law by perpetrating torture it certainly cannot be expected to respect bilateral agreement. The committee has repeatedly pointed out that in cases where the risk of torture is found to be manifest, in other words, where there are substantial grounds for believing that a person would be in danger of being subjected to torture, diplomatic assurances do not constitute a measure of protection. Thus where the receiving state displays a situation of flagrant human rights violations and the applicant discharged his or her burden of proof that his or her personal risk is real and foreseeable, diplomatic assurances are not a reliable safeguard."

O'REGAN J:
If you look at 204.

MR BUTLER:

Yes.

O'REGAN J:

That does appear diplomatic assurances are acceptable if structured in a particular way which is the effect of *Evans* as I read it.

MR BUTLER:

Yes, and I'm going to come back to another aspect of evidence in a moment and of course *Evans* is a curious case because it's really a question of where it's taking its inspiration from, as a way of, I'll think of it. Is it European or UNCAT and I want to come to that in a moment because Professor Nowak brings that out quite nicely.

O'REGAN J:

How significantly does this different from the information that was before the minister on assurances? Is this addition of Nowak substantially different from the earlier edition?

MR BUTLER:

It will be because it will have captured the more recent practice and the general comment, for example of the Committee Against Torture, absolutely, yes, absolutely.

ELLEN FRANCE J:

But that general theme that he's referring to is not new.

MR BUTLER:

No it's not so the general theme is not new but the tightness of the application of those underlying themes has become stronger and that's why I wanted to take you just to the authorities I've put in front of you in terms of the Special Rapporteur material which is where I was going to go to in a moment, there was just one more passage, two more passages from Nowak that I wanted to take Your Honours to if I may. If we look at 212, you'll see that

even in those cases where diplomatic assurances are available, the Committee practice demonstrates that the value of diplomatic assurances must be weighed against the outcome of the risk assessment and assessed whether the assurances are sufficiently detailed and elaborate, whether the details have been disclosed or kept secret and whether they include a post-return monitoring and make it a scheme. So the point I'm trying to make there is even in those cases where diplomatic assurances are allowed, what you're doing is you are trying to assess those assurances by reference to the risk assessment that you've already undertaken which goes to the point of contention that my learned friend, the Solicitor, was raising yesterday in terms of her critique of the Court of Appeal's approach, two-step approach, we would say that, of course, you must undertake a risk assessment which is both general and particular; a point underlined we would say by Article 3(2) of the Convention.

So if I can take you lastly to 217, paragraph 217. This is where Professor Nowak addresses *Othman*. "In relation to the European Court of Human Rights …" he says, "… the *Othman* case constituted a defining moment in the Court's jurisprudence regarding the value of diplomatic assurances." He then goes on to describe the case. If you go a little bit further down, 10 lines, "In *Othman*, the European Court noted that the CAT Committee diagnosed torture to be widespread and routine in Jordan but did not conclude therefore that the general human rights situation precluded accepting diplomatic assurances in individual cases," and we know that because we were taken to the case yesterday. He then says, "This judgment therefore stands opposed to the standing of the CAT Committee which has consistently emphasised that states are not to request diplomatic assurances from countries which are found to harbour systematic and widespread torture." Also, "The weight afforded to bilateral agreements in the argument …" so the reasoning, "… of the European Court clearly undermines the weight of the international human rights framework. Ultimately, the European Court analysed that given diplomatic assurances in *Othman* and political rather than legal terms." And concluded that, "Given the good relationship between the UK and Jordan, the good faith in which the assurances were concluded and

the approval of the highest levels of Government compliance with those assurances was likely. This judgment stands apart from previous ones in which the European Court have ruled that diplomatic assurances provided no safeguard because of the systematic nature of torture in the countries concerned."

So the point I'm trying to make is that the submissions advanced to you by the Human Rights Commission in this case that *Othman* marked a departure from previous understandings of the European Court of Human Rights and/or the approach of the UN Committee stands that view is not a unique view but one held also by this leading expert in the field.

I wanted to take you now if I could to material that's in the –

ARNOLD J:
So the position really being advanced is that it doesn't matter how tight the assurances are, how close the monitoring is?

MR BUTLER:
That's correct.

ARNOLD J:
So this is the kind of, an approach not really based on the individual, but based on the fundamental nature of what's occurring in the country?

MR BUTLER:
Yes and no, if I can be clear about this …

ARNOLD J:
Well, let me make it clear. Let's assume for the sake of the argument, you could give some watertight assurances that do mean the person gets a fair trial and is free from torture and so on. As I understand it, that would not be acceptable.

MR BUTLER:

Correct, because there's a number of underlying premises behind the conclusion that they won't be tortured and that they will get a fair trial that simply are not accepted because of the nature of the conduct and the systemic problems within the receiving state. So it's a fundamental disagreement really in relation to what weight, if any, can be put on the assurances in the context of that receiving state.

ARNOLD J:

So how do you square that then with the Act which says that the Minister can accept undertakings?

MR BUTLER:

Yes, but it's not specific as to what the undertakings are, the context within which they arise, what function the undertakings are to perform. So in other words, that language needs to be understood in the framework, the evolving understanding of the proper role of diplomatic assurances in this space.

ARNOLD J:

So it's only certain types of undertaking that the section permits the Minister to accept?

MR BUTLER:

Correct, and so the way I'd be reading that, unsurprisingly, is section 6 or you could apply *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) depending on which relevant standard it is one's applying and that I say is pretty orthodox. It's *Zaoui (No 2)* all over again, a case we know quite well.

GLAZEBROOK J:

And possibly in the context of extradition reading it in the context of this explicit provision in respect of torture in any event?

MR BUTLER:

Yes, correct. So is it helpful to Your Honours? Again I'm conscious of time and I'm a bit player in all of this. I do have some important points to make but I want to make sure I'm helping Your Honours. What I thought it would be useful to do is to take you to some of the Special Rapporteur material but Your Honours are well able to read that for yourselves but I just wanted to show you enough to make you want to be interested in going to it, if that makes sense. Some of it's replicated in my written submissions. Is that helpful to you or not? Please say yes so I can take you to at least one or two of them.

O'REGAN J:

Yes, I think one or two and then give us the references to the others.

MR BUTLER:

Thank you, that would be great. So I thought a useful one would be the one at the intervener's authorities, tab 30. So at this stage the relevant Special Rapporteur on Torture was Professor Nowak. So it's at tab 30. So at page 10 what he's doing is he is recounting various developments in relation to diplomatic assurances and reporting back to the Commission on Human Rights and via them to the General Assembly. You'll see in particular at paragraph 30 he's dealing with the discussion that was taking place at the Council of Europe. Your Honours are familiar with the Council of Europe obviously. It's the head body for the European Convention on Human Rights. So he's talking about this meeting, December 2005. He participated in a discussion on the development of guidelines for diplomatic assurances with the Group of Specialists on Human Rights, and he notes here in his presentation the main concerns that he had outlined. I think you'll find, if you go through the reasons advanced from (a) to (h), good reasons as to be quite sceptical about the appropriateness of relying on diplomatic assurances.

That concern is repeated again with the benefit of more exposure to how diplomatic assurances are undertaken at tab 31. This is his 2009 report after a visit to Denmark. The relevant page is page 23. There's a heading,

“Diplomatic assurances,” of paragraph 66 onwards and over the page at paragraph 69 he notes that he has noted on numerous occasions that diplomatic assurances with regard to torturing are nothing but attempts to circumvent the absolute prohibition of torture and non-refoulement. They are unreliable and ineffective and expresses his opinion that states: “Cannot resort to diplomatic assurances is a safeguard against torture where there are substantial grounds for believing that a person would be in danger of being subjected to torture or treatment or ill treatment I mean to say upon return.”

And you will see in the most recent report of the Special Rapporteur, not Professor Nowak now but Nils Melzer that's at tab 34, page 13, paragraph 45 is almost a page of again unfortunately quite close type devoted to diplomatic assurances. AT 46 it's noted that diplomatic assurances are being widely criticised for being used as a loophole undermining the principle of non-refoulement, highly questionable from both legal and policy perspectives. And then you will see a number of reasons given and Your Honours are well able to read those. I do say that having a look at those reasons is profitable.

I then wanted to take Your Honours if I may, and if Your Honours want further references, as I say they are in the written submissions so I don't propose to give you references to them but you will see them all. If you look at the Intervener’s bundle they are all clumped there together as a set. I wanted to take you then to –

GLAZEBROOK J:
If we're off this –

MR BUTLER:
It’s 11.30, sorry, thank you, quite right, thanks, sorry.

GLAZEBROOK J:
How much longer do you anticipate being?

MR BUTLER:

Your Honours have been very kind in letting me get these references out so I don't have much to say really on the fair trial aspect because I thought Mr Keith covered the point that we had made in our submissions yesterday. I will probably be about five minutes tops on the fair trial aspect but this torture one is important for us. So I'm thinking maybe another 15 minutes tops depending on questions that I would get from Your Honours.

GLAZEBROOK J:

And I think yesterday the thinking was that the cross-appeal would probably take a lot less time than in fact has been allocated so I think we're fine.

MR BUTLER:

Yes, thank you Your Honour, 15 minutes, thank you.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.49 AM

MR BUTLER:

Thank you, Your Honours. I have a few things to get through so I'm just going to crack on with it. The next authority I wanted to take you to was *Ismoilov* and also *Sultanov* so that's in respondent's tab 56, *Ismoilov*.

GLAZEBROOK J:

Well, if it's the respondent's tab I don't think we can get them.

O'REGAN J:

Well, if you tell us what it is we might be able to get it.

MR BUTLER:

Yes, okay, so *Ismoilov* and that's my attempt I-S-M-O-I-L-O-V against Russia.

GLAZEBROOK J:

Do we know what tab it is?

MR BUTLER:

Tab 56 of the respondent's authorities.

GLAZEBROOK J:

I couldn't find it when I looked the other day.

MR BUTLER:

If you're going to do the Google Internet thing, it's [2009] ECHR 348.

GLAZEBROOK J:

I've got one that has a decision of 24 April 2008. That's the one?

MR BUTLER:

That's the one.

O'REGAN J:

I can't get it but I'll follow along, it's all right.

GLAZEBROOK J:

I imagine probably send it to the registrar and get it printed off with a bit of luck.

MR BUTLER:

Well, look, where I'll, on the fly, improvise. Why don't we go with the one we can access which is *Sultanov*.

GLAZEBROOK J:

I've sent hopefully a link that will enable you to get it up and print it off for us if we can, Madam Registrar.

O'REGAN J:

This is in your tab, your one, *Sultanov*?

MR BUTLER:

Sultanov is in my tab 16. So it's the later of the two decisions I just wanted to take you to and it's a shorter decision, and the prints – both *Sultanov* and *Ismoilov* deal with the situation in Uzbekistan. The extraditing state is Russia. Parts of *Sultanov* I just wanted to take you to were at page 9 of the judgment. I'm looking at the hard copy which is just a printout off their website so it's not a fancy European human rights report version or anything of that sort, so it should correspond with what's in there.

GLAZEBROOK J:

What's the paragraph number?

MR BUTLER:

So the paragraph is – page 9, paragraph 57 onwards, Your Honour, and I just wanted to point out to you a not unhelpful collection of materials there around diplomatic assurances and the same review of materials is to be found in *Ismoilov* at paragraph 96. But if we can I just had wanted to touch on one or two aspects of those just if Your Honours would like to put a line down them and perhaps there are things that you might return to later. So paragraph 59 is an indented quote from the Special Rapporteur's report from 2006 with specific reference to Uzbekistan. He notes that, "The practice of torture in Uzbekistan is systematic." He notes half way down the rejection of having an international inquiry or independent scrutiny, something which the respondents have highlighted here in terms of having outsiders coming in and checking how the system broadly works, and then he notes at the end, "I reiterate that diplomatic assurances are not legally binding," that is so here, "undermine existing obligations of states to prohibit torture," that's the submission put to you by the respondent, "are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by states."

If you have a look at 61. Paragraph 22 just makes the point that I've made earlier, drawing on Nowak about being careful to look at which right is in issue, what it is that the assurances are responding to. "Assessing the

suitability of diplomatic assurances is relatively straightforward where they are intended to ensure that the individual concerned will not be subjected to capital punishment or certain violations of fair trial rights as a consequence of extradition," and then contrasts that where what you're dealing with is, for example, torture, 23, and notes the fact that that very distinction between the two was one drawn in *Suresh*, if you see the extracted passage from *Suresh*, a Canadian Supreme Court decision, you'll see that's the last sentence from *Suresh* that's been highlighted there.

Another quote from the Special Rapporteur at the bottom of page 24.

At paragraph 63 we've got the European Committee for the Prevention of Torture. Notes at paragraph 39, "The seeking of diplomatic assurances from countries with a poor overall record in relation to torture and ill-treatment is giving rise to particular concern." And if you look at 40, half way down, and this goes to the point that was raised by Your Honour, Justice France, with my friend, Mr Keith, "To have any chance of being effective, such a mechanism," here we're talking about post-return monitoring mechanisms, "would certainly need to incorporate some key guarantees, including the right of independent and suitably qualified persons to visit the individual concerned at any time, without prior notice, and to interview him or her in private in a place of their choosing." So I just thought it was useful that that point be brought out in that way.

So then if you go to the merits of *Sultanov*, page 15, paragraph 70 to 73. 70, "The Court's task is to establish whether there is a real risk of ill-treatment in the event of the applicant's extradition to Uzbekistan." 71, "The Court has recently acknowledged that this general problem still persists in the country…Given these circumstances," here I'm at the bottom sentence of 71, "Given these circumstances, the Court considers that ill-treatment of detainees is a pervasive and enduring problem in Uzbekistan."

Then at 73 it's noted that as to the Government's argument, so this is the Russian Government's argument, that assurances were obtained, it should be

pointed out that even if the Uzbek authorities had given the diplomatic assurances requested, that would not have absolved the Court from the obligation to examine whether such assurances provided, in practical terms, a sufficient guarantee that the applicant would be protected against the risk. And then it concludes at the end of that paragraph, “Given that the practice of torture in Uzbekistan is described by reputable international sources as systematic, the Court is not persuaded that assurances from the Uzbek authorities offer a reliable guarantee against the risk of ill-treatment.” And you’ll see the similar language to what I’m putting out here in *Sultanov* being used at *Ismoilov*, and that’s at paragraph 127.

What *Sultanov* does not contain but which is in *Ismoilov* which I would commend to Your Honours is an analysis at paragraph 111 of *Ismoilov* and following, it’s about a page and a bit, in fact two pages, of material from various interveners about the questionability, reliability of diplomatic assurances broadly. In other words what the experience is as to the reliability and I think it's just important that the Court has context as to the observed practice in relation to diplomatic assurances and I just should note the last few, those Russian cases, my friend Mr Ellis yesterday by slip I am sure referred to *Othman* as being a Grand Chamber decision but of course it's not it's just a section decision so the point I'm trying to make is that these decisions I've taken you to, the Russian decisions, are on a par with *Othman* in terms of where they sit in the overall scheme of things.

And I made reference to *Evans* a little bit earlier. There’s material in *Evans* which is of interest and in my view shows how it may perhaps be appropriate to apply diplomatic assurances because we're not adopting an absolutist, I think we're not adopting an absolutist approach but if you have a look at *Evans, Evans* shows how diplomatic assurances might be used at all, so shows the extent to which the Court can get down and dirty, so as to speak, get into the entrails of diplomatic assurances and bearing in mind the time restrictions on me. I think what I will do is just simply commend it to you and not, for example, in that decision, the analysis begins at paragraphs 287 onwards and it's noted at 293, paragraph 293 that at the centre of the case of

the UK, Afghanistan, MOU and the related EOL, the Court works through whether they are acceptable. It says well in light of *Othman* we have to proceed on the basis that they are acceptable and then what you see is a very close detailed analysis of the assurances that have been provided in the particular case. What the Court concludes is that the real threat here is provided by treatment at the hands of the NDS, that's the National Defence, I don't know what "S" stands for. I'm sorry, the National Directorate of Security, thank you, the National Directorate of Security. So there were three areas, Kandahar, Lashkargah and Kabul. They were not happy with Kabul but were prepared to allow transfer to the other two subject to conditions but they were not convinced that the safeguards already in the MOU were sufficient and added some extra ones and they are set out at 320 in the case of Kandahar.

O'REGAN J:
This was a judicial review case as well, was it?

MR BUTLER:
Yes it was but remember it was an interesting judicial review. I use it as an illustration of its judicial review but not how we know it because this is where the Court says we've actually got – we're not stepping back and doing a reasonableness assessment, we're actually – the job we're engaged in here is securing compliance obviously based on the material that's put before the Court.

So I wanted now to move swiftly to a fair trial. Your Honours will have read the submissions that have been advanced and the underlying theme of our submission that extradition there's a purpose to extradition. It's not just removal for no reason, it's removal for a purpose. The purpose is for trial. We say it has to be purpose for a fair trial, and I've set out the reasons in relation to that. What I wanted to talk about a little was just to use one of the cases in the bundle which is *Kapri.* So that's in the respondent's bundle I'm afraid again at tab 65. A decision of the UK Supreme Court from 2013.

ELLEN FRANCE J:

We've got that somewhere else.

O'REGAN J:

That is in the list of cases so we should be able to get that.

MR BUTLER:

Apparently it's in the appellant's bundle as well at tab 8. Are you using the same one, 2013 UKSC. Thank you, I'm grateful to my friend Mr Keith. So the context was extradition to Albania. Further context was a concern, well not a concern, evidence of systemic and judicial corruption. So I'm looking at the headnotes of the version of the report that I have got is from the Human Rights law reports so that's why I was making reference to the respondent's bundle. I'm not sure whether tab 8 in my friend the Solicitor's bundle is a different version.

O'REGAN J:

It's the weekly law reports.

MR BUTLER:

It's the weekly law reports, okay.

O'REGAN J:

But if you use paragraph numbers that will be fine.

MR BUTLER:

Yes, okay.

GLAZEBROOK J:

Sorry, what tab?

MR BUTLER:

Tab 8 of the Crown's.

GLAZEBROOK J:

Just to say I seem to be able to – the registrar just sent me a note to say she can open them and I seem to be able to open them now as well, the respondent, so no idea –

O'REGAN J:

We can open them but we can't find them, that was the problem *Ismoilov* wasn't on the list.

GLAZEBROOK J:

It is, 56.

O'REGAN J:

Mine doesn't have any numbers.

GLAZEBROOK J:

Doesn't it?

O'REGAN J:

No.

GLAZEBROOK J:

Yes, well mine yesterday I think didn't and also clearly I couldn't open them at all yesterday but today I seem to be able to.

FRENCH J:

I've got numbers but can't open any.

O'REGAN J:

Anyway we've got the one in the appellant's bundle.

GLAZEBROOK J:

Something has gone funny.

MR BUTLER:

Your Honour, this is so heartening, this is the first time I've ever done a case electronically and I was terrified and I am still terrified so I'm glad I'm in good company, that's why I've resolved to use some hardcopy material.

So the point of taking you to *Kapri* was that what we've got here is a system of general, of what's described as systemic corruption, so I'm looking in particular at paragraph 32. The test that's been applied. So the test that's been applied is this flagrant breach of the relevant right. I think Your Honours will know from our submissions we think that pitches things far too high and that the approach adopted by the Court of Appeal is the right way to go about thinking things. It's to use the phrase that was used by my friends for the respondent, it's concrete.

FRENCH J:

Except that they said that the two would yield the same result in every case but you're not saying that, are you?

MR BUTLER:

It depends on what we meant by "flagrant breach" I suppose, that's the language or the labelling problem. Again, I could draw on Lord Sumption, I could encourage him that the speech I will refer to is could a cracker and I'm sure that he'd love to do a sequel and his sequel could be a flagrant breach.

What does it actually mean? The Court of Appeal has descended to earth as opposed to being in the firmament but the reason for taking you to *Kapri* is to say, well what does this look like on the ground, what does one view of how you apply the flagrant breach test look like and so the way in which the House of Lords applies it here it says on 32, "The threshold test will require flagrant breach of the relevant rights such as will completely deny or nullify the right of the destination country but none of the cases in which the test has been described was concerned with the way it is to be applied by the complaint of systemic judicial corruption." Now take out the words "systemic judicial corruption" and put in "systemic lack of a judicial independence" and

that's the scenario you might consider we are in. "It is not so obvious that the only way it can be met as it was in those cases is by pointing to particular facts as circumstances affecting the case of the particular individual. The stark fact is that systemic corruption in a judicial system affects everyone who is subjected to it. No tribunal that operates within it can be relied upon to be independent and impartial. It is impossible to say that any individual who is returned to such a system will receive that most fundamental of all the rights provided for by Article 6 of the Convention, which is the right to a fair trial." And again it's interesting just to see the way in which it's characterised. "It is impossible to say that any individual who is returned…will receive." So instead of saying to the individual, "Well, you've got to show that in your case you won't get a fair trial," what it's saying is in this type of complaint, a systemic or system-wide complaint, in a sense the shoe is on the other foot. And what happens in this particular case is the extradition decision is set aside and further information is required to be obtained by the Scottish authorities as to the situation of the judicial system in Albania.

Monitoring. Just I'd wanted to pick on the point of monitoring. I took the opportunity when I was going through the material from *Sultanov* to just make the reference to the Committee on the Prevention of Torture, the European one. I think it's important for the Human Rights Commission to just really emphasise the importance of monitoring and independence. Here it's significant that unlike, for example, in *Othman* where there was an independent monitoring mechanism and *Lai* where as I understand it there was an independent monitoring mechanism, there is no independent monitoring mechanism here. Equally, there is no national human rights institution present in China. There is no ability to make a communication to the Committee Against Torture nor obviously to the Human Rights Committee because China hasn't ratified and so hasn't signed up to the optional protocol, and there will be the presence, or there is the ability for the presence of medical, a Chinese Government doctor to attend when medical investigations are being undertaken at Mr Kim's request. So while my friend describes these diplomatic assurances as sophisticated, the real "S" word is whether they are sufficient, assuming that you can even get into this territory.

I just before I finished just wanted to touch on the point about the allocation of roles and just really to reinforce the point that the Commission takes. Another way of thinking about our position is that yes, it's true, the Minister is the one who's allocated the role under section 30 of surrender. He gets to determine surrender and there's a wide range of considerations. When I say "he" it's because I'm talking about the current Minister. So he gets to consider a wide range of matters. What we say, and this is consistent with the thesis advanced in the Hickman extracts, I don't think I actually gave you the relevant page references in those but at page – I should probably give you those actually. Page 99 I can remember, page 113 and then page 114 are the pages that I think you'll find useful and profitable because the point that's made there is even on an approach like ours, or even on a heightened scrutiny approach, and this is a point that Lord Sumption makes as well quite well, is the intrusion that is made by the human rights considerations as a targeted intrusion, but the nature of the intrusion is such that Parliament has allocated to the Courts the role of ensuring that the decision-maker has respected the relevant provisions of the Bill of Rights and/or the ICCPR/UNCAT as appropriate.

So while the Minister here might get first move or advantage, so as to speak, get the ability to order inquiries, and you'll see on the decision paper, if you look at the Minister's decision paper, one of the decision papers she's crossed out, she hasn't agreed to send. She's crossed something out and said she wanted some further enquiries made and that's the nature of the role that she is given, her first move or advantage, the task of the Courts on review including this Court is to ensure that there is compliance, there is consistency with the ICCPR and the Bill of Rights and one of the challenges that I suggest the Court will face here when it's considering what the relevant human rights norms are is the approach to diplomatic assurances flagged in *Othman* which we say is even on the European jurisprudence a little bit of an outlier. Is that the approach that this Court wants to adopt, endorse, or is the approach that I've taken you to in terms of the Committee Against Torture, is that the approach you want to adopt?

So on that note, Your Honours, I propose to leave you to consider unless you have any further questions you wish to put to me. Thank you very much, Your Honours. We will leave and Ms Harris, on behalf of the Commission, during the course of the Court of Appeals, so that if anything pops up we can run down the road, I suppose, do whatever we would do in those circumstances and we will try and withdraw. We tried to pack up and we can otherwise withdraw hopefully silently and once this appeal is over. Thank you for your time and attention Your Honours.

GLAZEBROOK J:

Thank you. Madam Solicitor?

SOLICITOR-GENERAL:

I've only a few points to address in reply, Your Honours. If I can start with my friend, Mr Butler drawing a distinction between Article 3 of the Convention Against Torture and Article 3 of the European Convention on Human Rights and urging you to follow the latter. In my submission, despite there not being the same content in subparagraph 2 of Article 3 of the Convention Against Torture in the European Convention, in fact, in my submission, there is nothing different in reality about those two provisions. Both of them say, "When making the assessment, the State should take into account all relevant considerations …" which we say includes assurances and monitoring, "… including the general situation," and we agree that the general situation is a very important factor to take into that mix but, in the Crown submission, on neither instrument would the general situation in a state preclude proceeding on the basis of assurances. And I take my friend's criticism that in some cases the assurances have been said to be so vague and/or not relevant to the risk identified that they can't be relied on but, in fact, even the Convention Against Torture Committee does go through the same basis process looking at the general situation assessing the assurances often monitoring is the failing point.

I'll just draw your attention, Your Honours, to one case that you don't need to turn up, you can take the reference, which is in our submissions at tab 3, *Alzery v Sweden* Human Rights Committee, CCPR/C/88/D/1416/2005, 10 November 2006. Actually I might just open that if I may, at 11.3 of that, where you see the Committee looking at the merits of the issue. You see at 11.3 there, Your Honours, at page 33, "The first substantive issue… is whether the author's expulsion from Sweden to Egypt exposed him to a real risk of torture or other ill-treatment." At 11.4, "The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that – without more – would have prevented the expulsion… The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced… The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. There were no arrangements made outside the text of the assurances themselves which would have provided for an effective implementation," and so on. It goes on criticising the assurances themselves against the concession that without them there was a risk that meant the person shouldn't be surrendered."

So even on thinking about the Convention Against Torture or the European Covenant, the approach appears to be the same and in fact it doesn't appear to me to be a submission that can be made that there is a state in which the committee will simply say, "No, we refuse to look any further." They do look at the assurances and sometimes they are inadequate and they say the general situation therefore means you can't be surrendered but they have always looked at all of the circumstances, and in fact my friend just took Your Honours to *Kapri* in the House of Lords in the Crown's bundle. The immediately prior case in the bundle, although not in time, that followed the House of Lords case in *Kapri* where the High Court of Justiciary, the Scottish Court, did the same thing, looked at the particular facts and the circumstances to see would the issue identified, the risk issue would it arise and there the Scottish Court concluded there was no evidence of judicial corruption in ordinary criminal cases despite the allegation and the evidence of a systemic problem.

So the point can be left there, in my submission, that the Minister's approach was the right one, what is the general situation, what do I have in front of me that ameliorates those risks and can I be satisfied that they will be met. I mean monitoring of course is a very significant aspect to the assurances here frequently absent from the assurances criticised in some of the cases that you have been taken to. That's one point about the Convention Against Torture and the European Convention.

Just to cover off a quick point while I can. Your Honour Justice French has raised the question about whether the Court of Appeal test for fair trial protections is any different and my friend Mr Keith, this has already been addressed again this morning, said that they were co-extensive – I will just point out that the Court of Appeal itself thought it was applying and setting a lower threshold test. Paragraph 179, "The Court is quite explicit that it considers the flagrant denial of justice tests to be too high." It itself anticipates it's setting a lower threshold test which as Your Honours know we say is wrong.

O'REGAN J:
What paragraph was that again?

SOLICITOR-GENERAL:
Paragraph 179 of the Court of Appeal.

GLAZEBROOK J:
We've been referred to the comment of this Court in *Radhi* do you have any comments on that?

SOLICITOR-GENERAL:
That was where the Court of Appeal thought that flagrant was a –

GLAZEBROOK J:

No, I think it was just a fair trial is a fair trial if I can paraphrase in a different context.

SOLICITOR-GENERAL:

I might be misremembering that case was critical of flagrant because it denoted a required flavour of, there's a sort of high-handed conduct or some other, yes, high-handed conduct is perhaps a good summary of what I understood to be the criticism of the flagrant denial, which is –

ELLEN FRANCE J:

In *Radhi* it says, in paragraph 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. What is important is that extradition not be refused for trivial reasons."

SOLICITOR-GENERAL:

And to that I would say that is not what we say the flagrant denial test is, and in our written submission, I mean we simply set out what the test we say is right. Flagrant denial of justice, this is at our paragraph 29, goes beyond mere irregularities or lack of safeguards.

GLAZEBROOK J:

Sorry, perhaps just slow down slightly.

SOLICITOR-GENERAL:

Beg your pardon, Your Honour. Our paragraph 29 of the written submission sets out what the *Othman* Court says is the flagrant denial test. "What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence of the right guaranteed by that Article." So no flavour of the high-handed conduct that concerned the Court in *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480.

GLAZEBROOK J:
And the very essence in the right is the right to a fair trial. I think you've accepted.

SOLICITOR-GENERAL:
Yes.

Mr Keith handed up a table to Your Honours yesterday with apparent references to the material. The Crown takes issue with his third column in particular, about whether the Minister considered certain things. I don't wish to take Your Honours back through the material that you've already taken by through by, in particular, Ms Todd. I can point up a couple of examples where we say the table is wrong but in fact I'm afraid I do urge on Your Honours reviewing the references that we've pinpointed that are throughout the written submission, all of the references to what the Minister knew and what she considered. Just by way of example, the table points up that 2012 Criminal Procedure reforms are ineffectual in practice, referencing the Court of Appeal's findings. Then the table points out what the relevant assurances comply with, relevantly domestic requirements regarding a fair trial, whether that was considered by the Minister. No, says the table. We disagree with that. The Minister was advised, of course, and I can refer you to paragraph 371 of her November briefing in tab 39 of the case where she was advised about the Criminal Procedure reforms, that they had made some progress but hadn't entirely dealt with the matters she was concerned about. So I don't particularly want to go through every item but I suppose in reply that I just say we don't accept the description of whether the Minister considered these things or not, and we have set out for Your Honours where she did think about all relevant matters.

Two other things that I would mention, I will be guided by Your Honours on whether this is something you want to hear from the Crown on. Standard of review is one thing that I might just touch on to be clear about what the Crown is saying and the second point briefly on the use of assurances generally.

GLAZEBROOK J:

I think, given that they have been raised despite our efforts to curtail that, you certainly can. We certainly would find it helpful for you to clarify that.

SOLICITOR-GENERAL:

Well, with respect I join with the Court's scepticism about some of the adverbial adornments that are commonplace when we think about what does the Court do in judicial reviews, so I'm going to try and avoid those and try and submit in practice in this case what we say the Court does in its assessment of what is lawful, what the Minister does and how the Court should review what the Minister has done, none of which is intended to obfuscate the issues before the Court. So we accept, of course, that the Court reviews decision-makers' application of interpretation of a statute where the standard is if we have to use the phrase correctness then that is the standard. The Court gets to say what the meaning of the law is.

Here there are two interpretation or meaning questions, both of which we accept this Court ultimately decides. One isn't in dispute and it is the meaning of section 30 in relation to torture. Everyone accepts that the Minister can't surrender Mr Kim where there are substantial grounds for believing he is at real risk of torture.

The second interpretation question is in dispute is what is the meaning of section 30 in relation to fair trial. We say section 30(3)(e) should be interpreted to mean the Minister cannot surrender Mr Kim if there is a real risk of a flagrant denial of justice. And this is a rights consistent interpretation of those rights. Sorry, of his fair trial rights. That is a question again that this Court can answer. But after that point we say that the Minister's assessment of the risk, and the assurances, and their reliability, are about her taking the function that the statute gives to her of deciding whether in fact there is a real risk of torture. Whether, in fact, there is a real risk of denial of justice to Mr Kim. Now her evaluative and factual determination of those questions are matters of fact. It's not to say that this Court has to step away and look away, that is why we say the Minister should be entitled to come to a determination

of that evaluation on a set of assurances and conclusions that is one reasonably open to her. Now the Court can intervene, in fact, must intervene if it concludes that the Minister's approach there was unreasonable, and in particularly applying a high and detailed scrutiny about the content of the right and her ability to be satisfied as she must be under the Act. We say some weight must be given to the Minister's assessment, in particular the analysis of the strength of the bilateral relationship, and the diplomatic impact of non-compliance.

I think I answered in response to Justice O'Regan, I think, that the written submission reference to no legal yardstick should be read as a reference to there is no test for whether a state to state relationship is reliable, and that is a matter of weight for the Minister, but this Court should assume, must assume, that a decision-maker will put before the Court the reasons that it comes to that view. The reasons that it weights it the way it does, and again on a reasonableness question, has the Minister met her threshold is a question for you.

To be clear the Crown is not saying there is a balancing of interests here. Extradition on the one hand and exposure to torture on another, and that was a problematic issue that the Court dealt with in the second *Zaoui* case. That is not the balancing we say. We say the options that are reasonably open to her are the set of assurances that she has, that she's satisfied, ameliorate the risk of torture. We accept that that is an absolute prohibition. There is no balancing in the question.

We agree also that all exercises of public power must be rights consistent but we say, with respect, that it's absurd to then suggest that this Court should engage in the very question left to the Minister, using the material perhaps only that is in front of Your Honours, not even the material, all of it that was before the Minister, or arguably involving this Court asking for further assurances, or different assurances. If Your Honours are not satisfied the Minister has met her standard and her threshold then, with respect, the

answer is to find her decision wanting and return it to her. The Minster of Justice is now Minister Little, return it to him.

GLAZEBROOK J:

Can I just check. If it is returned for a particular reason, I mean say it's returned for because of fair trial and not because of torture, and I'm not in the least bit suggesting that that is what would happen in any sense. I would have thought, well Minister Little I would have thought would want to remake the decision. Would he be required to remake the decision if it's sent back or… I mean obviously he'd be able to rely on an earlier decision.

SOLICITOR-GENERAL:

So does Your Honour mean would he remake it in its entirety, or only in the bit criticised?

GLAZEBROOK J:

Yes, yes.

SOLICITOR-GENERAL:

Or would he be free just to say actually I don't want to make it again.

GLAZEBROOK J:

Yes.

SOLICITOR-GENERAL:

Okay, I'll answer both perhaps. Well I'll answer my second question first, because I know the answer to that. It is open for the Minister not to surrender Mr Kim, of course. As my friends have pointed out, there is no treaty, it is a discretionary decision to take. The first question, if this Court says on this aspect we find the decision wanting, I find it a bit hard to answer that in the abstract. I think it's very likely that it would open to the Minister to rest on, or to maintain the position taken, but he wouldn't be required to either. It might be that a series of material that hasn't been before the first Minister, is put

back before the second Minister, that encourages him to remake the whole decision. But on this Court saying –

GLAZEBROOK J:
Yes, obviously if there's going to be extra material then there's no question but – sorry, it was probably a red herring slightly.

SOLICITOR-GENERAL:
I think my answer with that, it must be open to him to say the Supreme Court has criticised this aspect of the decision and returned it to me for a decision. That is where I'll pay my attention. But he wouldn't be prohibited from looking at other material, sorry, other parts of the decision. I'm afraid it depends, Your Honour, on what comes back.

GLAZEBROOK J:
Absolutely.

SOLICITOR-GENERAL:
I would move off standard of review unless Your Honours have got any questions for me on that.

On the use of assurances generally, I understood Mr Keith yesterday to be saying that the PRC could interpret the assurances themselves to the extent that they might say, "Well, that's not torture," in relation to a practice that New Zealand would say was, and I say several things about that, if I may. He called in aid the case *GS* which I recall he took Your Honours to, or maybe not because it's in the respondent's materials at tab 59. I'll just refer to that case. This was an extradition from Bulgaria to Iran and assurances from Iran were obtained that –

GLAZEBROOK J:
What's it called?

SOLICITOR-GENERAL:

GS v Bulgaria. Their tab 59.

GLAZEBROOK J:

Yes, we've got it, or I've certainly got it.

SOLICITOR-GENERAL:

The assurance was that GS would not be subjected to torture or inhuman treatment if surrendered to Iran, and I understand my friend, Mr Keith, to call this in aid of the proposition that flogging in Iran is an authorised by law punishment, such that we and other nations would find that torture and/or inhumane treatment and he, I understood, was using *GS* to say that's the risk we have here.

If we look at, not literally now, when Your Honours have the case, to look at *GS*, the Court did the same thing. What is the general situation, understanding that flogging was part of the – a legitimate form of punishment, considered to be a legitimate form of punishment. It went on to say the assurances are unreliable because it was general, not specific, about the assurance. We don't have that problem here. The extradition request didn't specify that flogging would be an available punishment and that in the Court's mind raised profound misgivings about the Iranian authorities' trustworthiness in giving the assurance. The assurances couldn't be verified or monitored. They went on to say assurances against torture in a state in which it is endemic or persistent should as a rule be approached with caution, and I raise that to compare our situation here where the detailed assurances and monitoring as to how Mr Kim will be treated are significant and, to repeat my comment from yesterday, sophisticated.

I want to go to the assurances. They are actually in several places. I don't need to take you to the assurance about the death penalty. That doesn't seem to be at issue. But in the case in volume 3 – tab 40 in volume 2. So the assurances start at page 0204 in English and I want to draw attention to all of

the other assurances that are the monitoring assurance which in my submission are so critical.

GLAZEBROOK J:
Can I just check, I thought the submission was that China had a different view of what was torture in relatively specific circumstances, probably a bit like the water boarding issue in terms of different views as to what was torture and what wasn't. I'm not suggesting there were –

SOLICITOR-GENERAL:
I think that was the submission.

GLAZEBROOK J:
I'm not suggesting there's an issue with water boarding. It's just as an example.

SOLICITOR-GENERAL:
I think that was the submission being made that if the –

GLAZEBROOK J:
Yes, and so what's the answer to that?

SOLICITOR-GENERAL:
Well, the answer is twofold. One is that if the monitoring regime is significant for ensuring that Mr Kim will have New Zealand diplomatic or consular representatives available to him to see in quite a wide range of situations, that contact, as it says in 4, won't be censored or edited in any way. During the periods of his detention New Zealand diplomatic and consular representatives may visit him, and I accept that there isn't a – I think Mr Butler raised this point – there isn't a without-notice attention to him in his place of detention. At point 5 of the assurances he can be – may be accompanied by one or more of the following people chosen by New Zealand. An interpreter. A medical professional (a physician, dentist, psychiatric expert), and I do

accept that where the medical professional attends the PRC is entitled to have its own medical professional attend as well.

Further down the page, diplomatic and consular representatives have the opportunity to meet other people in private including prison staff, medical professionals and, with Mr Kim's consent, his lawyer. The other ones Your Honours I think have been taken to.

GLAZEBROOK J:
So is the submissions therefore that if there's a difference of opinion in terms of what is or is not torture, that the New Zealand representatives when undertaking monitoring can use the New Zealand – well, of course New Zealand would say that's the accepted definition internationally as to what constitutes torture.

SOLICITOR-GENERAL:
That is actually the second submission that I will come to. The first one is that this is not – that the Minister was satisfied that there was sufficient monitoring, that we understand how Mr Kim is to be treated. The second submission is that it isn't for one party or the other to simply unilaterally say there's no issue and no breach so that's that, and over the page from where Your Honours were in the assurances is that assurance 12, in the event of any issue arising in relation to the interpretation or application, the PRC and New Zealand will immediately enter into consultation in order to resolve the dispute in a manner satisfactory to both sides. So the point I want to make is that there's not a unilateral there has been no breach and therefore the assurances are worthless which I understood my friend to make the submission. That consultation aspect through the diplomacy relationship is critical to the assurances working.

ARNOLD J:
Just on this definition of "torture", I mean that's always going to be an issue. The definition in the Convention is quite wide, isn't it?

SOLICITOR-GENERAL:
It is.

ARNOLD J:
I mean in general terms, so there's always going to be a margin, a boundary issue, isn't there?

SOLICITOR-GENERAL:
That's right, at which, if that conduct is complained of, or identified, New Zealand and the PRC have an agreement that they will discuss those issues with the assurance. One of the things that the Ministry of Foreign Affairs sets out before the Minister, and that is at tab 80, which Your Honours don't necessarily need to turn up because you've seen it before, but they make the point that there are a number of co-operative mechanisms, bilateral mechanisms for dialogue and conflict resolution with PRC, between PRC and New Zealand, facilitating practical collaboration and mitigating potential disputes, and the New Zealand Government regularly discusses human rights issues and developments in the rule of law with the PRC through official level consultations. So my point is that it isn't left to what China says is torture, it is also open to New Zealand to say this is our assessment of torture. That relationship has been formed knowing that New Zealand has ratified the relevant conventions.

I was just going to move on to a further point about monitoring. The Courts in both *Badesha* and *Othman*, you don't need to go to them but I'll tell you the paragraph references, *Badesha* at paragraph 65, and *Othman* at 203, emphasise that the fact of monitoring is in itself a deterrent against the behaviour that the assurance goes to protect. So my friends were being critical that there is no independent or expert monitor, criticising, as I understand, the consular monitoring that is available. In *Badesha*, in fact, the monitoring was consular too, and the fact of monitoring was seen as one of the deterrents. As to expertise, the Minister of Foreign Affairs has assured the Minister that consular monitoring is something that his officials have

experience in, in PRC prisons. That's also in the MFAT advice at tab 80, and at paragraph 58 of the November advice to the Minister.

I think Your Honour Justice France asked a question about whether in *Lai* the monitoring was independent. As I understood it, it was consular monitoring. That's at paragraph 52 of *Lai*. It might be what Mr Ellis was about to hand me, that reference, but paragraph 52 in tab 10 makes it clear that *Lai*, there was consular monitoring. The Minister's delegate referencing that, "It is the access of Canadian officials to the cell of the applicant promised in the diplomatic assurances, that 'would mitigate any risk of abuse.'" So my point is I need to point out that it was Canadian officials there too.

One document that Your Honours, I believe it was referred to by Mr Butler noting that Minister Adams in relation to the August advice, which you have seen, she says more information please. The more information was followed up in the next tab, tab 83, with September advice to the Minister, and that gives her further information both about the monitoring and the timeframe that gets renegotiated or that has been renegotiated in respect of the recordings, do you see over the page at paragraph 10 and 11. "First the Minister of Foreign Affairs has now provided further specificity over the frequency of visits. He has instructed his officials to visit Mr Kim as frequently as you consider necessary, for example, every 48 hours which is indeed the choice the minister made or even daily to ensure his wellbeing." The Minister confirms there will be a dedicated resource to guarantee visits of necessary frequency. Secondly the process agrees to the point at 11.1 above namely, "Access to full an unedited recordings of all pre-trial interrogations during the investigation phase within 48 hours of each interrogation having taken place," so returning to my theme, sophisticated monitoring assurances.

Excuse me Your Honours, I'm just checking that I have said what I needed to say. Your Honours, those are the points we wanted to make in reply unless you have any questions for me.

GLAZEBROOK J:

No, thank you very much. Mr Ellis, we might as well start at least.

MR ELLIS:

Well what I was going to suggest is that I just make a few comments before 1 o'clock and then we agree hopefully to reconvene at 2.15, we re-organise our timetable so we do until five past three. The solicitor can do until 10 to four and we will have 10 minutes for reply, so I am losing more than they are so I think that should be acceptable and I don't think – well we're going to make a deliberate attempt to be very short so hopefully that's responded to because well it's obvious the submissions have been read so if I could just make a few points here before I go to the cross-appeal.

Because we didn't get a reply to the Intervener I just wanted to make a couple of very quick points. The proposition about intervention which is very important in these cases I had originally asked the Chief Commissioner David Rutherford I think in 2015 to intervene but the problem is funding and ultimately Mr Butler stood here acting pro bono as we do , it's just the funding issue and if you can only appear in one Court it's going to be the Supreme Court and we don't have the unfortunately the record in New Zealand for non-Government organisations to intervene, we don't have a liberty or an Amnesty International in the sense that there's the London Headquarters so we don't get interveners and we did ask both Amnesty International London and the association for the Prevention of Torture Geneva to intervene and they said, well they only, well one of them said, "We've only ever intervened twice and we just can't afford it," but those issues and then the proposition that I think I just forgot to add maybe in our written submissions, as we are not legally aided we would ask if we're fortunate enough to win we'd like costs and in terms of Justice Glazebrook's proposition about the minister reconsidering, I think in a practical sense if there was, say, the theoretical send it back for fair trial, the record is five years old. As we did from the first and second ministerial decision we would make more submissions to the minister because we will have learned from the process and in practical terms it would be likely that the minister would reconsider and we would have the

health issues which would become prominent and the minister wouldn't want to be judicially reviewed in that he didn't do something so in a practical level it's likely the minister would reconsider the whole lot and that was all the bits and pieces I wanted to do before I did the cross-appeal so if you're comfortable with adjourning.

GLAZEBROOK J:

Certainly, can I just ask you to think over the break, the application is for a stay and the question that's been asked is the stay of what. What I suggest is the better way of putting it might be that what you're asking is for us to quash the decision and not send it back for reconsideration and if it's looked at in that way it's much more in a standard judicial review context, but I'm not trying to constrain you but it might be useful for you to tell us if you persist on stay what you want to stay.

MR ELLIS:

Yes, I thinks that reflects what the solicitor says which was what we're really asking for is to bring it all into an end which is a remedy type proposition and I was asking myself, yes, why are we actually cross-appealing in the way we are rather than what you really suggested is a remedy situation. I think that that's quite sensible so I don't have a problem with that.

GLAZEBROOK J:

We'll hear after the adjournment then on those terms so we will take the luncheon adjournment, thank you.

COURT ADJOURNS: 12.57 PM

COURT RESUMES: 2.17 PM

MR ELLIS:

Thank you Ma'am. I've managed to successfully allocate myself very little to do in the cross-appeal so I will fit the timetable. I'm going to deal with paragraphs 1 to 6, but not 6.1 onwards and paragraphs 22 to 25, and Mr Keith

will deal with 6.1 to 22, and 26 to 40 as amended by our brief discussion before lunch on remedy, and there is just one particular point before I start on paragraph 1, or maybe two, I wanted to raise, and there has been some discussion on the appeal proper about our request for Mr Kim to be interviewed in New Zealand thereby avoiding the difficulty of the interrogation and the right to a lawyer and so forth, and that's been repeated a number of times and not taken up, and I just wanted to contrast that with the case of *R v McNeill* [2008] FCAFC 80, Federal Court of Australia Full Court, and Mr McNeill was convicted of murder of a chef on Norfolk Island and it has similarities to this case in that the body was wrapped up in a black polystyrene cut off the roll. Not a sheet in the sense of a big sheet, but a sheet, and dumped some way away, and the Federal Police of Australia came to interview him. There was one fingerprint on the polystyrene sheet that belonged to Mr McNeill and ultimately later, certainly when I interviewed him in the New South Wales prison, he said yes he disposed of the body, but there were 64 stab wounds in the body caused by three instruments, which seemed remarkably unlikely that one person would have done that, it was probably three, and he wasn't saying who. But anyway, he was convicted. But the process went, the Federal Police came to Nelson. They interviewed him and, I'm just reading from the judgment at paragraph 36, "The appellant was arrested in New Zealand by Detective Sergeant Christopher Roberts pursuant to the endorsed warrant," and he was conveyed to –

GLAZEBROOK J:

Norfolk is a, just looking it up because I was just checking, is an external territory of Australia, I think.

MR ELLIS:

Well no, no it isn't. well yes and no. Since about two or three years ago it's now part of the regional council of New South Wales and it's legislative assembly has been abolished and it's part of New South Wales, but it had its own legislative structure, but that doesn't matter. What's important is the Australian police, they don't have a prison on, and they only have a very small police force, so they have the New South Wales assistance, and the

Federal Police. But anyway they took him to the police station in Nelson and the New Zealand police officer stayed to ensure that New Zealand law was properly carried out while he was interviewed by the Australian, and he confessed and that was challenged in the Federal Appeal Court. I say, well why can't that happen here, that's the proposition I simply make, why can't the Chinese come and interview him here and we've saved a lot of trouble.

And the only other preliminary point I wanted to make is whilst there is already a case before the UN, before the Working Group on Arbitrary Detention, it seems to have got lost since Mr Assange successfully claimed being arbitrarily detained in the Ecuadorian Embassy and then a large number of lawyers in the world discovered this body and it's swamped with cases, whereas nobody had heard of it before but, you know, that's life so I made his application in 2015 and we haven't, we still haven't got it anyway. But it does bring to the forefront, when we get to 10 years, and it's nine years we've been going on this, whether we've got the ability to bring an international case without having to exhaust the rest of our domestic remedies may well be possible. So that would be a further consideration for the Minister to consider.

But returning to the written submissions, as we said in –

GLAZEBROOK J:
Sorry, I don't follow that second point.

MR ELLIS:
That –

GLAZEBROOK J:
Well just in relation to what it's got to do with not sending it back.

MR ELLIS:
It's not sending it back, it's what the Minister would do if it were sent back, he would be faced with the possibility, if not the probability, of a concurrent international claim. So he would be more likely to decide the case again from

the start. I was just following up where I left off before lunch. It's not a consideration that this Court needs to consider in terms of whether it sends it back or not, it's just what the practicalities would mean for the Minister now.

So in paragraph 1 we request the Court permanently stay the extradition proceeding, or the surrender proceeding. That was what we were seeking to be stayed, and paragraph 2 there sets out what we've already basically said. China is a terror regime, mass murderers, and this is a characterisation that hasn't been disputed, and since then there's been the new China Tribunal and Sir Geoffrey Nice.

At paragraph 4 we say, or paragraph 3, should not, could not extradite the respondent to face Chinese criminal proceedings without seeking undertakings from that government, and we spent a lot of time on how we monitor those propositions, assurances, and we do have the problem with the investigation which occurred in China and was subject to the depositions hearings here which, of course, is now somewhat stale and it's impossible, in my submission, to recreate that investigation 10 years on because the defence were never given the forensic evidence or it's just stale. So it's a little late and there hasn't been the interrogation that there could have been to follow up on. And at 4 we say the position is worse as the diplomatic assurances did not address the violations of human right endemic, so we've really dealt with that.

5, the Supreme Court of Sweden, which Mr Keith has already dealt with in the substantive appeal, we've shown you that a recent decision of a respected European nation has decided that they're not prepared to accept the assurances of the Chinese Government and I find it interesting, even if nobody else does. The Swedish nation are the largest trading partner with China in the European Union and the comeback hasn't happened. We know that China has declined to ratify the ICCPR so there is no obligation to fair trial and we know that whilst they've accepted and are bound by the Convention Against Torture they don't abide it, so it is as simply said. What they say is effectively worthless in terms of international human rights law. China's been

unable to secure working extradition arrangements. The Australian Government, it was defeated in the Senate and withdrawn. Hong Kong, we've had significant publicity about what happened there this year. And the whole proposition of what the Chinese procedure is, is to obtain confessions and that's what happens. 99.9% of people plead guilty because of the process and it's our proposition that we don't send somebody back to face that stark reality.

Then Mr Keith will deal with the rest of that as much as we need to, given our shortened remedy point, and then if I move to paragraph 22 which is probably predicated by 20 and 21 to get the context of it. The proceeding is inherently oppressive and unfair and at 22 we say the prejudice on fairness and oppression arise from the structure of Chinese society and its criminal institutions and the fact that the President of China says, "Well, we don't agree with the concept of judicial independence," and we do have the acquittal, I think I told you yesterday, well, I know I told you yesterday, the 99.9% rate, and I misquoted, it was in the footnote, 1076 acquittals. I think I said 1026. And then homicide cases, the acquittal rate I think I can safely say is zero. Detainees are at risk both before and after conviction, and there was some discussion from the Solicitor about saying the penalty that one could get, theoretically, is life without parole, and as she put it, that was a sentence that was available in New Zealand, a sentence that's not been imposed, well I don't think it has, on the three strikes system. It may be a theoretical penalty but Judges haven't quite got to that situation as yet. It was my understanding in, as we brought up to this case over the years, that his sentence was more likely to be a finite one and not life without parole, so I'm not going to suggest that the Chinese would impose that, "nothing formal" it says there, but that's been our proposition.

We do have, in comparison, we actually have somebody who's been imprisoned in New Zealand for 50 years, five-zero, on preventative detention for seven counts of indecent assault and that may be the better case to suggest that the shocking the conscience of the nation is not quite the right

test for disproportionately poor treatment but that's for another Court later on this year.

The third point there, on page 17, paragraph 23, the stay jurisdiction is thought to be exercised on the ground of a delay of over 10 years, is in itself oppressive, and it can be said that, and it no doubt will be said, well we brought these applications, or some of them, and the Minister of course has had to repeat her assessment, but we did bring up, in the very first hearing we had, in the deposition hearing, the very points that we raise in this Court. And if we are proved right, that he can't – he's at risk of, substantial risk of torture and he can't get a fair trial, and I think we have a very genuine, undue delay point that we can raise, because it's consequential on what the result is here. But time is running and enough basically is enough, which is really what we're saying in the cross-appeal. He's suffered enough, it's been too long, and it is not safe to send him back there.

Then 24.2, over the page, as I said a little while ago, there's no scope for defendant's or the counsel to seek the evidence in China and it's now 10 years old. So trying to get an alternative point of view as to what happened 10 years ago, and we don't know whether the evidence has been, by some of the witnesses, or even all of them, fabricated. We know that happens in China, from the evidence. We simply don't know. But, even if it is, the forensic evidence is unlikely to be available to us and trying to run a defence in the environment of the Chinese Criminal Court is not a realistic possibility. And given that he won't be able to cross-examine the witnesses, he will be convicted without ever having an opportunity to cross-examine the witnesses and that is one of the main reasons why this matter should be brought to an end.

He didn't abscond and hide, as has been suggested. He was in Auckland for 18 months after the death living quite openly and he lived in South Korea for, I think it was 10 months after the homicide and only then was he arrested. It didn't seem to be the behaviour of a criminal hiding from the authorities, and he was detained, he was in detention for some eight years because he was

supposed to be a flight risk, but the fact that he hasn't flown belies that he was a flight risk. He must become more of a flight risk as the case draws to a close, so that's an aspect of why he was allegedly arbitrarily detained for that long.

Anyway unless there are any questions on my little bit, Mr Keith has until five past three, hopefully, to finish his.

GLAZEBROOK J:
Thank you Mr Ellis. Mr Keith?

MR KEITH:
May it please Your Honours. To follow on from Mr Ellis' small part of his submissions, and I will try to be swift, but I'm also very much seeking Your Honour's guidance, so much of what we say about jurisdiction goes by the board, which is I think a good idea, both at this time of day and also because it avoids a lot of complexity. The appellants cross-appeal submissions, in fact, say, well this could be characterised as an application for injunctive relief. They say, of course, they oppose that but I'm very happy to take it on those terms and it has, in fact, been sought on those terms before, so that avoids a great deal of what we otherwise were going to have to say. So I will not go into much of that. I will go into it a little just because we say that the Court's jurisdiction in respect of that remedy should be informed by the principles of abuse of process. The reason I say that is that the Court can give an injunction in its judicial review capacity in one of two circumstances. One, which my learned friends have pointed to, and which I agree with, is where a, only one decision can be made, and we will be saying, and I will explain why, that is the case here. So there is no subversion of the Minister's discretion if there is only one legal answer. But the other reason why the stay jurisdiction is relevant, why the Bill of Rights jurisdiction mentioned in our submissions is relevant, is that an injunction can be issued where no other remedy would do, and it's our submission that in the present circumstances of this individual case, no other remedy will do, and I'll come to why that is.

So on the first point of whether or not another decision is possible, what we say in the submissions is that the problem posed by extradition to China in this case is intractable, and I say that for two reasons. One, is that we have the benefit, and there is nothing controvertible about it. We have the benefit of what China has said since about this decision, about the lower Court's decision, about the Swedish decision, about moves towards it being able to extradite from Hong Kong, about judicial independence. All of those things are formal statements of China on the record so there can be no question about their freshness or their cogency to take a point that my learned friends have taken up. What we say of that is if China cannot do better to try to secure extradition with Hong Kong, if China cannot do better to save a failing and painstakingly negotiated extradition treaty with Australia, this Court can take cognisance of that and say, how likely, how realistic, how even remotely tenable is it to say, well, the Minister could remake this, make further inquiries? Now my learned friends would say it's not for this Court to second-guess diplomatic assessments, and one has to have some sympathy for that at its core but where one has such an extreme circumstance as this, where, for example, the decision of the Swedish Supreme Court that we talked about this morning was denounced by the Chinese Government as a so-called decision about so-called torture that shocked the world (that's the decision, by the way, not the torture), then where are we to go? What is this Court to make of that?

My learned friends also described the comment of the Chinese Government on the Court of Appeal decision as neutral. We cited in the footnote to our submissions the Chinese Government said it hoped that the New Zealand side could deal with this case impartially and extradite Mr Kim. That is, unless this Court or the Minister extradite Mr Kim they are not being impartial. So it does give us some reason or some particular reason to say this is at that extreme end. But we don't even need to get into diplomatic predictions or into looking at what are statements but I think I can properly say are statements of bad faith on the part of the Chinese Government. These are not light criticisms to make of other countries' judiciaries. It's also no light criticism to

respond, for example, to the Hong Kong protests by saying that they will end with bones broken and crushed.

But we can get past that too because there are in fact and in law intractable problems here, literally intractable. Mr Ellis has just touched on what to do about a now 10 year old criminal investigation and we say in the submissions, and the evidence is there and it's not controverted, that Mr Ansley, for example, said the other Human Rights material said the Chinese police do fabricate evidence, they do fail to collect exculpatory evidence, they do not hand over, certainly not disclose to the defence, anything that does not serve the objective of prosecution and successful prosecution.

That's irremediable. It happened 10 years ago. It happened before some of the reforms upon which the Minister relied. So even with the best will in the world, even with watertight, if we took it that way, assurances that they would do better now, what's to be done about that? What's to be done for Mr Kim?

The second category, I said there were legally intractable issues. Well, we had some discussion yesterday about what the Chinese Government assurances could and couldn't do. That is, as given, and I think members of the Court indicated this was unsurprising but it is material both yesterday and again today, as given the assurances could not contradict what Chinese law provides. So an assurance, no matter how much effort the present Minister and his advisers were to put in, an assurance is not going to, for example, create an independent and impartial judiciary in China. Article 14(1) of the ICCPR. It is not going to create under Article 14(3) the right to examine witnesses on the same terms and obtain evidence on the same terms as the prosecution. We know that this is what the Chinese Criminal Procedure Law says. And we have also touched on the particular legal regime that applies to defence counsel and not to anyone else. So that is not going to change, or at least it cannot be done by undertaking or assurance.

The further categories beyond that, the Minister was already told in the first successful judicial review proceeding to go back and reconsider in light of

whether Mr Kim would have access to counsel when interrogated. The Minister went back, reconsidered, made inquiries but could get nowhere there either, and now the Court of Appeal has confirmed that finding, only more forcefully.

And the last point in terms of what's intractable, and this is to take up something that we've gone back and forth on in the substantive appeal, China has said to the Committee Against Torture that, for instance, it does not have, or it has said that these interrogation shears, and I just take that as a concrete example, are not a torture implement, and it says that China maintains that in the United Nations context. I take my learned friend the Solicitor-General's point from her reply, that yes there could be consultations about whether or not a particular implement amounted to torture, but there seems to be an upstream problem from that, or possibly two. The first is an intensely practical one. Unless China is proposing to consult New Zealand first before any interrogation proceeds, and there's nothing about that, on exactly what they proposed to do and not do to Mr Kim, it will have already happened by the time there is a dispute. And the second is, one can have consultations but if, thinking about the incentives for China, the imperatives for China, what China has actually promised to do if they remain of the view, as they must, that these things that they say are lawful under the Torture Convention are lawful, where are we to go. So it is, as I say, legally impractical. Legally and practically irresolvable.

The other point, and it really goes to remedy in the proceeding before you, is to look at Mr Kim's circumstances and to the – what has happened in this proceeding, and Mr Ellis has already touched on the impact upon Mr Kim. You had an updated psychological report to which the Crown has, for no very clear reason objected, except to say well the Minister could consider Mr Kim's mental state, but I want to use it here to a different point, and that different point is this. What we have in the Court of Appeal judgment, and I stress that that table that I handed up yesterday that Ms Jagose was critical of, is just a reference to passages in the Court of Appeal, and I've tried my best to make it as neural and balanced as I can, but what we have is a whole series of errors,

a whole series of pretty patent mistakes. For example, and I'm grateful to the Solicitor-General for her clarification this morning, we have an assurance to comply with international obligations, and I know that I discussed this in some detail with Your Honours yesterday, but what's been usefully and very properly clarified is that reference to international obligations has no content. So it is, so far as that is concerned, empty. Likewise the –

GLAZEBROOK J:
That wasn't what I took from what the Solicitor-General said.

MR KEITH:
I took it that, I'm happy to be corrected, that the Minister approached it on the basis that China had no international, relevant, applicable international obligation. I think that's right Ma'am. So if it didn't have any, if the Minister interpreted that as meaning it doesn't have any applicable obligations, then that's what we have.

O'REGAN J:
I must say I still find that breath-taking.

MR KEITH:
But it is the Minister's assessment Sir.

O'REGAN J:
They're international obligations, they're clearly applicable, and they've said they'll abide by them.

MR KEITH:
Far be it for me to second-guess the Minister and the Court of Appeal Sir.

O'REGAN J:
Well it would be the only thing you're not second-guessing her on.

MR KEITH:

And I don't want to do it again please, yesterday was enough. But I do say at least that where we did get to, even best will in the world, that undertaking cannot make up for what in Article 14 is not permitted by Chinese law.

But my point in bringing that up, and I'm not going to go back through any of these, but when one looks at those things, when one looks, for example, finding by the Court of Appeal that advice from the expert on Mr Kim's behalf was misrepresented to the Minister, he talked about these Criminal Procedure Laws, the Minister was told he didn't. We have another example in the submissions of the Committee Against Torture findings being held out as really just confirming what had gone before. They didn't. We have the Amnesty International report being held out as evidence of this theory of high risk people. It wasn't. And the Nowak study, similarly, is high risk. It wasn't.

ELLEN FRANCE J:

For these purposes you have to work on the basis, don't you, of the findings the Court of Appeal made?

MR KEITH:

Yes, and they make the finding about Mr Ansley.

ELLEN FRANCE J:

Well, then you – what this is about is why then they should have taken, adopted a different remedy.

MR KEITH:

Yes.

ELLEN FRANCE J:

And I don't quite see how what you're saying, what your submission –

MR KEITH:

I'm saying that the nature of the – sorry Your Honour, I didn't mean to…

ELLEN FRANCE J:

Sorry, I'm just unclear what your submission is in this respect.

MR KEITH:

My submission is that the nature of the error, what serves to be remedied here for Mr Kim, is when the errors approach a certain level of patency, when they become so back-glaring, then the fitting remedy for Mr Kim, who has been dragged through this for however many years, is to quash and not remit. That's what I'm saying makes out the basis, that this is the only effective remedy. So I'm saying that these errors, most of which aren't challenged by the Crown on appeal, and they aren't, not only are mistakes, they're mistakes of a gravity that mean if this had been got right the outcome for Mr Kim would very likely have been different, certainly faster.

O'REGAN J:

So, is your submission that they're errors or that there's some sort of impropriety going on? I mean you seem to be saying the latter.

MR KEITH:

I'm content to take them as errors Sir, but I'm taking them as errors that are of a nature that have needlessly prolonged this proceeding, and I mean this proceeding as in this entire extradition. If, for example, the Court of Appeal is right in saying that more assurances, other assurances, were needed, or in saying that some of the assurances provided didn't actually address the problems.

O'REGAN J:

Well the High Court Judge, I mean, the High Court Judge thought they were fine. I don't see how you get anywhere close to impropriety on that.

MR KEITH:

I'm not suggesting impropriety Sir, I'm not. I am saying that, as an effective remedy now, at this remove, several years down the track, these errors having been found and not contested, the Court has a remedial discretion as

to what to do next and my submission on the errors, you have already heard me on, what can be done and can't be done by the Minister, if remitted, and we have some concrete indication of that. But my second point is the errors are of such a nature that the proper remedial response, the proper discretionary response of this Court is to quash and not remit.

O'REGAN J:
Is that what you asked the Court of Appeal to do?

MR KEITH:
No Sir. Why we, well, we did in fact ask for quashing and not remitting in the statement of claim and as for relief in the Court of Appeal. We did not frame it in terms of saying these errors, as that Court later found, are of such a nature.

ELLEN FRANCE J:
Sorry, did you ask for quashing in the Court of Appeal?

MR KEITH:
We asked for quashing in the claim as first laid and we asked for quashing and not remitting by way of relief in the Court of Appeal, that's our note anyway, but it wasn't made in the terms that we're now making it and I accept that.

GLAZEBROOK J:
I can understand the submission that there's no point in remitting because the decision would have been different had the errors been –

MR KEITH:
Yes.

GLAZEBROOK J:
– different, so your second submission though is that there were a whole lot of errors and time now means it shouldn't be remitted?

MR KEITH:

Yes Ma'am, that's very well put. Beyond that, Your Honours, and I'm just really seeing, I said I'd be quick, but I may have been extremely quick. I did want to touch on two points.

O'REGAN J:

Nothing wrong with that.

MR KEITH:

No, no. Mr Ellis' words may have been, "Be quick if you can be, young man." So I'm doing my best. The two further things that I was going to touch on in particular from the written submissions, so the – 27.2 to 27.3 of the written submissions we say the Court doesn't come to this question in isolation or by way of speculation, and we talk about what has happened in Hong Kong and Australia, we actually talked about Australia earlier, and in Sweden, and in case it's suggested that my criticisms of the Chinese Government reactions here are somehow pious or irrelevant, my learned friends have said quite a few times that the assurances given here were detailed and sophisticated and the one point I bring up here, and I'll just give you the reference although I'm happy to go back to it, in the respondent's submissions to the substantive appeal we said that wasn't the case but we also averted to, at page 23, it's at footnote 88, the *Othman* case, or "Otman" I think is Dr Butler's pronunciation and I'm sure he's right, is instructive partly because the undertakings there were more significant, more detailed and particularly said give a fair trial in terms of Article 6, but having been turned down in the European Court of Human Rights in the first place the Jordanian Government came back and quoted it, footnote 88, from the follow-up decision, which was in the British Special Immigration Appeals Commission, and the evidence there was all members of the executive Government have made it clear that while they cannot interfere in judicial decision-making, they will do everything within their power to ensure a retrial is fair, and they make concrete proposals. It's also recorded that the Jordanian judiciary are determined to ensure a fair retrial, and there's comment on the profession in the decision, the profession in Jordan saying, you know, trying. So that's the reaction that one makes in this

environment, not to insult and denounce and cry partiality. You try harder. You do better. And that is part of what I'm saying about there being only one decision here.

The other point that I did want to touch on was this discussion about new material and there's actually a very useful summary in my learned friend's submissions on the cross-appeal at paragraphs 11 and 12 and if I could take Your Honours to that. Now we've said – well, as a starting point there was common ground in the Court of Appeal that the Minister ought to have regard not only to what material she had before her but also what was reasonably available to her. The only point I make about the first category of material, that at paragraph 11 of the Crown submissions, is that as well as Mr Ansley who was very critical of Chinese police and so on, that could be substantiated by reference to material and academic commentary available to the Minister at that time about fabrication of evidence, including forensic evidence, and we say that's material here. It's permissible here to look to that under both limbs that we've advanced as a case for injunction. So both as to there being nothing to be done here about a 10 year old investigation which may well have been contrived and we won't ever know, and also to this intractable problem.

GLAZEBROOK J:
Some of that forensic evidence has been retested in New Zealand, hasn't it?

MR KEITH:
Yes, but the objection is and the evidence from Mr Ansley was you can trust nothing, and I take it from that we cannot trust what has been done or not done in terms of chain of custody, in terms of fabrication, this material and Mr Ansley are quite clear that fabrication and also removal of inconvenient material goes on.

And on the post-dating material, paragraph 12, 12.1 through 12.4 particularly, we do say that this material – actually, 12.1 to 12.3 really – we do say this

material just goes to my earlier point about the reaction and approach of the Chinese Government.

And this is partly in answer to the questions from Justice France in particular, I think, as to what did we seek? Why are we seeking it now? We're seeking it now because we have the findings of the Court of Appeal. We have a finding, a whole series of findings of inadequate inquiry and so on. We have a whole series of findings about the inadequacy of the undertakings. If those are sustained, then what we say is that those errors are so grave that they warrant this remedy.

I've already touched on what I say is the incontrovertibility of the Chinese Government's statements and the Swedish decision. I think that's actually 2019 in paragraph 37, I'm sorry.

38, and Mr Ellis has already touched on this and we have the psychological report, but we do ask the Court to bear in mind that we have had five years' of imprisonment and a total of eight years of various kinds of detention and all the while having the prospect of conditions something like death row syndrome.

And last we do say that we do quote the present Minister, and I won't quote my learned friend, the Solicitor-General, because she has very properly accepted there are both issues of safe haven but also of human rights, but the Minister said publicly about the Court of Appeal decision that we needed to take care that we don't set ourselves up to become a safe haven. The Solicitor-General said yesterday "a soft touch". It's not necessary for me to say that that's inappropriate. It's simply wrong.

The question, the point, is that the Minister and her officials undoubtedly tried very hard in the years leading up to 2016 to secure what was then unprecedented, in recent memory at least, extradition. We have in Mr Adank's evidence something about the difficulty and effort that goes into negotiating diplomatic assurances, something New Zealand had never had to

do before. But what that's yielded, what we have in the Court of Appeal here, is that we have these intractable problems and that's why we say for Mr Kim in his own case in the circumstances the injunction we seek is the appropriate remedy.

Now unless Your Honours have questions – I have tried to be fast, Mr Ellis will be relieved – those are our submissions, Ma'am.

GLAZEBROOK J:
Thank you. Madam Solicitor.

SOLICITOR-GENERAL:
Thank you, Your Honours. Of course, you've got the written submissions from the Crown and I won't go through them but I'll touch some of the matters that have just arisen, especially in light of what I understand Mr Kim's position is now on relief. I think Mr Ellis probably made the clearest submission of Mr Kim's case which is that he said enough is enough, and that is the main and highest point that I think Mr Kim comes to this Court with now by saying really it has been too long, too much and enough is enough. The Crown opposes that relief where it would amount to this Court taking the decision that has been given to the Minister and deciding for itself that Mr Kim cannot be surrendered. That is our main opposition to that relief. But may I touch on a few things along the way?

My friends have referred both in their substantive appeal and in the cross-appeal to the Swedish case, *QJ*. We're referred to it earlier but my friends now rely on it to say that it has since the Minister's decision become a matter that is incontrovertible that somebody else has said no and can never be surrendered to China. That's not what the Swedish case says. That's in the respondent's cross-appeal authorities at tab 25. But what happened there, and Your Honours have been to it, but as we know *QJ* was a recognised member of a very high-risk group for torture, a political dissident and a former party member wanted on significant embezzlement or at least financial crimes. If surrendered he would be put into a sanctioned but

separate part of the criminal justice system especially for party members which is notoriously closed. It's at paragraphs 59 and 19 of that case. As Your Honours I think identified earlier today, the PRC didn't actually give assurances in that case but it seems that the Swedish authority put to the Court the assurances that it would seek, and one of the things that the Court said, "Well, we haven't got anything from China." They were dissatisfied with that. They determined that it was difficult to monitor compliance given that China doesn't allow the UN Torture Convention protocols for inspections and international monitors, so that assumes that under the assurances China will have the same attitude but in fact in our assurances we know that is not so. So the Court in Sweden wasn't saying never. They were saying on this basis and for this person, again in my submission doing the very test that we say the Minister did do. No, they say that is not something that we will do, surrender QJ. So it isn't that the Swedish case stands for the proposition that it is uncontroverted that they will not send to China, just in that case, on that basis, they wouldn't.

So the point that my friends make is that for there are only two reasons where the relief they seek, an injunction, I'll come to that shortly, there are only two bases where that sort of relief should be given. One where there's only one decision that can be taken, and to that I say that my friends rehearse their general appeal where they focus your attention on the general situation in the PRC and the criticisms that they've already made of that, without reference then to the particular question about Mr Kim because that is, of course, the Minister's question, there simply cannot only be one answer to this because it is, as we've already seen on the record, the first decision when it was remade there was a different set or further assurances given that made the Minister balance the risk and the mitigations in a different way.

The second basis is that where no other remedy would do because the issues here are so intractable. The Crown takes issues with the proposition that the reasons put forward as being intractable are, in fact, so. It was said that Mr Ansley has put in the record, or has given evidence that nothing can be trusted, and so the 10 year old record of the crime becomes something that

Your Honours are invited to consider is an intractable problem. But in fact the evidence is also before the Minister from Professor Fu that the changes that the reforms in 2012 have brought are continuing. That their problems are more evident and obvious where there are political or sensitive cases is simply not a proposition that we can accept from Mr Ansley that nothing can be trusted. So the proposition that there is no other remedy we take issue with. There is, if the Court finds that, against the appellant and the Court of Appeal is upheld, the correct remedy is for the Minister to take that decision again guided by this Court as we've already had an exchange quite probably also taking account of the new information that Mr Kim now wishes to put forward.

I'll come to the point on injunction in a moment. Mr Keith's proposition that this Court should quash and not remit the case because the errors found in the Court of Appeal, which haven't been contested, are of such a magnitude that the decision can't be taken, so two points that we take issue with there. Of course the Crown contested the whole of the Court of Appeal's judgment, and yes we didn't go through every line and say, for example, the criticism that the Judge makes of the Minister's setting aside some of the concerns that Mr Ansley had, the Court thought they did too lightly, we take the view that the Court has got that wrong about requiring – well I don't want to repeat the appeal point, but requiring an approach to be taken of a full assessment of a general situation before the Minister could move on. So the issues are not of such a magnitude that a decision could not be retaken. As has been evidenced here the Minister has made one decision that was said to be unlawful by the High Court. The second decision the High Court said was lawful, and yes I accept that it's been set aside by the Court of Appeal, but these decisions are capable of being taken again. My friend added to that in a second version of that proposition, that the time now passed should lead this Court to saying enough is enough. You know, there is a significant time passing aspect to this case, and that is just a fact and we can't avoid that. Our written submission in the main appeal has a chronology which sets out what has happened in the period since the young woman was killed in China, as it relates to this case. The time that passes is an issue that the Minister is

entitled to consider under the Extradition Act when she, or he is more likely, reconsiders if that is the remedy given. So the points that my friend has put to you are all matters that the Extradition Act asks the Minister to consider. So that is the proper place, we say, for those things to be considered.

Injunction. I'll just address the point that I think the Crown Proceedings Act is in our authorities bundle but Your Honours probably don't need to look at it to know that what I'm going to say is that the Crown can't be injuncted in the way that might be being suggested, but in any event of course I take the view that if the Court was to say, in the expression of Mr Kim's rights, that it would be a breach of his rights, under either international or domestic human rights legislation, to extradite him, then no injunction is needed on a Crown or Crown party. But that proposition is a very high bar for this Court which, in the main appeal we have opposed the proposition that you could come to that view, which would have to be that in absolute terms on no view can Mr Kim now be surrendered. In my submission that's not open to you and that is a question that must go back to the Minister.

I'll just take a quick look at the written submission. Ms Todd's just reminded me of a further point about discharge which, of course, the Extradition Act provides as well, a separate process by which the Court considers a discharge application. Now that is not a matter that Mr Kim can yet bring because he needs to have his review proceedings finally determined. But once that occurs – section 36 of the Extradition Act. Once that occurs Mr Kim, if he isn't surrendered and conveyed out of New Zealand within two months after the final determination of this proceeding then he may apply to a High Court Judge to be discharged from the process. So again the Act anticipates that that is a step that can be taken but not, in my submission, an extraordinary judicial review remedy and not because there is no other remedy available. The other remedies are available. They're in the Extradition Act.

O'REGAN J:

It's really more here judicial review remedies, isn't it, we're talking about? We're talking about quashing the decision?

SOLICITOR-GENERAL:

Yes, and not –

O'REGAN J:

And on the basis that there's no point in sending it back effectively because the Minister couldn't lawfully determine that surrender's appropriate and the Court –

SOLICITOR-GENERAL:

That's right and that's in fact the only remedy I would say that's possible. Obviously not one that I support.

O'REGAN J:

But that's essentially what Mr Keith's asking for.

SOLICITOR-GENERAL:

It would have to be on the basis that this Court would have to declare that Mr Kim cannot be surrendered lawfully, cannot ever be surrendered lawfully, and that, in my submission, is a very high bar which this Court won't reach or shouldn't reach. But yes, that would be the judicial review remedy. My friend put it in terms of there's no other remedy will do but in fact if this Court says, "Appellants, you're wrong. The decision of the Court of Appeal stands. It goes back to the Minister," within two months Mr Kim can have a further attempt to persuade the Court to discharge him from the extradition process.

ELLEN FRANCE J:

The discharge isn't – isn't it forever, though, is it, in the sense that if you – I was just looking at…

SOLICITOR-GENERAL:

I thought the opposite, Your Honour, but…

ELLEN FRANCE J:

Well, I might be – I was just looking at section 38.

SOLICITOR-GENERAL:

Yes, quite right. Discharge of a person doesn't preclude further proceedings. That would have to start again in the – eligibility stage would have to be gone through again but, yes.

ELLEN FRANCE J:

Yes, it's just I think that means the discharge in that sense doesn't necessarily get Mr Kim to where he wants to be.

SOLICITOR-GENERAL:

No, quite, because he wants a finding or a declaration that he can never be lawfully surrendered, yes.

GLAZEBROOK J:

Well presumably absent some kind of fundamental change in the position in China even if you quashed and said at the moment he can't go back but it would be difficult to say he could never lawfully go back because, I mean it's slightly –

SOLICITOR-GENERAL:

So it would have to be presently he cannot be surrendered would have to be where the Court gets to.

GLAZEBROOK J:

Exactly, that would be the reason you wouldn't send it back for another decision I would have thought, although the delay point if that is a point and in judicial review you sometimes do come to that view.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

It's not impossible I would have thought it would be unusual in an extradition context.

SOLICITOR-GENERAL:

And I say two things to delay, one is that it is a matter for the Minister to consider when he considers the matter again if that's where we get to.

GLAZEBROOK J:

Yes, but it may be that you come to the view that no reasonable Minister could, with the type of delay we've been looking at and I think in extradition cases that has sometimes been the view some Courts have come to in jurisdictions.

SOLICITOR-GENERAL:

I mean we could speculate as to a set of circumstances in which that might be appropriate for the Court to say that enough is enough delay as really counting here, we say that's not here. Ms Todd is pointing out section 8 of the Extradition Act requiring that the matter has to be – the passage of time has to – it can't just be the simple passage of time but rather the unjust and oppressive nature of that passage of time. Is that section 8? Yes, the amount of time having passed having regard to all the circumstances it would be unjust or oppressive to surrender the person in section 8. I'm happy to rest on the written submission unless Your Honours have any further questions.

GLAZEBROOK J:

Thank you.

SOLICITOR-GENERAL:

Might I say just before I end, Your Honours, I'm very grateful to Ms Todd and Ms Taylor for their assistance in this case. I know I've been up in front of you

but greatly assisted by them. Kia rite, ki te pai, o Te Kōti. As the Court pleases.

GLAZEBROOK J:
Thank you.

MR ELLIS:
If you could just give us a moment. The first point was a general observation on the minister's got to decide not the Court. I don't think we've mentioned this in these proceedings before you but we had some considerable discussion about the Law Commission's extradition bill which removes the decision making power from the minister and has it residing in the Court. No doubt that has not been passed. I think it was about – well Geoff McLay was the Commissioner, it was probably, I don't remember when, 2015 perhaps because this case probably needs to finish before that's politically acceptable. That's just a little background information.

In terms of Justice France section 36, this charge, we've been there before Justice Mallon. I think we made Her Honour think a bit. We did say we wanted a discharge in that case and the other thing that I suppose we could have done and haven't done because it's risky, he couldn't apply to be a protected person because he's a permanent resident but that was another avenue of possibility but if it came round again on section 36 it is self-apparent that we'd say its undue delay and then my learned junior reminds me to say in respect of the Swedish case, really the point we're making is the Swedish Supreme Court in July last year is saying undertakings or guarantees is the wording they use, are not reliable from China and we adopt that and lastly we say the Court of Appeal decision stands uncontroverted and it is a powerful decision. It's a decision that drew attention, you know, around the world. I was at Harvard and read it in the *New York Times* at the time. It's a matter of some importance as will this decision be, and I know that it's obviously in our client's best interest that you make a decision as soon as possible but we would obviously prefer you to make a well-reasoned and well thought out decision rather than a rapid one.

So those are our submissions on the cross-appeal unless there is any questions.

GLAZEBROOK J:
Thank you, Mr Ellis. Thank you very much all counsel for your assistance and the point the Solicitor-General was making was well made. We know very well that there is a lot of work goes behind the scenes in these matters, not just with the people who are sitting at the counsel table, but also other people that are working in the various offices, so the Court is always very grateful for the assistance given by counsel and their teams and, in particular, in this case we've been very grateful for the assistance we've been given.

We will take time to consider. We take the point that's just been made and we will give our decision in writing as soon as possible and if there is any other matters that we think counsel may be able to assist on after we begin our deliberations we will also get back to counsel as soon as possible. Thank you.

COURT ADJOURNS: 3.28 PM