Supreme Court of New Zealand

20 December 2012

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

KYUNG YUP KIM v THE PRISON MANAGER, MOUNT EDEN CORRECTIONS FACILITY (SC 80/2012)
[2012] NZSC 121

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Kyung Yup Kim, a citizen of the Republic of Korea and a permanent resident of New Zealand, is presently detained in Mt Eden Prison. An ex parte application for a provisional arrest warrant in respect of Mr Kim was made on behalf of the People's Republic of China, and issued by Judge Broadmore in June 2011. The Minister of Justice decided to allow the statutory extradition process to be invoked on 15 August 2011.

Mr Kim has been offered fixture dates for the Court's hearing under the Extradition Act that will determine whether he is eligible for surrender in relation to a murder he allegedly committed in Shanghai. He has successfully applied on each occasion for adjournment of the fixture so the hearing has not taken place.

On 12 September 2012, following a change of counsel, Mr Kim applied to the High Court for a writ of habeas corpus, claiming that he was being unlawfully detained. The High Court held that the arguments advanced on behalf of Mr Kim were not suitable for summary determination in a habeas corpus application. The Court of Appeal upheld this decision, and Mr Kim now appeals to this Court.

Mr Kim's counsel argued that the Judge did not have reasonable grounds to be satisfied he was an extraditable person under the Extradition Act because: first, China had not shown that it had complied with provisions of its own extradition law in requesting surrender of

Mr Kim, and secondly, Mr Kim was merely suspected of committing the murder, and had not in fact been "accused" of the offence. Counsel, in an argument which differed from his submissions in the lower Courts, submitted that these challenges were capable of fair summary determination on a habeas corpus application and did not seek to question the current approach to habeas corpus applications taken by the New Zealand Court of Appeal.

The Supreme Court has unanimously dismissed the appeal. Three of the five Judges of the Court (the Chief Justice, McGrath and Glazebrook JJ) agreed with Mr Kim that the arguments were capable of determination on a habeas corpus application. The arguments themselves turned on the information before the Judge at the time the warrant was issued, and New Zealand law. The international context of the Extradition Act made it clear that the meaning of an "accused" person necessarily accommodates the procedural differences in the approach to prosecution of crime in different national jurisdictions. Therefore, in deciding whether a person who was to be the subject of extradition proceedings was an "accused" person, rather than focussing on whether formal charges had been laid, the particular facts of each case must be assessed. In the present case, on the information before the Judge, Mr Kim was plainly an accused person.

The Supreme Court also decided that it was not necessary to establish compliance with extradition law in China before a provisional warrant was issued. The provisional warrant process is preliminary and able to be used before any request for surrender has been made. Whether or not Chinese law was complied with is accordingly irrelevant to the issue of a provisional warrant. Other arguments relating to the possibility of torture or imposition of the death penalty, if Mr Kim is surrendered, were premature. They are mandatory and discretionary considerations at a later stage in the process under the Extradition Act. The Chinese government has also said that it will not impose the death penalty in Mr Kim's case.

Chambers J's separate concurring judgment would have dismissed the appeal for the reasons set out by the Courts below, and William Young J agreed that the approach taken by those Courts was open to them.

The appeal is accordingly dismissed.

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