IN THE SUPREME COURT OF NEW ZEALAND

SC 80/2012
[2012] NZSC 121

BETWEEN	KYUNG YUP KIM Appellant
AND	THE PRISON MANAGER, MOUNT EDEN CORRECTIONS FACILITY Respondent

Hearing: 10 December 2012

Court: Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ

Counsel: T Ellis and G K Edgeler for Appellant
M R Heron QC Solicitor-General and D J Perkins for Respondent

Judgment: 20 December 2012

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS

ELIAS CJ, McGRATH AND GLAZEBROOK JJ

(Given by McGrath J)

Introduction

[1] Kyung Yup Kim, a citizen of the Republic of Korea and a permanent resident of New Zealand, is presently detained in Mt Eden Prison pursuant to a warrant of detention issued under the Extradition Act 1999. Mr Kim appeals to this Court against a judgment of the Court of Appeal,[1] upholding the High Court,[2] which refused his application for a warrant of habeas corpus.

Procedural background

[2] In May 2010 Interpol published a Red Notice in respect of the appellant on its public website. On 1 June the police in Shanghai wrote to the New Zealand office of Interpol asking that he be provisionally arrested. The letter foreshadowed that the People's Republic of China intended to request the surrender of Mr Kim from New Zealand to China for the intentional murder of Ms Peiyun Chen in Shanghai in December 2009. It was accompanied by a certified copy and English translation of a warrant for the arrest of the appellant issued by the Shanghai Municipal Public Security Bureau. The letter also enclosed a number of documents variously headed "Identification Record", "Interrogation Record" and "Questioning Record" comprising verified written statements to police officers of the Criminal Investigation Division of the Bureau. China's request for extradition of the appellant was received by the New Zealand Government on 23 May 2011.

[3] An ex parte application for a provisional arrest warrant in respect of the appellant was made on behalf of China early in June and a provisional arrest warrant dated 9 June 2011 was issued by Judge Broadmore.

[4] The appellant was arrested soon after and came before the District Court on 13 June. He did not then seek bail, indicating he might do so in the future, and was

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1 *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZCA 471, [2012] 3 NZLR 845.
2 *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZHC 2417, [2012] NZAR 990.

remanded in custody. When some six months later he applied for bail, his application was heard by Judge Gibson and refused with reasons on 7 February 2012.[3] An appeal to the High Court against that decision was dismissed.[4] Since then Mr Kim has been detained under warrants which have been successively reissued at callover hearings at the District Court. During the period of his detention the appellant has been offered fixture dates for the Court's hearing under s 24 of the Extradition Act that will determine whether he is eligible for surrender in relation to the offences he allegedly committed in Shanghai. He has however successfully applied on each occasion for adjournment of the fixture.

[5] On 12 September 2012, following a change of counsel, the appellant applied to the High Court for a writ of habeas corpus, claiming that he was being illegally detained. He has also recently filed judicial review proceedings, in which he challenges the decision to issue the provisional warrant and various actions and decisions of New Zealand government Ministers and officials in relation to the application for his extradition. The sole matter before this Court, however, is the habeas corpus proceedings.

Issues

[6] The appellant's argument in this Court is that he has been unlawfully detained because there was insufficient information before the Court in terms of s 20 of the Extradition Act to satisfy the Judge that:

(a) the authorities which were required by art 47 of the Extradition Law of the People's Republic of China to consent to a request for extradition had given their approval; and

(b) there were reasonable grounds to believe the appellant is accused of having committed an extradition offence in China and that he was, accordingly, an extraditable person. The police in Shanghai merely

[3] *R v Kim* DC Auckland CRI-2011-004-11056, 7 February 2012.
[4] *Kim v People's Republic of China* [2012] NZHC 294.

suspected that he had committed the murder and wanted him for questioning.

The statutory scheme

[7] Before addressing this argument, it is necessary to refer to the statutory context, confining our discussion to provisions which are relevant to this case. Requests for extradition to and from New Zealand are governed by the Extradition Act. The object of the Act is stated in s 12:

> **12 Object of this Act**
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> The object of this Act is to provide for the surrender of an accused or convicted person from New Zealand to an extradition country or from an extradition country to New Zealand, and in particular—
>
> (a) to enable New Zealand to carry out its obligations under extradition treaties; and
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> (b) to provide a means for New Zealand to give effect to requests for extradition from Commonwealth countries; and
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> (c) to provide a means for New Zealand to give effect to requests for extradition from non-Commonwealth countries with which New Zealand does not have an extradition treaty; and
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> (d) to provide a simplified procedure for New Zealand to give effect to requests for extradition from Australia and certain other countries; and
>
> (e) to facilitate the making of requests for the extradition of persons to New Zealand.

"Extradition country" is defined in terms that denote a country to which the part of the Act providing for the relevant extradition proceedings applies.[5]

[8] As the particular purposes listed in the object provision foreshadow, the Act provides a number of means for giving effect to extradition objections or requests. In particular, provided certain requirements are met, the Act enables non-Commonwealth countries and countries with which New Zealand does not have an extradition treaty (a category which includes China) to make requests for extradition of a person accused of an offence committed within that country's

5 *Laws of New Zealand* Extradition (Reissue 1) at [8].

jurisdiction. To this end, Part 5 of the Act provides, in s 60, for the extension of its provisions to cover individual requests on an application to the Minister of Justice. The application must be accompanied by duly authenticated supporting documents. These include a warrant for arrest of the person issued in the extradition country by a person having authority to issue it, together with a written deposition describing the offence, the applicable penalty and the conduct constituting the offence.[6]

[9] The decision on whether such a request should be dealt with under the Act is made by the Minister of Justice who must consider certain matters, including the seriousness of the offence, the object of the Act and any other matters that the Minister considers relevant. If the Minister decides to extend the Act on such an individual request, the subject of the request is liable to be arrested and surrendered in the manner provided by the general extradition procedure in Part 3. That part of the Act then applies with the necessary modifications.[7]

[10] Section 60 also incorporates by reference the provisions in Part 3 for a provisional arrest. Section 60(7) provides:

> (7) … a provisional arrest warrant in relation a person who is, or is suspected of being, in New Zealand or is on his or her way to New Zealand may be issued in accordance with Part 3 *even if a request to which this section applies has not yet been made.* (emphasis added)

In this respect, s 20(2) mirrors s 60(7) and permits a provisional arrest warrant to be obtained under Part 3, even if at this point no request for surrender has been made.[8]

[11] There was no issue taken that Part 3 of the Act applies in this case. Under Part 3, there are four stages of decision-making in extradition proceedings. First, a District Court Judge may issue a warrant for the arrest of a person who is in, or suspected of being in or on the way to, New Zealand, for extradition purposes. Alternative procedures are available. The arrest warrant may be issued under s 19, on the request of the Minister, following a request for extradition of the person by an extradition country. Under s 20, the Judge may, in certain circumstances, which we

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6 Sections 60(2) and 18(4).
7 Section 60(6).
8 In Part 3 of the Act, a request for surrender is made under s 18.

will later discuss, issue a provisional arrest warrant whether or not a formal request for surrender of the person has been made under s 18. That is the type of warrant issued by Judge Broadmore in this case.

[12] The Act requires that a person arrested under either warrant must be brought before the Court as soon as possible. This is the second stage. The person will either be granted bail, which is not available as of right, or will be detained pending determination of his or her eligibility for surrender under s 24. If the Judge decides that the person is eligible for surrender, the Minister must determine whether the person is to be surrendered.[9] Subject to certain exceptions not presently relevant, if the Minister determines that the person is to be surrendered, the Minister must make a surrender order.[10]

[13] The determination of whether a person is eligible for surrender is under a judicial process. It comprises the third stage and a critical step in extradition proceedings under Part 3. If the person is held under a provisional warrant, the Court's hearing may not proceed until the Minister notifies the Court that he or she has received a request for surrender of the person.

[14] Subject to certain mandatory restrictions on surrender under s 7, and any circumstances giving rise to discretionary restrictions on surrender under s 8, the subject person will be eligible for surrender if the criteria under s 24 applicable to individual requests are established to the satisfaction of the Judge. The offence must be an "extradition offence", that is punishable in the requesting country by not less than 12 months' imprisonment, and the conduct must constitute an offence under New Zealand law which is subject to similar punishment. The Act, however, makes clear that it is the nature of the acts or omissions that is important, rather than how they are categorised or named or how the constituent elements of the offence are expressed in the law of the extradition country.[11] As well, the evidence of the offence produced to the Court or given at the hearing must be such that would justify a trial for the offence in New Zealand.[12]

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9 Under s 30.
10 Under s 31.
11 Section 5.
12 Section 4.

[15] Stipulated supporting documents accompanying the request for surrender must be before the Court. There must be a warrant for the arrest of the person for the offence issued in the extradition country. As well, there must be a written deposition describing the offence and applicable penalty, and setting out the conduct constituting the offence.[13]

[16] The fourth stage is the decision by the Minister on whether to surrender an eligible person. It is also subject to controls. The Minister must not decide to surrender the person if mandatory restrictions on surrender under the Act apply, or if it appears that there are substantial grounds for believing that the person would be in danger of being subjected to torture in the extradition country.[14] As well, the Minister may determine not to surrender if it appears that the person may be sentenced to death by the appropriate authority in the extradition country, and that country is unable to sufficiently assure the Minister that will not happen, or that if it does, the sentence will not be carried out.[15]

[17] The Minister may also decide that the person is not to be surrendered if it appears that compelling or extraordinary circumstances relating to the person exist (such as age or health) which would make surrender unjust or oppressive, or if for any other reason the Minister considers the person should not be surrendered.[16] These are the principal matters that the Minister must address where they arise. It is unnecessary for present purposes to refer further to other factors of this kind. Following a ministerial determination that a person is to be surrendered, the Minister must go on to make a surrender order in respect of the person.[17]

[18] In summary, there are four distinct stages of decision-making in extradition proceedings under the Act. First, a person who is the subject of a request to surrender or a warrant for arrest in another country (in this instance on an individual request) may be arrested on a warrant issued by a Judge. Secondly, the arrested person must be brought before a court as soon as possible and may seek bail. If no

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13 Sections 18(4) and 24(2)(a).
14 Section 30(2).
15 Section 30(3).
16 Section 30(3).
17 Section 31(1).

application is made or bail is refused, the person is detained pending determination of the extradition proceedings. Thirdly, the District Court must determine whether the person is eligible for surrender in relation to the offence for which it is sought. Fourthly, if found to be eligible, the Minister must determine whether the person is to be surrendered and then make any consequential surrender orders. The Act is prescriptive as to which matters must be addressed at each stage. The substantive decisions on eligibility and surrender are made at the third and fourth stages.

[19] This appeal, however, is concerned with the first stage of extradition proceedings and concerns the decision to detain a person under a provisional warrant issued under s 20. The purpose of such detention is to hold a person who is the subject of a criminal process overseas, so that extradition proceedings can be undertaken. This decision is preliminary to the substantive extradition proceedings and determinations that follow. So is the second stage in which the arrested person has the opportunity to seek bail, without which the person may not go at large. At this point, the Judge will determine if there is just cause for continued detention on the general principles of the common law in relation to bail.

[20] Against that context, we turn to the provision in the Act for issue of a provisional arrest warrant:

> **20 Provisional arrest warrant may be issued**
>
> (1) A District Court Judge may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him or her that—
>
> (a) a warrant for the arrest of a person has been issued in an extradition country by a court or a Judge or other person having authority under the law of the extradition country to issue it; and
>
> (b) the person is, or is suspected of being, in New Zealand or on his or her way to New Zealand; and
>
> (c) there are reasonable grounds to believe that the person is an extraditable person in relation to the extradition country and the offence for which the person is sought is an extradition offence; and
>
> (d) it is necessary or desirable for an arrest warrant to be issued urgently.

(2) A warrant may be issued under this section even though no request for surrender has been made.

[21] A prerequisite for the decision to issue the provisional warrant, in respect of a person in New Zealand, is that a warrant for the arrest of the person has been issued in the extradition country by a person authorised to do so. Section 20 does not, however, stipulate that the overseas warrant be issued in respect of a particular offence. Another prerequisite is that there are reasonable grounds to believe the person is an "extraditable person" in relation to the country and that the offence is an extradition offence. "Extraditable person" is a defined term:

3 Meaning of extraditable person

In this Act, a person is an **extraditable person** in relation to an extradition country if—

(a) the person is accused of having committed an extradition offence against the law of that country;

...

This requires that the person is accused of having committed an extradition offence against the law of that country and it is this provision which links the subject of the warrant to the alleged crime. A further prerequisite is that it must be necessary or desirable for the warrant to be issued urgently.

[22] China is not an extradition country but that requirement of the definition is met as a necessary modification of s 20(c) on the extension of the Act to an individual request. It is common ground that murder is an "extradition offence". It is also clear that, on the information available, the issue of a provisional warrant was urgent, if only for public safety reasons in New Zealand. What is in issue is the adequacy of the overseas arrest warrant and whether the information before the Judge was sufficient to satisfy him on reasonable grounds that the appellant was a person *accused* of having committed the offence of murder in China. If it was not, there was no basis for the Judge to decide the appellant was an extraditable person in relation to the extradition country under s 20(1)(c) and a prerequisite for issue of the warrant was not made out.

[23] The Judge had to be satisfied of these matters only "on the basis of the information presented to him or her".[18] This indicates that the Judge may rely on material that would be open to challenge at the eligibility hearing. The Judge acts only on the information put before the Court by the applicant. At that time there may not be a surrender application and the Judge may not have the detailed accompanying material required when one is made. But the material before the Court must be sufficient to satisfy the Judge the criteria are met. In the case of the person being an extraditable person this is according to the standard of "reasonable grounds to believe". There must be information which supports the Judge's belief, but the standard of reasonable belief is not high. It does not require information akin to evidence of an extent necessary in New Zealand to justify committal of an offender for trial.[19] If the Judge is satisfied, the provisional warrant may and usually will be issued. Questions concerning whether bail should be allowed will be addressed at the next stage.

[24] Finally, it is implicit in Part 3 that, following arrest, extradition proceedings are to be undertaken expeditiously.[20]

Habeas corpus

[25] This appeal relates to a habeas corpus application. Section 14(2) of the Habeas Corpus Act 2001 provides, subject to exceptions not relevant to this case:

> (2) A Judge dealing with an application must enquire into the matters of fact and law claimed to justify the detention and is not confined in that enquiry to correction of jurisdiction errors.

[26] Whether there were reasonable grounds on the information put before the Judge for him to believe that the circumstances of s 20(1)(c) were met turns on questions of fact and the application of New Zealand law. The High Court and Court of Appeal did not consider the question because they took the view that proceedings by way of habeas corpus were not appropriate, principally because determination of the validity of the overseas request would require evidence of a kind that could not

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18 Section 20(1).
19 *Laws of New Zealand*, above n 5, at [21].
20 Section 23(4)(c)(ii) in particular so indicates.

be accommodated in the habeas corpus procedure. Any challenge to the application of s 20(1)(c) should, they considered, accordingly be made in judicial review proceedings, rather than through habeas corpus. In this, they applied the decision of the Court of Appeal in *Manuel v Superintendent of Hawkes Bay Regional Prison*.[21]

[27] In *Manuel* the Court of Appeal held that habeas corpus is the appropriate procedure in which to challenge the lawfulness of administrative or judicial determinations only where the challenge is one able to be determined fairly by summary process. In other cases such challenge must be made in proceedings for judicial review.

[28] Leave to appeal to this Court in this case was granted on the basis that the correctness of *Manuel* was in issue. The Solicitor-General's written submissions that *Manuel* was correctly decided were prepared on that basis. At the hearing of the appeal, however, Mr Ellis for the appellant took a different approach to that taken in the Courts below. He said he was presenting an argument "within" *Manuel*, leaving more complex additional grounds he wished to argue for judicial review proceedings the appellant had brought. Mr Ellis submitted that the challenges to the appellant's detention based on both non-compliance with art 47 of the Chinese extradition law, and whether the appellant was accused or merely suspected of the alleged offending, were clearly capable of summary determination. He emphasised that no affidavit evidence had been called in response to his criticisms of the information before the Judge, which had been advanced months previously. On that basis Mr Ellis submitted that, even applying *Manuel*, the High Court and Court of Appeal should have found that the grounds for lawful detention under s 20(1) were not made out.

[29] For reasons that differ from those urged on us by counsel, but will become plain in our discussion of his argument, we consider that the challenge to the provisional arrest warrant was capable of fair determination on the basis accepted in *Manuel*. We therefore do not need to consider whether *Manuel* was correctly decided.

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[21] *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA).

[30] Both issues on which this appeal falls to be decided can be addressed shortly by reference to the statutory scheme, and the information before Judge Broadmore. On the first issue, Mr Ellis argued that no steps could be taken under the Extradition Act unless a proper request for surrender was before the Court. Counsel had put in issue whether the requirements of art 47 of the Extradition Law of China had been properly met. The article imposes procedural requirements on government agencies in China who wish to seek extradition, first to submit opinions to authorities for approval of the intended extradition request. The approving authorities include the Supreme People's Court, the Supreme People's Procuratorate, the Minister of Public Security, the Minister of State Security and the Ministry of Justice. The appellant's submission was that the absence of information concerning whether art 47 had been complied with, when that matter had been put in issue, was fatal to the application for issue of a provisional warrant. The short answer to that submission is that s 20(2) permits a provisional warrant to be issued even though, at the time, no application for surrender has been made. The warrant is "provisional" on an application being made in a reasonable time. Whether or not art 47 was complied with is simply irrelevant to the issues under s 20.

[31] As well, the appellant made submissions concerning the possibility of torture or imposition of the death penalty, if he is surrendered. These submissions are premature. They address mandatory and discretionary considerations which fall for consideration later in extradition proceedings. They are not matters that have to be considered under s 20 at the first stage. It follows that the claim that the information before the Judge was deficient in relation to compliance with art 47 fails because compliance is irrelevant to lawful detention in New Zealand under s 20.

Information before the District Court Judge

[32] The remaining submission for the appellant was that he had not been accused of having committed murder but was rather suspected of having done so. The purpose of the surrender application is said to have been to question him. On this basis, Mr Ellis argued, the Judge could not have concluded that the appellant had been accused of murder and was therefore an extraditable person. To address this

submission we set out a summary of the information before the Judge when he issued the provisional warrant.

[33] The Judge issuing the arrest warrant had before him documentary information similar in kind to that required to accompany an application for surrender. The application for a provisional warrant was supported by an affidavit by a member of the New Zealand Police which referred to and annexed the Interpol Red Notice. Under that notice, China was seeking Mr Kim as a "fugitive wanted for prosecution" on a "charge" of the "crime of murder". It also stated that Mr Kim was "suspected of murdering CHEN Peiyun".

[34] The initial letter seeking provisional arrest was sent by the person in charge of the organised crime division of the Shanghai CID. The letter recites that:

> The Chinese authorities intend to request the surrender of Mr Kim from New Zealand to China for the intentional homicide of Ms Peiyun CHEN in December 2009 in Shanghai.

[35] The letter also refers to the "alleged offending" and summarised information drawn from attached deposition statements:

> On 31 December 2009, a female corpse was found at a wasteland area in Shanghai. The body was found to be that of Peiyun Chen. It was clear from the autopsy done on the body that she had been intentionally killed.
>
> Mr Kim is suspected of killing the victim at his residence in Shanghai (room 402, number 57, lane 1911 Caobao Road, Shanghai, China) on 11 December 2009. Her DNA was found in the bedroom of that address. **Attached** are original true copies and translations of the interview records and statements of Jiaqin Li, his girlfriend, as to his place of residence.
>
> Mr Kim told a friend, Mr Kiyong Park, that he had just killed someone. **Attached** are the interview records and statement of Kiyong Park as certified true copies and translations into English.

[36] The letter concluded:

> **Sentences that can be imposed**
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> Under article 232 of the Criminal Law of the People's Republic of China, intentional homicide carries a penalty of death, life imprisonment or fixed imprisonment of not less than ten years but if the circumstances are relatively minor the person shall be sentenced to imprisonment for not less

> than three years but not more than ten years. In this case the People's Republic of China has agreed to waive the death penalty.

[37] Also annexed to the affidavit was a certified copy of an arrest warrant from the Shanghai Public Security Bureau which authorised the arrest of Mr Kim, "suspected of Intentional Homicide".

[38] One deposition statement said the appellant had left China for Korea on 14 December 2009. He left Korea for New Zealand on 4 October 2010. Personal details of Mr Kim were provided together with an identification of him by his girlfriend from a photograph also supplied to the Court. Transcripts of interviews with witnesses were also annexed to the affidavit before the Judge. These included interviews with Mr Kim's girlfriend and Mr Park, a friend to whom he is said to have confessed that "he found a prostitute and might have beaten her to death".

[39] Before the Judge was also the request of extradition from China sent to the Minister of Justice in March 2011. This refers to the Interpol Red Notice and that Mr Kim is "suspected of committing an intentional homicide". It asks for assistance from New Zealand to take Mr Kim "into custody and extradite him to China for prosecution", and states that he is "a suspect of intentional homicide" and that he "was found strongly suspicious of this crime".

[40] It is on the basis of this information that the lawfulness of the Judge's decision can and must be assessed.

[41] The provisional arrest warrant issued by the Judge contains this statement of the Judge's findings:

> On 10 June 2011 the People's Republic of China applied for a provisional warrant under section 20 of the Extradition Act 1999 for the arrest of KIM Kyungyup of Auckland, occupation unknown.
>
> The information provided in support of the application states that –
>
> (a) KIM Kyungyup is accused of the following offence in the People's Republic of China: murder (intentional homicide) pursuant to Article 232 of the Criminal Law of People's Republic of China.
>
> (b) On 11 March 2010 a warrant for the arrest of KIM Kyungyup in relation to the offence was issued by Xue Bin ZHANG,

> Commissioner of the Shanghai Municipal Public Security Bureau, on approval from the No 1 Branch of Shanghai People's Procuratorate on 10 March 2010.
>
> I am satisfied that –
>
> (a) The warrant for the arrest of KIM Kyungyup has been issued in the People's Republic of China by a judicial authority having lawful authority to issue the warrant; and
>
> (b) KIM Kyungyup is in New Zealand; and
>
> (c) There are reasonable grounds to believe that –
>
> (i) KIM Kyungyup is an extraditable person within the meaning of section 3 of the Extradition Act 1999;
>
> (ii) The offence for which KIM Kyungyup is sought is an extradition offence within the meaning of section 4 of the Extradition Act 1999; and
>
> (d) It is necessary or desirable that a warrant for the arrest of KIM Kyungyup be issued urgently.

Is the appellant "accused" of the offence?

[42] The meaning of "the person is accused of having committed an ... offence" in s 3(a) of the Extradition Act must be determined, having regard to the purpose of the provision and the context in which the phrase appears under the Act. Under s 12, the Act's object is to provide for surrender of "an accused or convicted person" and the object extends to providing a means of giving effect to individual requests for extradition for non-Commonwealth countries and those with which New Zealand does not have an extradition treaty.[22] The overall purpose of the Extradition Act includes facilitation of the bringing to justice of those in New Zealand accused of serious crimes committed outside of New Zealand. It is well-recognised that this purpose calls for a contextual construction of extradition statutes that accommodates the different legal systems to which they apply, rather than one premised on meanings reflecting the context of criminal procedure under New Zealand domestic law.[23] This is an instance of the well-established presumption of statutory interpretation that, as far as the wording allows, legislation should be read in a way

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22 Section 12(c).

23 *Re Ismail* [1998] UKHL 32, [1999] 1 AC 320 at 329.

that is consistent with international obligations.[24] New Zealand extradition legislation gives general effect to such obligations and in certain cases extends them.

[43] Ascertaining whether someone in New Zealand is an "accused" person in the extradition context necessarily takes account of the procedural differences in the approach to prosecution of crime in different national jurisdictions. It is not appropriate to look to a formal charge, equivalent to what happens under New Zealand procedure at a relatively early stage, to identify when a suspect becomes an accused person. Nor does the issue of whether someone has been accused turn on the way documents from the overseas country are expressed. When a prosecutor is satisfied that sufficient evidence has been gathered to bring criminal proceedings and takes a step towards commencing them against a person, he or she will be an accused person for the purposes of the New Zealand legislation. As the House of Lords said in *Re Ismail*,[25] the approach to when a person is accused "will require an intense focus on the particular facts of each case".[26]

[44] It follows that the fact that an enforcement authority seeks surrender of a person or provisional detention prior to laying formal charges is not inconsistent with the person being properly regarded as an accused person. The purpose of the questioning may be to check that there is a proper basis for an official accusation after hearing from the accused person.[27] It is a feature of many national systems that the final prosecution decision may be made at a later stage than under New Zealand procedure, with the trial taking place soon thereafter.[28]

[45] I turn to the key facts of this case. The indications of the autopsy that the deceased had been intentionally killed, and the finding of her DNA in the appellant's bedroom, were key facts before the District Court. So was the statement by a friend that the appellant had told him he had just killed someone. Personal details concerning the appellant linking him to the apartment and providing photographic identification, were also before the Court. The information before the Judge also

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24 *New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA).
25 *Re Ismail*, above n 23.
26 At 327.
27 *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) at [149]–[156] per Thomas P.
28 *Assange* at [153].

included a memorandum from counsel for the applicant recording that the appellant had left Shanghai "shortly after the alleged offences" and saying that "the Shanghai police have made an urgent request for his provisional arrest pending a request for surrender".

[46] This information indicates that, at the time the Chinese Police requested his arrest under a provisional warrant, extensive evidence implicating the appellant had been obtained. Taking all these matters into account, the process of prosecution under Chinese law was well under way. On this analysis of the facts that were before the Judge, the appellant was clearly a person whom the Judge had reasonable grounds to believe had been accused of the alleged crime for which his arrest was sought. It followed that he was able to be satisfied, as he was, that the appellant was an extraditable person. The second ground of appeal must accordingly also be dismissed.

[47] It follows that the issues in the appeal can be and are fairly determined in these proceedings against the appellant. There was no defect in the provisional warrant under which he was originally detained and in reliance on which all subsequent warrants were issued.

Conclusion

[48] The appeal is accordingly dismissed. The respondent did not seek costs and we make no award.

WILLIAM YOUNG J

[49] Under s 9(3) of the Habeas Corpus Act 2001, an inter partes hearing date must be allocated that is not more than three working days after an application for habeas corpus is filed. It is obviously not mandatory for the High Court judge to determine the application on the first allocated hearing date, but s 9(2) requires such applications to be "disposed of as a matter of priority and urgency". This happens in a forensic context in which the parties are not entitled to "general or special

discovery"[29] and the High Court Rules as to discovery and inspection are not applicable.[30] A decision in favour of an applicant is not appealable.[31]

[50] The typical speed with which such applications are dealt with is illustrated by what happened here. The application for habeas corpus was filed on 12 September 2012. The respondent jailer's response is dated 13 September and invoked the then current warrant and the relevant provisions of the Extradition Act 1999 and the Summary Proceedings Act 1957. The case was heard before Kós J on 14 September and judgment was issued on 18 September.

[51] Where an application is against the applicant's jailer, the jailer can be expected to produce at short notice the warrant (or other authority) under which the applicant is held. But behind such a warrant, there will always be a decision, almost always judicial. Such a decision is subject to judicial review in which the decision-maker and other relevant parties will be respondents. So it might be thought that the production by the jailer of an apparently regular warrant is a sufficient response to an application for habeas corpus and that, in particular, there is no requirement for the jailer to justify the correctness or regularity of the earlier decision. Unsurprisingly, there is a good deal of authority to this effect, which is reviewed in *Manuel v Superintendent of Hawkes Bay Regional Prison*.[32] But as the judgment in *Manuel* records, there are also habeas corpus cases in which courts have gone behind the warrant (or equivalent authority) and there has been a lively associated debate in academic journals.

[52] There is also s 14(2) of the Habeas Corpus Act which provides:

> A Judge dealing with an application must enquire into the matters of fact and law claimed to justify the detention and is not confined in that enquiry to the correction of jurisdictional errors; but this subsection does not entitle a Judge to call into question—
>
> (a) a conviction of an offence by a court of competent jurisdiction, the Court Martial of New Zealand established under section 8 of the Court Martial Act 2007, or a

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29 Habeas Corpus Act 2001, s 7(5)(a).
30 Section 7(5)(b).
31 Section 16(1).
32 *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [33]–[38].

disciplinary officer acting under Part 5 of the Armed Forces Discipline Act 1971; or

(b) a ruling as to bail by a court of competent jurisdiction.

I note in passing that it is possible that s 14(2)(b) is engaged in this case because the detention warrant under which the appellant is currently in jail results from the most recent decision refusing him bail.[33] This point was touched on in argument but not developed and I will therefore put it to one side.

[53] Section 14(2) is plainly capable of being read – indeed it reads most naturally – as encompassing the review of a decision which resulted in the issuing of the warrant, leaving aside convictions and refusals of bail. There is, however, a tension between:

(a) The apparent effect of s 14(2); and

(b) What is practical and fair in proceedings where (i) the parties to the original decision and the decision-maker are not necessarily respondents (ii) discovery and inspection are not available (iii) urgency is required and (iv) an unsuccessful respondent cannot appeal.

This tension was resolved in *Manuel* in the manner already discussed in the majority judgment.

[54] Whether the balance struck in *Manuel* was right is open to legitimate debate. That debate was engaged in by the Solicitor-General but not by Mr Ellis for the appellant. He was content to advance his case on the basis of the *Manuel* test. This means that the present appeal does not provide an appropriate occasion for reconsidering *Manuel*. I note in passing that if the Habeas Corpus Amendment Bill 2012 is enacted in the form in which it has been reported back to the House of Representatives, any such future reconsideration will occur in a very different statutory context.

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[33] See *R v Kyung Yup Kim* DC Auckland CRI-2011-004-11056, 7 February 2012; and *R v Kyung Yup Kim* [2012] NZHC 294.

[55] The present appeal must therefore be addressed in terms of two questions:

(a) Are the arguments advanced "properly susceptible to fair and sensible summary determination"?[34] And, if so:

(b) Are they correct?

To anticipate a point to which I will revert to shortly, it might be thought logical to determine question (a) first. That question is taken directly from the text of the judgment in *Manuel*, but as will become apparent, I think some reformulation is appropriate. I will explain why shortly.

[56] As it turns out, the two arguments advanced by the appellant – the art 47 and "person … accused" arguments – are untenable, something which becomes immediately apparent once they are examined in detail. The reasons why are explained in the majority judgment and touched on by me later in this judgment. Accordingly I agree that the appeal can be dismissed, effectively on the merits. But despite being, to this extent, in agreement with the majority judgment, I am not persuaded that the judgments of the High Court and Court of Appeal in this case proceeded on the wrong basis, as I will now explain.

[57] Reverting to the comments made in [55], I think that the Court of Appeal in *Manuel* envisaged that question (a) would be addressed before question (b). I also think that the Court envisaged that question (a) would be construed as if it read, "Are the arguments advanced properly susceptible to fair and sensible summary determination *in favour of the applicant*?" This reformulation of the question is consistent with the general drift of the judgment in *Manuel* and, in particular, the concerns about the inability to appeal decisions made in favour of applicants. Accordingly, I consider it is open to a court to decline habeas corpus if satisfied that:

(a) The applicant cannot succeed without the court entertaining and accepting a particular argument; and

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[34] *Manuel*, above n 32, at [49].

(b) That argument is not susceptible to summary determination and thus not justiciable in habeas corpus proceedings.

[58] The appellant's argument as to the request by the Chinese government was based on its alleged invalidity under Chinese law. But necessarily implicit in the argument was the proposition that a valid request was fundamental to the provisional warrant issued under s 20 of the Extradition Act. This proposition is demonstrably wrong. It follows that on this aspect of the case, the appellant's argument is susceptible to summary determination and rejection. The High Court and Court of Appeal, however, did not decide the case on this basis. Instead they seem to have assumed that the proposition was sound and looked only at the justiciability of the validity issue, which they saw, correctly, as not susceptible to summary determination. For the reasons given in [57], I see this as providing an alternative, but perfectly sound, basis for refusing habeas corpus in relation to the request argument.

[59] In dealing with the appellant's "person ... accused" argument, both the High Court and Court of Appeal seem to have assumed that the argument they were addressing was that (a) the appellant was entitled to habeas corpus if he is not an "extraditable person", and (b) it is for the respondent to establish that he has that status because he is a "person … accused". Whether the appellant is in fact a "person ... accused" and thus an "extraditable person" will be determined at the substantive extradition hearing. What was material for the habeas corpus application was whether the test provided for by s 20 had been met. Under this section, the warrant-issuing judge was required to be satisfied, on the available information, that there were reasonable grounds for believing that the appellant was an extraditable person. This test was plainly satisfied on the material put before Judge Broadmore. But the High Court and Court of Appeal did not deal with the case on this basis. Instead, both courts addressed the justiciability of the issue whether the appellant is a "person … accused" and found against the appellant accordingly.

[60] Given the extent of the material which was before Judge Broadmore and the not very exacting threshold provided by s 20, the appellant's argument on this aspect of the case was never very strong. This makes it a little artificial to consider the

issues which would have arisen if the argument had been stronger. But despite this artificiality, I find it difficult to see how the argument could ever have obtained serious traction without an inquiry into Chinese criminal law and procedure, which would have been beyond the scope of what is appropriate in habeas corpus proceedings.[35] For this reason I am prepared to accept that it was open to the High Court and Court of Appeal to deal with this aspect of the case in the way in which they did.

CHAMBERS J

What is in issue

[61] I agree with the result the majority have reached but not with their reasons. In my view, this appeal should be dismissed for the reasons given in the admirable judgments of Kós J[36] and the Court of Appeal.[37] I cannot improve on their reasons, with the consequence that this opinion can be brief.

[62] The application for leave to appeal and Mr Ellis's submissions in support of it caused us to think that Mr Ellis intended to advance a wholesale attack on the current habeas corpus approach set out in *Manuel v Superintendent of Hawkes Bay Regional Prison*.[38] The submissions indicated that the approach was inconsistent with ss 8 and 9 of the New Zealand Bill of Rights Act 1990 and with international authority, including decisions of the United Nations Human Rights Committee. Because we believed *Manuel* was under attack, we granted leave. We expressed the issue in the following terms:[39]

> Whether the Courts below were correct to dismiss the proceeding because the alleged deficiencies in the request to surrender and the application for a provisional warrant were not suitable for determination on a habeas corpus application.

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35 Perhaps the argument might have been along the lines that (i) Judge Broadmore should have required more information before issuing the warrant and, (ii) accordingly the habeas corpus application ought to have been resolved on the basis of what the additional information would have disclosed.

36 *Kim v Manager, Mt Eden Corrections Facility* [2012] NZHC 2417, [2012] NZAR 990.

37 *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZCA 471, [2012] 3 NZLR 845.

38 *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA).

39 *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZSC 100.

[63] It came as some surprise, therefore, to us – and, I think, the respondent's counsel – when Mr Ellis, in his written submissions for the appeal, appeared to accept the correctness of *Manuel*. Mr Ellis said that Mr Kim had "sought to live within that judgment", by which he meant that this was a case in which the Courts below had misinterpreted *Manuel* and had "drastically [limited] the scope of habeas corpus" in a manner contrary to the *Manuel* test. In other parts of his submissions, however, he was advocating an approach to habeas corpus quite different from that set out in *Manuel*, a throwback to his position when seeking leave. The Solicitor-General and Mr Perkins, for the Manager of the Mt Eden Corrections Facility, were obviously, like me, uncertain whether the *Manuel* approach was under attack. Indeed, in their written submissions, they identified the first issue in the following terms:

> Does the Court of Appeal's decision in *Manuel v Superintendent of Hawkes Bay Regional Prison* correctly describe the constraints on the High Court's jurisdiction to examine issues of fact and law under s 14(2) of the Habeas Corpus Act 2001?

[64] Because of the confusion, we questioned Mr Ellis at the hearing as to whether he was challenging the *Manuel* test. He confirmed he was not. In light of that, the issue now before us becomes whether, on a proper application of *Manuel*, the two matters Mr Ellis has chosen — the art 47 question and the "accused" question, as I shall call them — were properly susceptible to fair and sensible summary determination. As it turns out, therefore, this appeal does not involve a challenge to *Manuel* but simply whether it was correctly applied. Whether *Manuel* was correctly decided turns out to be an issue for another day.

The High Court and Court of Appeal decisions

[65] Kós J summarised the effect of *Manuel* at [10]–[15] of his judgment. In particular, he cited the following key passage from *Manuel*:

> [49] A person who detains another can fairly be expected to establish, effectively on demand, the legal justification for the detention. In cases involving imprisonment or other statutory confinements, this will involve the production of a relevant warrant or warrants or other documents which provide the basis for the detention. We accept that apparently regular warrants (or other similar documents) will not always be a decisive answer

> to a habeas corpus application. But it will be a rare case, we think, where the habeas corpus procedures will permit the Court to inquire into challenges on administrative law grounds to decisions which lie upstream of apparently regular warrants. This is particularly likely to be the case where the decision maker is not the detaining party. There may not be a bright line which distinguishes between those arguments which are available on habeas corpus applications and those which can only be deployed (if deployed at all) in judicial review proceedings. Nonetheless we see the test as coming down to whether the arguments in issue are properly susceptible to fair and sensible summary determination. If they are, they can be addressed in habeas corpus proceedings. If not, they must be held over for evaluation in judicial review proceedings. In such proceedings, an application for interim relief (including release from custody) would be dealt with urgently and the Judge dealing with such an application would be in a position to give directions as to the future conduct of the litigation to ensure prompt substantive determination.

[66] Later in his judgment, Kós J noted three matters with regard to challenges to decisions made upstream of the warrant. I mention two of those points. The first was his reiteration of the point made in *Manuel* that "it will be a 'rare case' where habeas corpus procedure permits the Court to inquire into challenges on administrative law grounds to decisions lying upstream of apparently regular warrants".[40] Secondly, Kós J noted that, while "in some situations it is possible to reach a summary view as to the validity of [the upstream] decision", where the challenge involves "condemnation of the judicial or even administrative decision productive of an apparently regular warrant, on the basis of contested questions of fact, summary process under habeas corpus is not likely to be an appropriate course".[41] I agree.

[67] On the art 47 question, Kós J concluded that he simply could not "make a summary determination as to invalidity of process under foreign law, in the absence of evidence thereon".[42] He went on:

> But this is an exact example of why caution must be exercised on summary upstream review. Where the issue becomes one of evidence of foreign law, such evidence is not readily obtainable on summary procedure within the three day time limit provided in s 9. That goes to an issue upstream of the warrant itself – namely the validity of the s 18(1) request for surrender. These matters must be addressed either in judicial review processes in relation to the grant of the provisional arrest warrant (which is what detains

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40 At [45].
41 At [46].
42 At [49].

Mr Kim in New Zealand) or in the surrender eligibility hearing in due course.

[68] On that question, the Court of Appeal reached exactly the same view:

> [51] We agree with the Judge that the alleged deficiencies in the request to extradite Mr Kim are not suitable for determination in a habeas corpus application.

[69] Later they said:[43]

> If it is permissible to enter into upstream issues regarding the validity of the arrest warrant issued in the PRC or the validity of the extradition request, expert evidence would again be required as to the interpretation of art 47; whether it was in force at the relevant time; and whether it was complied with. This issue does not lend itself to summary determination and certainly not on the materials currently before the Court.

[70] The Court of Appeal added:[44]

> We add that, for the purpose of issuing the provisional arrest warrant, Judge Broadmore was not required to enter upon the issues discussed in this part of the judgment. Nor were those judicial officers responsible for Mr Kim's subsequent remands.

[71] I agree with both judgments on the art 47 point.[45]

[72] On the "accused" question, Kós J held:

> [55] Whether Mr Kim is an extraditable person is a question of fundamental importance. It will be front and centre in the surrender eligibility hearing in due course. And, certainly, it may also be raised in a judicial review application. That course is foreshadowed in the draft proceedings prepared for Mr Kim. But it is not a matter that I can reasonably deal with on a summary basis, where it is dependent upon what may be contested evidence of foreign law and criminal procedure, none of which is now, or could reasonably be, before me.
>
> [56] It is clear on the evidence that a warrant for arrest of Mr Kim was issued by the Shanghai Municipal Public Security Bureau on 11 March 2010. The exact nature of that instrument, and whether it is sufficient to amount to criminal accusation of an extradition offence in terms of s 3(a), is a matter that will need to be examined at another time. I accept in light of the authorities such as *Ismail* that the Court considering those issues would need

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43 At [65].

44 At [66].

45 While it is just a quibble, what currently detains Mr Kim in New Zealand – see [67] above – is not Judge Broadmore's provisional arrest warrant but Judge Cunningham's warrant of detention dated 15 October 2012.

> to look beyond the mere appearance of the warrant. But that would depend upon evidence, and that evidence is not before me.

[73] The Court of Appeal agreed. They considered this issue to be "intensely factual" and held that "the materials currently before the Court are plainly insufficient to reach any reliable finding on this point".[46] They held that detailed expert evidence would be required on this matter. They also had "some doubts about accepting the English translations of documents issued by the PRC".[47] I agree with those findings as well.

[74] While Mr Ellis made submissions on art 47 and the meaning of "accused" in the definition of extraditable person, he did not explain why, in terms of *Manuel*, Kós J and the Court of Appeal were wrong not to embark on the factual and legal analyses the issues raised. It is important to remember in this regard that foreign law, which is at the heart of both these issues, is a matter for expert evidence and requires findings of fact to be made. As the Solicitor-General correctly submitted, the matters raised by Mr Ellis "require intense factual scrutiny and careful legal submissions" and are quite unsuitable for "determination in a summary way on a habeas corpus application".

Conclusion

[75] I regret that I cannot agree with the majority's approach. As I understand it, they consider it is necessary for a Judge on a habeas corpus application to inquire into the validity of decisions which lie upstream of apparently regular warrants (such as Judge Cunningham's warrant of detention in this case), the very thing which *Manuel* said would be "rare". The majority have in effect now determined two of Mr Ellis's grounds for judicial review in Mr Kim's as yet unheard application for judicial review and decided against Mr Kim on those. Had Mr Ellis chosen to rely on more of his judicial review grounds on the habeas corpus application, the Court would, on the majority's approach, have had to inquire into those as well. Habeas corpus becomes as broad as the applicant wants to make it and becomes in effect indistinct from judicial review – the very antithesis of what *Manuel* held. The sheer

[46] At [63].
[47] At [64].

depth of analysis the majority's approach has entailed is, to my mind, inconsistent with the nature of habeas corpus as explained in *Manuel* – its tight time limits, the fact the jailer is the only contradictor and the inability of anyone save the applicant to appeal. But since mine is a minority position, I see no point in explaining further my points of difference with the majority's reasoning.

[76] I want to make my position clear on two points. First, in agreement with what was said in *Manuel*, I am in no way protecting from challenge any Court decision affecting rights. The issue is the appropriate means of challenge. Obviously the art 47 question and the "accused" question could be addressed at the s 24 hearing, which could have been heard back in 2011 had Mr Kim not on successive occasions sought to have it adjourned. Alternatively, if speedier adjudication was sought, Mr Kim could have brought long ago an application for judicial review of the actual decision in question – Judge Broadmore's – and could have attempted to obtain interim relief. With judicial review, one has the right parties before the Court, each side has a right of appeal and nuanced relief is possible. Judicial review is very liberally available under New Zealand procedural law. In this respect, I endorse completely what the Court of Appeal, sitting as a Full Court, said in *Bennett v Superintendent, Rimutaka Prison*.[48]

[77] And that leads on to my second point. I think overseas decisions on habeas corpus must be evaluated with caution.[49] Judicial review in other jurisdictions is not always as liberally available as it is in New Zealand. Habeas corpus has at times had to be stretched so that justice can be done, as otherwise a detained person might have no other remedy. Thankfully we are not in that position. While habeas corpus remains an important remedy, New Zealand law now provides other procedures and remedies much better suited to deal with arguments of the kind advanced in this case.

[78] For these reasons, I would dismiss the appeal. I would answer the question on which we granted leave:

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[48] *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA), especially at [60]–[70].

[49] This point is also considered in *Bennett*, above n 48, at [71]–[74].

> Yes, the Courts below were correct to dismiss the proceeding because the alleged deficiencies in the request to surrender and the application for a provisional warrant were not suitable for determination on a habeas corpus application.

[79] The fact the majority, William Young J and I have reached different conclusions on the application of *Manuel* indicates that at some point either the Court of Appeal or this Court should have a fresh look at it. The amendment to s 14 of the Habeas Corpus Act proposed by cl 7(1) of the Habeas Corpus Amendment Bill 2012,[50] if enacted, will also render reconsideration of *Manuel* necessary. At first blush, it would appear to strengthen the argument I have advanced.

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[50] Habeas Corpus Amendment Bill 2012 (34–2).