Supreme Court of New Zealand

21 March 2014

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

KIM DOTCOM, FINN BATATO, MATHIAS ORTMANN AND BRAM VAN DER KOLK v UNITED STATES OF AMERICA
(SC 30/2013) [2014] NZSC 24

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 Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The government of the United States of America has requested the extradition of Messrs Dotcom, Ortmann, van der Kolk and Batato to face criminal charges of copyright infringement, money laundering, racketeering and wire fraud. The charges arise out of the appellants' alleged involvement in activities of the Megaupload group of companies.

For the purpose of the District Court hearing to determine whether the appellants are eligible for extradition, the United States has made use of the "record of the case" procedure for submitting evidence, which is provided for in s 25 of the Extradition Act 1999. The record of the case comprises a summary of the evidence that the state requesting extradition has acquired against the appellants, including: extracts from a large number of emails, data stored on servers supporting the Megaupload websites, a network analysis of how the websites operated, an analysis of relevant financial transactions, and the proposed testimony of investigators who

undertook undercover activities as users of the websites and of a number of experts and copyright owners. The record of the case is relied on as establishing a prima facie case against the appellants, which is one of the requirements for eligibility for extradition.

In the District Court, the appellants sought disclosure by the United States of documents, records and information in its possession in relation to the criminal charges. A District Court Judge ordered the United States to disclose the relevant documents. The orders were upheld by the High Court, but then quashed by the Court of Appeal. The question in the appeal to the Supreme Court was whether or not the disclosure orders made by the District Court were wrongly made.

The Supreme Court has decided, by a majority comprising McGrath, William Young, Glazebrook and Blanchard JJ, that the District Court was wrong to order disclosure by the United States of the documents concerned.

McGrath, William Young, Glazebrook and Blanchard JJ have decided that s 25 of the Extradition Act does not require that a "record of the case" include copies of all documents it summarises. Nor does the Criminal Disclosure Act 2008 or s 102 of the Extradition Act impose obligations of general disclosure on a foreign state requesting extradition or confer on an extradition judge a power to order disclosure.

The majority has, however, held that a requesting state has a duty of candour and good faith to disclose any information that would render worthless or seriously undermine the evidence upon which it relies. As well, a requesting state must provide, in advance of the District Court hearing, the information on which it will rely to establish a prima facie case against the persons whose extradition has been requested. Where the record of case process is used, it is the record of the case that must be so provided. There was no suggestion that the United States had not complied with any of these obligations.

The majority has decided that the statutory powers, in the Criminal Disclosure Act, of a judge in domestic criminal proceedings are not incorporated into the Extradition Act and, accordingly, the District Court has no statutory power to make disclosure orders in extradition cases.

Finally, the majority has also held that the District Court had no inherent power to make the disclosure orders that it did in this case, because the appellants had not demonstrated that further information was necessary for the fair determination of their eligibility for surrender. The appellants already had adequate access to or knowledge of the information summarised in the record of the case.

The Chief Justice has dissented. In accordance with the views of the majority, the appeal has been dismissed.

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