IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 83/2018
[2018] NZSC 109

BETWEEN	RAYMOND JOSEPH TUKAKI Applicant
AND	THE COMMONWEALTH OF AUSTRALIA Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: C G Tuck for Applicant
F R J Sinclair for Respondent

Judgment: 19 November 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant is charged with six counts of serious violent and sexual offending alleged to have been committed in the Northern Territory of Australia in 1998–1999. The Commonwealth of Australia seeks his extradition so that he can stand trial on these counts in the Supreme Court of the Northern Territory.

[2] In May 2017 the District Court found the applicant was eligible for surrender under Part 4 of the Extradition Act 1999.[1] The District Court Judge also found that there was no basis to refer the applicant's case to the Minister of Justice under s 48(4)(a)(ii) of the Extradition Act. The applicant appealed to the High Court against the finding that he was eligible for surrender and sought judicial review in

1 *Commonwealth of Australia v Tukaki* [2017] NZDC 10792 (Judge Ingram).

relation to the refusal to refer his case to the Minister of Justice. Both the appeal and the application for judicial review were dismissed.[2] The applicant's appeal to the Court of Appeal against both aspects of the High Court decision also failed.[3] The applicant now seeks leave to appeal to this Court against the Court of Appeal decision.

[3] The applicant raises four grounds on which he says leave to appeal should be granted.

[4] The first ground deals with the finding that it would not be oppressive to surrender the applicant to Australia in light of the amount of time that has passed since the offending is alleged to have occurred and the fact that the applicant, a Māori, has built a new life for himself and now lives on tribal land where he is supported by his whānau in a traditional and culturally appropriate way.[4] The applicant wishes to argue that the meaning ascribed to "oppressive" by the Courts below (oppressing, harsh or cruel) was too restrictive. He wishes to argue that a more liberal meaning should be given to recognise human rights, including indigenous human rights, which would factor in New Zealand's obligations under international treaties and also the Treaty of Waitangi as well as Maori values (tikanga human rights).

[5] As the applicant acknowledges, "oppressive" sets a deliberately high threshold. The Court of Appeal's analysis recognised the significance of international obligations and the Treaty of Waitangi.[5] However, the Court did not consider that the facts of the case demonstrated that extradition would be oppressive. We do not consider that there is a sufficient factual basis for the argument that the applicant wishes to pursue on this point to justify leave being granted.

[6] The second ground deals with the issue as to whether the applicant's case should have been referred to the Minister of Justice under s 48(4)(a)(ii). That provision applies where a court is satisfied that the grounds for making a surrender

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2 *Tukaki v The District Court at Tauranga* [2017] NZHC 843 (Moore J).
3 *Tukaki v The Commonwealth of Australia* [2018] NZCA 324 (Winkelmann, Simon France and Wylie JJ) [*Tukaki* (CA)].
4 Extradition Act 1999, s 8(1)(c).
5 *Tukaki* (CA), above n 3, at [29]–[37].

order otherwise exist but it appears to the court that, because of compelling or extraordinary circumstances of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period. If that provision applies the court can refer the matter to the Minister of Justice, and the Minister must then determine whether the person is to be surrendered.[6] The question as to the meaning of the term "oppressive" arises in relation to this ground as it did in relation to the first ground and our comments in relation to that ground apply equally in this context. In addition, the applicant wishes to argue that the Court of Appeal was wrong to find there were not "compelling or extraordinary" circumstances for the purposes of s 48. Having considered the Court of Appeal's careful analysis of this issue, we do not consider there is sufficient prospect of success on this ground to justify the granting of leave.[7]

[7] Ground 4 deals with the issue of comity, but the arguments that the applicant seeks to raise in this context largely overlap with the second ground, and we see no basis for granting leave on this ground.

[8] Ground 3 relates to the admission of fresh evidence in the event that leave is given. In view of our conclusion that none of the grounds for the granting of leave is sufficient to justify the granting of leave, this ground becomes irrelevant.

[9] We do not consider that it is necessary in the interests of justice for the Court to hear and determine the applicant's proposed appeal.[8] We therefore dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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6 Section 49.
7 *Tukaki* (CA), above n 3, at [42]–[52].
8 Senior Courts Act 2016, s 74.