IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 88/2021
[2021] NZSC 187

BETWEEN	MATHIAS ORTMANN First Applicant
	BRAM VAN DER KOLK Second Applicant
AND	UNITED STATES OF AMERICA First Respondent
	DISTRICT COURT AT NORTH SHORE Second Respondent

SC 90/2021

BETWEEN	KIM DOTCOM Applicant
AND	UNITED STATES OF AMERICA First Respondent
	DISTRICT COURT AT NORTH SHORE Second Respondent

Court:	Winkelmann CJ, O'Regan and Ellen France JJ
Counsel:	G M Illingworth QC, P J K Spring and A K Hyde for Messrs Ortmann and van der Kolk R M Mansfield QC and S L Cogan for Mr Dotcom D J Boldt, F R J Sinclair and Z A Fuhr for United States of America D Sothieson for District Court at North Shore
Judgment:	21 December 2021

JUDGMENT OF THE COURT

A The applications for leave to appeal are dismissed.

B The applicants must pay the first respondent one set of costs of $2,500.

REASONS

Introduction

[1] The applicants seek leave to appeal from a decision of the Court of Appeal in which the Court dismissed their appeals, declined applications by Messrs Ortmann and van der Kolk to adduce further evidence, and declined Mr Dotcom's application for orders enforcing requests made under the Privacy Act 1993.[1]

Background

[2] The applicants have been found eligible to be extradited to the United States of America to face trial for criminal copyright infringement and other related charges.[2] In the context of considering the applicants' appeals by way of case stated on the eligibility decision, this Court also dealt with appeals relating to parallel judicial review proceedings challenging the eligibility decision.[3] This Court allowed the judicial review appeals, but the judicial review aspect of the appeals was limited to determining whether the Court of Appeal, in its 2018 judgment,[4] had erred in holding the judicial review proceedings were an abuse of process. After considering further submissions, we remitted the matter to the Court of Appeal "for the identification and resolution of any outstanding issues in relation to the judicial review appeals".[5]

[3] On remittal back to the Court of Appeal, the appeals were considered by the same panel which had dismissed the appeals in 2018. Prior to the hearing, the panel declined an application that the panel members should recuse themselves.

---

1 *Ortmann v The United States States of America* [2021] NZCA 310 (Kós P, French and Miller JJ) [CA judgment]. The second respondent abides the decision of this Court on the leave applications.

2 The United States is no longer seeking the extradition of the fourth of the appellants in that case, Finn Batato, due to ill-health. Mr Batato has been formally discharged.

3 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 [SC judgment].

4 *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 [CA 2018 judgment].

5 *Ortmann v United States of America* [2021] NZSC 9 at [8].

[4] In dismissing the appeals on the remittal back, the Court of Appeal identified breaches of natural justice relied upon by the applicants which were said to have arisen, separately or cumulatively, from the following matters:[6]

> (a) The failure to undertake the required meaningful assessment as to whether there is a prima facie case against the appellants.
>
> (b) Wrongly dismissing applications to adduce fresh evidence.
>
> (c) The wrongful conduct of the United States in depriving the appellants of funding.
>
> (d) The abuse of process [on the part of the authorities, including that of] domestic agencies in withholding material from Mr Dotcom.

[5] The Court then considered each of these issues in turn, concluding that none of the issues remained outstanding. That was, essentially, because each issue either had been considered on its merits in the Court's 2018 judgment, or, as in the case of the final issue relating to Mr Dotcom's Privacy Act requests, was a new matter outside the scope of the remittal back.

[6] In relation to the first issue, the Court of Appeal noted that in its 2018 judgment, the Court found there was no basis to interfere with the High Court's finding a prima facie case had been established.[7] The Court said that the evidence in the record of the case (ROC) filed in support of the extradition request amounted to a "strong" prima facie case.[8] In the remittal judgment, the Court noted that this finding was one made in the context of applications for special leave, not under the judicial review heading. But the Court said "it was nonetheless a merits-based assessment".[9]

[7] The Court stated that the second issue had also been considered in the 2018 judgment, again in the context of determining the application for leave to appeal the refusal of a stay application brought by the applicants against what they said were funding constraints (the funding stay). The Court's view then was that the proposed evidence would not have precluded the finding of a prima facie case as required under

---

6 CA judgment, above n 1, at [43].

7 *Ortmann v The United States of America* [2017] NZHC 189 (Gilbert J).

8 CA 2018 judgment, above n 4, at [265].

9 CA judgment, above n 1, at [52]. The Court noted also that this Court had addressed key aspects of the sufficiency of evidence in its judgment, referring to the SC judgment, above n 2, at [323]–[324], [385]–[386] and [388].

s 24(2)(d)(i) of the Extradition Act 1999.[10] The Court also considered and decided against admitting new evidence on the judicial review.[11] In the judgment on remittal back, the Court said it was still of the view the proposed evidence did not affect the availability of the inferences the United States sought to draw from the evidence in the ROC, nor did it justify a stay.

[8] Similarly, the Court held that the third and fourth issues – breach of natural justice arising from the refusal to grant the funding stay[12] and from alleged misconduct on the part of the authorities – were not outstanding, the Court having considered and rejected such allegations on their merits in 2018. Under the latter head, the Court made the point that the allegations of misconduct addressed in 2018 included Mr Dotcom's complaint about the handling of his Privacy Act requests by domestic authorities. Any attempts to rely on events relating to those requests that post-dated delivery of the 2018 judgment were new matters that could not qualify as an outstanding issue.

[9] Finally, the Court addressed the cause of action based on the innominate ground. The Court was sceptical about the extent to which this ground had been advanced in the proceedings, but in any event, said it was "self-evidently parasitic on the other judicial review challenges which [the Court] found were not tenable".[13]

The proposed appeals

[10] In essence, the applicants wish to argue that the Court of Appeal has not done what this Court directed it to do. As a result, they have not had the consideration of their judicial review appeals to which they are entitled as of right. All three applicants say the Court of Appeal erred in concluding the judicial review claims could be disposed of on the basis the issues were addressed in the context of the case stated appeals. In particular, they say it was wrong to treat consideration which occurred as part of determining an application for special leave as a merits assessment.

---

10 CA 2018 judgment, above n 4, at [283].
11 At [264].
12 The Court made the point that this was treated as as a breach of natural justice issue in 2018.
13 CA judgment, above n 1, at [74].

[11] Because of the Court's misstep, the applicants contend that there has been no meaningful assessment of the sufficiency of the evidence under s 24(2)(d)(i) and certainly no consideration of that issue in light of the applicable law as settled by this Court. The applicants also say they have not had the opportunity to challenge the inferences the United States asked the Courts below to draw from the evidence in the ROC. That is because their applications to adduce evidence have been wrongfully dismissed and/or the wrongful and coercive conduct of the authorities has prevented them from advancing this evidence. Mr Dotcom also challenges the refusal to enforce his Privacy Act requests.

[12] Finally, there are complaints about the inadequacy of the procedure adopted by the Court of Appeal in the remittal back, the decision to decline Messrs Ortmann and van der Kolk's further application to adduce fresh evidence in the remitted appeal, and about the decision of the panel not to recuse itself.

[13] The applicants say these errors give rise to questions of general or public importance and that this Court's intervention is necessary to prevent a miscarriage of justice.[14]

Assessment

[14] In allowing the judicial review appeals, this Court said that the Court of Appeal "ought to have engaged with the grounds of judicial review to determine whether all of the grounds were truly duplicative" of the case stated appeal grounds.[15] Decisions to decline special leave are not usually treated as decisions on the merits, and so consideration of an issue in that context would not ordinarily be seen as conforming with the direction given in this case on remittal back. Rather, the expectation would be that the issues would be reconsidered in the context of the supervisory/judicial review jurisdiction.

[15] The point made in the Court of Appeal's judgment on remittal back, however, is that the Court's 2018 judgment did address the merits in some detail before refusing

---

14 Senior Courts Act 2016, s 74(2)(a) and (b).
15 SC judgment, above n 3, at [586].

leave.[16] The present case can therefore be seen as out of the usual run where the leave decisions were, in fact, based on a merits assessment, rather than the narrower focus of the leave criteria in s 144 of the Summary Proceedings Act 1957.

[16] In any event, we do not consider the question of whether the Court of Appeal erred in its approach as giving rise to a question of general or public importance. Instead, we see the question as turning on an assessment of whether, on these particular facts, the issues the applicants wish to revisit remain outstanding.

[17] To put that question in context, this Court in its earlier decision accepted there was "clearly extensive overlap" between the case stated appeal grounds and the judicial review grounds,[17] but directed the Court of Appeal to consider whether there remained "outstanding issues". Outstanding issues were described as "those which have not been addressed as part of the case stated appeals".[18] The various issues the applicants wish to revisit have been canvassed to a greater or lesser extent in the Courts below.[19] We interpolate here that the fact that the consideration of some procedural aspects took place in the context of the case stated appeals may well be a feature of the fact it was the applicants' preference, at least as recorded in the High Court, to also deal with those matters under that head.[20]

[18] In any event, in considering the miscarriage of justice limb of the leave criteria, what is important is that, as the respondent submits, the issues the applicants wish to revisit have in fact been dealt with in an expansive and detailed way. Further, while a number of matters are raised, the gravamen of the complaints as we see it is the applicants' inability to adduce expert evidence on matters of context and particularly about the availability of inferences drawn from evidence in the ROC about the applicants' approach to take-down notices. This Court has said that this is a matter for trial.[21] We are satisfied that nothing raised by the applicants gives rise to the

---

16 The discussion in CA 2018 judgment, above n 4, at [260]–[268], [279]–[285] and [293]–[301] illustrates the point. See also CA judgment, above n 1, at [52], [63], [67] and [70].

17 SC judgment, above n 3, at [579].

18 At [597].

19 Leave to appeal from the Court of Appeal's decision in 2018 declining special leave to appeal was declined: *Ortmann v United States of America* [2018] NZSC 126.

20 *Ortmann v United States of America* [2016] NZHC 522 (Asher J) at [5] and [9].

21 SC judgment, above n 3, at [387], n 454.

appearance of a miscarriage of justice in the Court of Appeal's factual assessment. Nor do we see any error in the approach of the Court of Appeal to the question relating to the enforcement of Mr Dotcom's Privacy Act requests or Messrs Ortmann and van der Kolk's application to adduce further evidence on the remitted appeal.

[19] We acknowledge that there are a range of other matters the applicants raise within the broad headings we have discussed. However, we see the arguments the applicants wish to make about these matters and about the procedural approach of the Court of Appeal, including the recusal decision, as having insufficient prospects of success to justify an appeal to this Court.

[20] We add that this Court in its initial judgment on the appeal was concerned at the finding of the Court of Appeal that the judicial review proceedings were an abuse of process, which may have meant that the merits of the judicial review appeals had not been considered. The Court of Appeal has now confirmed in its remittal back judgment that it would have come to the same conclusion on all the issues if it had considered these issues under the judicial review heading.[22] That being the case, we do not consider there is anything more that this Court needs to do in relation to the proposed appeals, given our conclusion that no miscarriage has arisen.

Result

[21] For these reasons, the applications for leave to appeal are dismissed. The applicants must pay the first respondent one set of costs of $2,500.

Solicitors:
Keegan Alexander, Auckland for Messrs Ortmann and van der Kolk
Mackenzie Elvin, Tauranga for Mr Dotcom
Crown Law Office, Wellington for United States of America
D Sothieson, Ministry of Justice, Wellington for District Court at North Shore

---

22 CA judgment, above n 1, at [76].