

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 47/2021
[2021] NZSC 36

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: R M Mansfield and S L Cogan for Applicant
D J Boldt, F R J Sinclair and Z A Fuhr for Respondents

Judgment: 4 May 2021

JUDGMENT OF THE COURT

- A** The application for an order that, pending determination of the applicant's application for leave to appeal to this Court, the hearing in the Court of Appeal on 6 May 2021 be adjourned until after the determination of the application for leave to appeal (and the appeal, if leave is granted) is dismissed.
- B** There is no order as to costs.
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REASONS

[1] In its judgment of 4 November 2020, this Court allowed the appeal of the applicant and his co-appellants in relation to their applications for judicial review of

the District Court decision finding them eligible for surrender to the United States of America.¹

[2] In its subsequent judgment of 22 February 2021, this Court remitted the proceedings to the Court of Appeal for the identification of the outstanding issues in relation to the judicial review appeals and the resolution of those issues.²

[3] The Court of Appeal panel dealing with the remitted appeals is the same panel as that which dealt with the appeals of the applicant and his co-appellants when they first came to that Court (Kós P, French and Miller JJ).³ On 3 March 2021, the applicant applied to the Court of Appeal for the panel to recuse itself from hearing the remitted proceedings. By a minute dated 15 March 2021, that application was dealt with as follows:⁴

The request by the appellants that the panel recuse itself is declined. Full reasons will be given in due course in our substantive decision on the remitted appeals.

[4] The applicant then filed a memorandum in the Court of Appeal dated 6 April 2021, in which he requested the panel give its reasons for declining to recuse itself prior to the substantive hearing. In a minute dated 12 April 2021, the Court of Appeal dealt with a number of other issues raised by the applicant and his co-appellants, but did not specifically address the request for the giving of reasons on the recusal application to be accelerated.⁵

[5] The hearing of the remitted appeals is set down for 6 May 2021. That fixture was set by the Court of Appeal in February 2021, immediately after this Court remitted the two judicial review appeals to the Court of Appeal.

[6] On 30 April 2021 (nearly three weeks after the 12 April 2021 minute), the applicant filed an application for leave to appeal against the panel's rejection of the

¹ *Ortmann v United States of America* [2020] NZSC 120.

² *Ortmann v United States of America* [2021] NZSC 9.

³ See the earlier Court of Appeal judgment which dealt with the judicial review appeals in *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475.

⁴ *Ortmann v United States of America* CA302/2015, 15 March 2021 (Kós P) at [3].

⁵ *Ortmann v United States of America* CA302/2015, 12 April 2021 (Kós P).

applicant's request that the panel give reasons for its decision not to recuse itself.⁶ His application for leave to appeal says he seeks the following relief:

- (a) The Court of Appeal be directed to provide reasons for the panel's refusal to recuse itself for the remitted appeal.
- (b) The 6 May 2021 fixture be vacated pending the issue of the Court of Appeal's reasons and determination of any application for leave to appeal the Court of Appeal's decision and, if leave is granted, substantive determination of any such appeal.
- (c) Costs.

[7] On 3 May 2021, the applicant filed a further memorandum seeking urgent orders in respect of his application for leave. In that memorandum, the applicant seeks as a matter of urgency:

... an order that, pending determination of his application for leave to appeal, the 6 May 2021 hearing of the remitted appeal be adjourned until after the application for leave to appeal (and, if leave is granted, any appeal) has been determined.

[8] This judgment deals with the 3 May 2021 application for an order adjourning the Court of Appeal hearing on 6 May 2021.

[9] The application for leave to appeal relates to an interlocutory matter. That means that both s 74(1) and (4) of the Senior Courts Act 2016 apply. Under s 74(1), the Court must not give leave to appeal unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the appeal. Under s 74(4), the Court must not give leave unless satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

[10] The applicant ultimately wishes to argue that the members of the Court of Appeal panel ought to have recused themselves because the panel had expressed views

⁶ The Court of Appeal said in its minute of 15 March 2021 that it would give full reasons in conjunction with its substantive judgment. So, it did not refuse to give reasons, but rather indicated it would give reasons at a later date. The applicant submits that in the 12 April 2021 minute, the Court of Appeal dismissed his application dated 6 April 2021 that the Court provide reasons for its recusal decision. There is no explicit reference to that application in the 12 April 2021 minute. The applicant's case is that the omission of any reference to that application and the indication that the Court did not intend to address it was, in effect, a dismissal of the application.

about outstanding issues in the remitted appeals in its original judgment.⁷ He argues that it is in the interests of justice for this Court to hear and determine his proposed appeal because a matter of general or public importance arises and because a substantial miscarriage of justice may occur if the appeal is not heard.⁸

[11] The matter of general or public importance said to have arisen is that the provision of reasoned judgments is crucial to maintaining public confidence in the judiciary, particularly in the context of recusal applications. The substantial miscarriage of justice the applicant claims may occur is that he would be denied a right of appeal in respect of the composition of the Court of Appeal panel until after it has heard and determined the remitted appeals if his application for leave is not heard. Although the applicant does not expressly address s 74(4) in his application for leave, the reason he gives in relation to the substantial miscarriage of justice ground is clearly the reason he argues that the appeal needs to be determined now.

[12] The Court will assume, without deciding, that there is an appealable decision by the Court of Appeal and that this Court has jurisdiction to make the order sought. It would be unusual for an appellate court to interfere with the scheduling of a proceeding in the Court appealed from, in the absence of an application for leave to appeal against a decision refusing an application for adjournment. But, as will become apparent, it is not necessary for us to decide these points and given the urgency, we do not do so.

[13] The basis for the making of an order adjourning the Court of Appeal hearing of 6 May 2021 would be if this Court considered there was a real prospect that an injustice would result if it declined to make the order. In the present case, such an injustice would arise if the Court determined, on the basis of the information now before it, that there was a real prospect that a potentially successful application for leave would be thwarted if no order was made and the applicant would not be able to pursue the arguments he wishes to make about the refusal of the Court of Appeal panel to recuse itself in a future application for leave to appeal to this Court against the Court of Appeal's judgment in the remitted appeals.

⁷ *Ortmann*, above n 3.

⁸ Senior Courts Act 2016, s 74(2)(a) and (b).

[14] As already indicated, under s 74(4) of the Senior Courts Act, the Court must not give leave to appeal unless the Court is satisfied that it is necessary in the interests of justice for this Court to hear and determine the proposed appeal before the hearing of the remitted appeals in the Court of Appeal. If the matter at issue remains available for argument in a future application for leave to appeal (and a future appeal if leave is granted), it will be difficult to persuade the Court that the s 74(4) test is met. In the present case, there appears to be no impediment to the concerns the applicant wishes to raise about the composition of the Court of Appeal panel being dealt with by this Court on a further appeal against the substantive decision. While that involves some potential for duplication of effort if an appeal against the Court of Appeal panel's decision not to recuse itself were ultimately successful, that has to be balanced against the disruption to the processes of the Court of Appeal (and the inconvenience to the other parties to the remitted appeals) if this Court made the order the applicant seeks.

[15] We are not persuaded that the interests of justice require the making of an order in the form sought by the applicant. The application for such an order is therefore dismissed.

[16] In his 3 May 2021 memorandum, the applicant indicated that, if the Court did not make the order sought, he would nevertheless seek to pursue his application for leave to appeal. The applicant is entitled to do so. We therefore say no more about it at this stage.

[17] The other appellants and the respondents in the Court of Appeal have not been called upon to respond to this application. We therefore make no order for costs.

Solicitors:
Mackenzie Elvin, Tauranga for Applicant
Crown Law Office, Wellington for Respondents