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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 57/2019
[2021] NZSC 57

BETWEEN	MINISTER OF JUSTICE First Appellant	
	ATTORNEY-GENERAL Second Appellant	
AND	KYUNG YUP KIM Respondent	

Hearing:	25 and 26 February 2020
Further Submissions:	2 July 2020
Court:	Glazebrook, O'Regan, Ellen France, Arnold and French JJ
Counsel:	U R Jagose QC, A F Todd and G M Taylor for Appellants A J Ellis, B J R Keith and G K Edgeler for Respondent A S Butler, R A Kirkness and C S A Harris for Human Rights Commission as Intervener
Judgment:	4 June 2021

JUDGMENT OF THE COURT

A **The appeal is adjourned until 30 July 2021.**

B **A report is to be filed by the parties on or before 30 July 2021 outlining the matters set out at [443], [455]–[457] and [463].**

C **The cross-appeal is dismissed.**

REASONS

GLAZEBROOK, ELLEN FRANCE AND ARNOLD JJ
(Given by Glazebrook J)

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Introduction

[1] Mr Kim is accused of killing a young woman, Ms Peiyun Chen, while he was in Shanghai in 2009. In May 2011, New Zealand received a request from the People's Republic of China (PRC) seeking his extradition on one count of intentional homicide. The request included an assurance that, if convicted, Mr Kim would not be subject to the death penalty.[1]

[1] This assurance was based on a determination by the Supreme People's Court of the People's Republic of China (PRC) under art 50 of the Extradition Law (PRC) that, if Mr Kim was extradited and then convicted of a crime that is punishable by the death penalty, "the trial court will not impose the death penalty on him, including death penalty with a two-year reprieve".

[2] This appeal concerns the decision made by the then Minister of Justice, the Hon Amy Adams (the Minister), that Mr Kim should be surrendered to the PRC.[2]

Procedural history[3]

[3] After receiving the request for extradition from the PRC, the Hon Simon Power, the then Minister of Justice, determined that the PRC's request should be dealt with under the Extradition Act 1999.[4] The Extradition Act provides a two-stage process. First, the District Court must determine whether a person for whom an extradition request has been made is eligible for surrender to the requesting country.[5] If it is held that the person is eligible for surrender, the Minister of Justice must then determine whether the person should be surrendered to the requesting country.[6]

[4] Mr Kim appeared before the District Court for his eligibility hearing from 16 to 18 September 2013. Judge Gibson issued his decision on 29 November 2013, determining that Mr Kim is eligible for surrender.[7]

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2 Her decision was made under s 30 of the Extradition Act 1999.

3 The procedural history is lengthy and, aside from the most recent appeal to the Court of Appeal and then to this Court, is set out in full in *Kim v The Minister of Justice* [2016] NZHC 1491 (Mallon J) [discharge application] at [38]–[56]. That judgment dealt with an application to discharge Mr Kim from extradition under s 36 of the Extradition Act, on the basis that there had been delay in surrendering Mr Kim and sufficient cause had not been shown. Mr Kim was unsuccessful and did not appeal against the decision.

4 Under s 60 of the Extradition Act, the Minister of Justice may decide that an extradition request from a non-Commonwealth country with which New Zealand has no extradition treaty, such as the PRC, can be dealt with under the Act. The request for surrender must include the supporting documents described in s 18 of the Extradition Act, such as a warrant for arrest. The Minister must then consider any undertakings as to mutual extradition, the seriousness of the offence, the object of the Extradition Act and any other matters the Minister considers relevant. If the Minister decides the request should be dealt with under the Extradition Act, the person who is the subject of the request is liable to be arrested and surrendered in the manner provided by Part 3 of the Act as if the Minister had received a request under s 18, and the provisions of the Act apply so far as applicable and with the necessary modifications.

5 Section 24.

6 Section 30.

7 *Re Kim* DC Auckland CRI-2011-004-11056, 29 November 2013 [DC eligibility judgment]. Judge Gibson was satisfied, as required by s 24(2), that the supporting documents in the form described in s 18(4) had been produced to the Court and would, according to the law of New Zealand, justify Mr Kim's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand, and that the alleged offence is an extradition offence in relation to the PRC. Argument centred on whether there was a prima facie case against Mr Kim under s 24(2)(d)(i), which Judge Gibson held there was (at [28]), and whether, as per s 24(3)–(4), either the mandatory restrictions on surrender contained in s 7 of the Act or the discretionary restrictions contained in s 8 of the Act applied. Judge Gibson held they did not (at [30]–[34]).

[5] On 30 November 2015, the Minister (the Hon Amy Adams) determined that Mr Kim should be surrendered to the PRC, having obtained assurances relating to torture and fair trial issues (first surrender decision).[8]

[6] Mr Kim was successful in his judicial review of that decision before Mallon J in the High Court (first judicial review) and the Minister was directed to reconsider her decision.[9]

[7] Having considered further information and submissions, on 19 September 2016 the Minister concluded that Mr Kim should be surrendered (second surrender decision).

[8] Mr Kim's application for judicial review of that second surrender decision was dismissed by Mallon J in the High Court (second judicial review).[10] His appeal against that decision was allowed by the Court of Appeal on 11 June 2019.[11]

[9] The application by the Minister of Justice and the Attorney-General (referred to collectively as the appellants in this judgment) for leave to appeal against the decision of the Court of Appeal was granted by this Court on 20 September 2019.[12] That judgment also granted Mr Kim's application for leave to cross-appeal.[13] The Human Rights Commission was given leave to intervene by minute of 2 October 2019.

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8 The Minister made her decision with reference to both the mandatory and discretionary restrictions in ss 7 and 8 of the Extradition Act, as well as s 30. The Minister also stated her decision was made taking into account New Zealand's international obligations and the relevant provisions in the New Zealand Bill of Rights Act 1990.

9 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 [first judicial review]. The judicial review was heard at the same time as the discharge application, above n 3.

10 *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823 [second judicial review].

11 *Kim v Minister of Justice of New Zealand* [2019] NZCA 209, [2019] 3 NZLR 173 (Cooper, Winkelmann and Williams JJ) [CA judgment].

12 *Minister of Justice v Kim* [2019] NZSC 100 (Glazebrook, O'Regan and Ellen France JJ) [SC leave judgment]. The approved question was whether the Court of Appeal was correct to quash and remit the Minister of Justice's decision to surrender the respondent under s 30 of the Extradition Act.

13 There was no approved question specified with regard to the cross-appeal.

Further background

The allegations[14]

[10] In brief, Mr Kim is suspected by the PRC authorities of killing Ms Chen in Shanghai on about 10 December 2009. Mr Kim denies this allegation.[15]

[11] Ms Chen's body was found in a wasteland in Shanghai on 31 December 2009. An autopsy was carried out, which noted a 2.5 cm wound on her forehead and injuries to her lips and mouth. The autopsy concluded that the cause of death was strangulation and that Ms Chen had sustained injuries to her forehead from a blunt object. Police inquiries revealed that she was last seen alive at around midnight on 10 December 2009 when she had left a bar where she worked as a waitress.

[12] Mr Kim had been in Shanghai from 22 August 2009 to 14 December 2009 to visit his then girlfriend, Ms Jiaqin Li. Ms Li had previously lived in Auckland. Mr Kim rented an apartment in Caobao Road, Shanghai and initially lived there. From November 2009, he mainly stayed with Ms Li at her parents' apartment in Huiming Garden, although he continued to rent the Caobao Road apartment.

[13] Ms Chen's body was found wrapped in a large black cloth, bound with a piece of tape. Pieces of a coloured quilt were also found wrapped around her head and hips underneath the black cloth. In early 2010, the Chinese police circulated pictures of the quilt found with the body. The quilt was identified by Ms Li as being similar to one Mr Kim had at his apartment on Caobao Road. She also told the police that the black cloth and tape were similar to items she had seen at his apartment.

[14] As a result of the information provided by Ms Li, the Chinese police went to the Caobao Road apartment. Ten blood samples were extracted for analysis. Nine samples were found to match the DNA of the victim, Ms Chen.

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14 The evidence provided by the PRC authorities against Mr Kim is summarised in the discharge application, above n 3, at [6]–[12]. We rely on that summary for this section of the judgment.

15 The evidence Mr Kim provided to the District Court is summarised at [13]–[16] of the discharge application. Evidence presented by New Zealand experts at the District Court hearing is summarised at [8] and [11] of the discharge application.

[15] The Chinese police examined Mr Kim's mobile phone records which showed that Mr Kim sent a text message on the morning of 10 December 2009 to the phone of Ki Yong Park, a South Korean national, asking Mr Park to contact him urgently. Mr Park told the police that Mr Kim had telephoned him several times between 11 and 12 December. He said that, on returning from work on 12 December, he found Mr Kim waiting near his apartment, crying and smoking. Mr Kim told him he may have beaten a prostitute to death. There was evidence to suggest that Ms Chen engaged in prostitution.

Seeking assurances

[16] Before making the first surrender decision, the Minister instructed officials to explore the seeking of assurances from the PRC relating to torture and fair trial issues. This process began in November 2014 and continued until early July 2015. It involved communication between New Zealand and PRC officials conducted through diplomatic channels and included meetings in Wellington and Beijing. The Minister was briefed periodically during the process of seeking assurances. Once finalised, the draft assurances and other relevant materials were provided to Mr Kim for comment and submissions.[16]

[17] The Minister received a final briefing from the Ministry of Justice (the Ministry) on 23 November 2015.[17] Six volumes of materials accompanied the briefing, including Mr Kim's submissions and the District Court file. As noted above, the Minister made her first surrender decision on 30 November 2015.

[18] The diplomatic assurances relating to torture and fair trial are set out in full below.[18] The overall assurances are that the PRC will comply with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and with applicable international legal obligations and

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16 Submissions and evidence for Mr Kim were received on 11 September 2014, 15 December 2014, 9 September 2015, 21 October 2015 and 23 October 2015.

17 There had been earlier briefings on 9 and 16 November 2015.

18 See below at [129] and [288].

domestic law in relation to fair trial.[19] There are also some specific assurances, such as Mr Kim's right to instruct a lawyer, and further assurances to enable New Zealand to monitor both Mr Kim's trial and how he is treated during his detention.

First surrender decision

[19] The Minister's reasons for her decision focussed on four main issues. First, she explained that, although she accepted there was evidence that torture was still an issue in the PRC, she did not consider that there were substantial grounds for believing Mr Kim would be in danger of being subjected to it.[20] This conclusion was, in her view, supported by a number of factors including the assurances provided by the PRC.

[20] Second, the Minister determined that Mr Kim would receive a trial in the PRC that, "to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14 of the [International Covenant on Civil and Political Rights (ICCPR)]",[21] and so the discretionary ground to refuse surrender under s 30(3)(e) of the Extradition Act was not made out.[22] She considered that concerns about the criminal justice system in the PRC had been sufficiently addressed by reforms to the Criminal Procedure Law (PRC) in 1996 and 2012, as well as the assurances offered by the PRC on this occasion.

[21] Third, the Minister was satisfied that the PRC would not impose the death penalty on Mr Kim as the Supreme People's Court of the PRC had determined that

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19 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) [UNCAT]. New Zealand ratified UNCAT on 10 December 1989 and then ratified the Optional Protocol on 14 March 2007: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (adopted 18 December 2002, entered into force 22 June 2006) [Optional Protocol]. The PRC ratified UNCAT on 4 October 1988 but has never adopted the Optional Protocol. The purpose of the Optional Protocol is outlined below at n 182.

20 By s 30(2)(b) of the Extradition Act, the Minister is not permitted to surrender an individual if there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country.

21 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]. New Zealand ratified the ICCPR on 28 December 1978. The PRC signed the ICCPR on 5 October 1998 but has yet to ratify it.

22 By s 30(3)(e) of the Extradition Act, the Minister may refuse surrender where, for "any other reason", they consider the person should not be surrendered.

this would not occur.[23] She considered this assurance would be upheld, particularly as New Zealand had previously received an assurance not to impose the death penalty from the PRC that had been honoured.

[22] Finally, the Minister considered that Mr Kim's health concerns were not such as to mean that there were compelling or extraordinary circumstances rendering it unjust or oppressive to surrender him.[24] She said that he had not provided any evidence to show he was too unwell to travel. She considered Mr Kim would continue to have adequate access to medical treatment in the PRC.

First judicial review decision

[23] Mr Kim sought judicial review of this decision. For those proceedings, he provided an affidavit from Mr Clive Ansley, a lawyer with experience of the criminal justice system in the PRC.[25]

[24] The High Court was satisfied that, absent the assurances, there were substantial grounds for believing that Mr Kim would be in danger of being tortured if extradited to the PRC.[26] The Court concluded that there were a number of factors that meant Mr Kim's risk of torture was higher than assessed by the Minister. In light of this, the critical issue was whether the assurances would adequately protect him.[27]

[25] Despite what the Judge described as the thorough process and considerable work undertaken to seek to ensure the protection of Mr Kim's rights, she considered

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23 See above n 1. By s 30(3)(a)(i) of the Extradition Act, the Minister may refuse surrender if it appears the person may be sentenced to death and the extradition country is unable to sufficiently assure the Minister that the person will not be sentenced to death.

24 By s 30(3)(d) of the Extradition Act, the Minister may refuse surrender if it appears to the Minister that compelling or extraordinary circumstances of the person, such as those relating to their age or health, exist that would make it unjust or oppressive to surrender them.

25 This experience was described by the Court of Appeal as "a little dated": CA judgment, above n 11, at [36]. Mr Ansley finished practising as a lawyer in the PRC in April 2003, but retained the title of Advising Professor at the Law Faculty of Fudan University, Shanghai. The appellants accepted during the first judicial review hearing that there could be "no dispute that Mr Ansley is qualified by reason of his education, experience and scholarship to provide opinions on the Chinese criminal justice system, including in relation to the political structures in the PRC": first judicial review, above n 9, at [12]. The evidence of Mr Ansley in relation to the prevalence of torture in the PRC is outlined below at [167]–[168], while his evidence about fair trial issues and the rule of law is described below at [309]–[311], [371] and [390].

26 First judicial review, above n 9, at [84] and [254].

27 At [255].

that the surrender order must be reconsidered.[28] The main reason was that the assurances did not appear to permit New Zealand representatives to disclose information about Mr Kim's treatment to third parties. The Minister needed to consider how, in light of this, Mr Kim's rights would be protected.[29]

[26] With regard to fair trial rights, the Judge held that the Minister had not specifically addressed whether the assurances sufficiently protect Mr Kim from ill-treatment and guarantee his right to silence during pre-trial interrogations in circumstances where there was no right for a lawyer to be present for all pre-trial interrogations. The Minister had also not explicitly addressed whether the recording of interrogations was an adequate substitute for the presence of a lawyer. There was also the issue of whether Mr Kim would be compelled to answer questions.[30]

[27] The final point was that the Minister would need to be satisfied that the access to Mr Kim permitted in the assurances would be proactively undertaken. It was unclear to the Court whether the permitted visits would actually occur.[31]

Second surrender decision[32]

[28] In making her second surrender decision, the Minister considered the material that was before the High Court and the Court's decisions on both judicial review and discharge. She also took into account two further briefings (on 31 August 2016 and 19 September 2016) and considered additional information provided by the Minister of Foreign Affairs and Trade, the Hon Murray McCully, and officials from the Ministry of Foreign Affairs and Trade (MFAT). She took expert advice from Professor Fu Hualing, a Professor of Law at the University of Hong Kong. She had before her supplementary publications as to the human rights situation in the PRC. She also considered further submissions made on behalf of Mr Kim.[33]

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28 At [256].
29 At [259].
30 At [260].
31 At [261]. There was also an issue as to whether any reliance could be placed on South Korea to monitor Mr Kim's treatment. This did not form part of the argument for the parties or the intervener in this Court.
32 The Minister had been told that, in reaching her decision, she needed to put her previous decision and the reasons for it out of her mind and start again.
33 Provided on 29 July 2016 and 24 August 2016.

[29] The Minister again decided that Mr Kim should be extradited. On the concerns outlined by the High Court, she said she was satisfied that:

(a) Mr Kim's treatment would be proactively monitored;

(b) New Zealand would be able to disclose information about Mr Kim's treatment to third parties "in appropriate circumstances", and that "the effectiveness of the assurances will not be undermined";

(c) Mr Kim's rights would be sufficiently protected despite the absence of a lawyer during pre-trial interrogations; and

(d) there would be no legal consequence under PRC law if Mr Kim refused to answer questions during pre-trial interrogations, meaning he had the right to silence.

Second judicial review decision

[30] Mr Kim applied for judicial review of the second surrender decision. On the second judicial review the High Court was satisfied that the additional information received by the Minister "comprehensively addressed the three matters of concern in the first judicial review" and the Minister's reconsideration in light of that information adequately addressed the deficiencies in decision-making identified.[34] The Court concluded that it was reasonably open to the Minister to determine that Mr Kim's rights would be protected by the assurances if he was surrendered to the PRC, and thus the decision to order surrender was a lawful exercise of her discretionary power.[35]

Court of Appeal judgment

[31] On appeal against the High Court decision, the Court of Appeal identified what it considered were "wide-ranging" concerns with the Minister's decision.[36]

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34 Second judicial review, above n 10, at [155].
35 At [155] and [157].
36 CA judgment, above n 11, at [274].

[32] The Court first held that the Minister had failed to consider, as a preliminary question, whether the general human rights situation in the PRC was such that any assurances could be accepted.[37]

[33] In relation to torture, the Court held that the Minister had failed to consider how the assurances could adequately protect Mr Kim from torture in light of (among other things) the prevalence of torture despite its illegality and the disincentives for reporting it.[38] The Minister had, among other errors, also failed to address adequately the High Court's concerns about the risk to Mr Kim expressed in the first judicial review.[39]

[34] With regard to fair trial issues, the Court held that the inquiry for the Minister is whether Mr Kim is at a "real and not merely fanciful risk" of a departure from standards such that it would deprive him of "a key benefit of a procedural right" under the provisions of the ICCPR, which are designed to "secure the right to a fair trial".[40] This meant the Minister had applied the incorrect legal test. It also held that a number of concerns about compliance with fair trial rights were not adequately addressed by the assurances.[41]

[35] Further, the Court considered that the Minister should have sought a specific assurance that the five years spent in custody in New Zealand would be deducted from any finite sentence of imprisonment in the PRC.[42] A failure to take this into account would, it said, lead to a disproportionately severe punishment.

[36] The Court declined to examine an issue raised by Mr Kim as to whether the Minister could reasonably have relied upon advice from PRC officials regarding his access to mental health services while in custody in the PRC as insufficient support for the claim was provided.[43]

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37 At [73]–[79] and [275(b)].
38 At [128]–[139] and [275(f)].
39 At [120], [124]–[126] and [275(d)–(e)].
40 At [179]–[180] and [275(i)].
41 At [221], [243], [256]–[257] and [275(j)].
42 At [267] and [275(k)].
43 At [269]–[270] and [275(l)].

[37] Counsel for Mr Kim had additionally raised issues about the death penalty and prevalence of extra-judicial killings. The Court of Appeal held that the Minister had not erred in her assessment of these.[44] These issues were not pursued in the appeal before this Court.

Issues

[38] The issues in the appeal are:

(a) What is the standard of review?

(b) Was the Minister obliged to make a preliminary assessment of the general human rights situation in the PRC before seeking assurances?

(c) In what circumstances is it possible to rely on assurances related to torture?

(d) Are the assurances in this case relating to torture sufficient?

(e) What is the proper test when assessing whether Mr Kim will receive a fair trial?

(f) In light of this test, are the assurances received on fair trial issues adequate?

(g) Should the Minister have received an assurance with regard to remand time?

[39] On the cross-appeal, the question is whether in all the circumstances the Minister's decision should be set aside and the matter not remitted to the Minister for reconsideration.[45]

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44 At [155], [165] and [275(g)–(h)].

45 In written submissions this was put as a request that the Court permanently stay the extradition proceeding. However it is described, Mr Kim in effect seeks an order that he cannot be extradited to the PRC.

What is the standard of review?

Court of Appeal judgment

[40] The Court of Appeal recorded that it was common ground between the parties that the High Court applied the appropriate standard of review: that of heightened scrutiny.[46] The Court agreed this was the appropriate standard.[47]

Appellants' submissions

[41] The appellants say that the standard of review was agreed in the Courts below and therefore that the intervener's argument in relation to correctness, outlined below, is not properly before this Court. The issue for the Court is whether the Minister's conclusion that Mr Kim should be surrendered was "reasonably open" to the Minister on the basis of sufficient and relevant evidence. It is accepted that the Court would apply heightened scrutiny to the consideration of that question. In the appellants' submission, it is not, however, for the Court to decide whether the relevant risks exist and substitute its own view, as to do so would have the Court going beyond its constitutional mandate.[48]

Intervener's submissions

[42] The Human Rights Commission submits that the rights contained in the New Zealand Bill of Rights Act 1990 (Bill of Rights) are legal standards. Whether actions are consistent with the Bill of Rights is thus a question of law. This means that the review standard should be one of correctness. Further, with regard to torture, s 30(2)(b) of the Extradition Act reflects the position at international law where the prohibition against torture is jus cogens.[49]

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46 CA judgment, above n 11, at [45], referring to the first judicial review, above n 9, at [7], and at [46], referring to the second judicial review, above n 10, at [17].

47 At [47].

48 Relying on *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCR 3 at [39].

49 We note that, although the prohibition against torture is jus cogens, this Court in *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [51] held that the principle of non-refoulement to torture had not reached that status.

[43] The Commission submits that the Canadian approach from *Suresh v Canada (Minister of Citizenship and Immigration)*, involving deference to the Minister's decision and an assessment as to whether it is reasonable, should be rejected as it reflects the particular constitutional arrangements in Canada and, in any event, the caselaw there is in a state of flux.

[44] Finally, the Commission notes that New Zealand's compliance with its international human rights obligations is assessed by international bodies such as the United Nations Human Rights Council (UNHRC) and the Committee against Torture[50] on a correctness standard. The Commission submits that it is appropriate to align New Zealand's approach accordingly.

Mr Kim's submissions

[45] Mr Kim submits that the Minister's decision to surrender him fell short on the heightened scrutiny test but that the Commission's position "may be more straightforward".

Our assessment

[46] We accept the appellants' submission that the issue of the proper standard of review is not before us. We thus do not deal definitively with the Commission's submission on the Bill of Rights and whether it requires a correctness standard of review. We do, however, make the following comments.

[47] It is accepted by the appellants that a surrender order for Mr Kim cannot be made if there are substantial grounds for believing that he would be in danger of being subjected to an act of torture in the PRC. The appellants equally accept that Mr Kim cannot be surrendered if he would not receive a fair trial in the PRC. As we discuss later, there is, however, disagreement on the test to be applied relating to whether or not there will be a fair trial.

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[50] The Committee against Torture is a body of independent experts that monitors implementation of the UNCAT, above n 19, by its States Parties.

[48] With regard to torture, the task for the Minister was to evaluate the level of risk based on the available evidence. With regard to fair trial, the decision to be made was whether Mr Kim will receive a fair trial (in terms of the appropriate test). This is again based on an assessment of the evidence available. In both cases, the decision can be seen as largely factual.

[49] As we understand the Commission's submission, the correctness standard would mean that, if the Court took a different view of the facts, then it would hold the Minister had erred, even if it considered the Minister's evaluation of the facts was reasonably open to her.[51] However, it is accepted by the Commission in its written submissions that it may be appropriate for the courts to give weight to the executive's assessment of certain aspects of the extradition decision where the executive possesses particular expertise or some other form of competence relative to the court.[52] Such expertise would have to be taken into account in any review.[53] It seems to us that this would mean that a correctness standard would be difficult to apply in practice.

[50] We comment, however, that the standard of review may not make a difference in this case. If this Court, taking into account the Minister's expertise where appropriate, considers that there are substantial grounds for believing Mr Kim will be at risk of torture or that he will not receive a fair trial, then it would be unlikely to conclude that it was reasonably open to the Minister to decide to surrender Mr Kim to the PRC.[54]

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51 This would be similar to the review of factual findings on a general appeal (see *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5]) or to the review of evaluative decisions on a general appeal (see *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32]–[33] per Blanchard, Tipping and McGrath JJ). This case, however, concerns judicial review of a decision given to the Minister by the Extradition Act, rather than a general appeal.

52 In oral submissions, the Commission may have retreated somewhat from this submission, noting that the Minister making the decision here was the Minister of Justice, rather than the Minister of Foreign Affairs and Trade (who would possess the relevant expertise), and arguing that accepting that the Minister of Justice can place weight on a relationship which is difficult to measure amounts to deference.

53 We consider, contrary to the position taken in oral submissions by the Commission, that the Minister was entitled to rely on the expertise of the Minister of Foreign Affairs and Trade. The latter's assessment of the state of the bilateral relationship is "evidence" like any other evidence. Nor do we consider that it is improper for the courts to take that expertise into account. If, however, there is contrary evidence related to the state of bilateral relations, then of course the courts would evaluate all of the evidence in the normal manner.

54 We agree with the Commission that *Suresh*, above n 48, reflects Canada's particular constitutional arrangements. To the extent that the comments at [39] in *Suresh* might suggest that an assessment of the risk of torture is outside the realm of expertise of reviewing courts, we do not agree. Such an assessment would be based on the courts' assessment of the evidence—as it is in other cases.

[51] We also comment that, as the standard of review is not before us, we are not to be taken as endorsing the heightened scrutiny test.[55] Whether, and if so when, heightened scrutiny of the reasonableness of a decision is appropriate will have to be considered in a case where the issue arises and has been fully argued.

Was the Minister obliged to make a preliminary assessment of the general human rights situation in the PRC before seeking assurances?

Court of Appeal judgment

[52] The Court held that, before determining whether to accept assurances, the Minister was obliged to address the preliminary question of whether the general human rights situation in the receiving state excludes accepting any assurances whatsoever.[56] The Court considered that not addressing the general human rights situation as a first stage in the process risks there being a concentration on "a series of isolated risks" without taking into account the broader situation.[57] The Court's view was that: "Broken up, the process could produce a falsely reassuring picture as to the effectiveness of assurances."[58]

[53] The Court accepted that the Minister's briefing papers for both decisions advised that it was appropriate to consider the general situation in the receiving state regarding the subject matter of the assurances but considered the advice "obscure".[59] In her reasons, the Minister only referred to the general situation in the PRC with regard to torture, failing to address the general human rights situation as a separate and preliminary question.[60] This ground of appeal therefore succeeded in the Court of Appeal.[61]

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55 For commentary, see for example, Dean Knight "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" [2016] NZ L Rev 63; Dean Knight "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL 117; and Hanna Wilberg "Administrative Law" [2019] NZ L Rev 487 at 495–499. See also the comments of Elias CJ in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [5] on the utility of labels such as heightened scrutiny.

56 CA judgment, above n 11, at [73].

57 At [74].

58 At [74].

59 At [75]–[76].

60 At [77].

61 At [79].

Appellants' submissions

[54] The appellants accept that the general human rights situation is a relevant factor when considering the situation of the individual, in line with the approach of the Canadian Supreme Court in *India v Badesha*.[62] There is, however, no need for this to be considered as a separate preliminary question.[63]

Mr Kim's submissions

[55] Mr Kim submits that the approach of the Court of Appeal is correct and follows *Othman v United Kingdom*,[64] as well as earlier caselaw. Further, in the case of torture it is submitted that the approach aligns with art 3(2) of UNCAT.[65]

[56] Mr Kim also submits that the preliminary question has been applied in subsequent cases of the European Court of Human Rights (ECHR), being *Labsi v Slovakia*,[66] *Kasymakhunov v Russia*,[67] and *GS v Bulgaria*.[68] He also says it was applied in a recent decision of the Swedish Supreme Court, *The People's Republic of China v QJ* (*PRC v QJ*).[69]

Our assessment

[57] We do accept (as do the appellants) that there may be extreme situations where there is no point in seeking assurances as they obviously could not be relied on. If, for example, the body giving the assurance has no control over a territory, its assurance that something will or will not happen is meaningless. However, this does not mean that it is always necessary to conduct a preliminary assessment before considering whether to seek assurances. It would be artificial to require such a two-stage approach and it would form a procedural straitjacket for the Minister which is not justified. As

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62 *India v Badesha* 2017 SCC 44, [2017] 2 SCR 127 at [48], citing *Suresh*, above n 48, at [124]–[125]. The appellants further say that the cases cited for the preliminary question in *Othman v United Kingdom* (2012) 55 EHRR 1 (ECHR) [*Othman* (ECHR)] do not in fact stand for this question.

63 That it is not a separate preliminary question is also the Commission's position.

64 *Othman* (ECHR), above n 62, at [188].

65 UNCAT, above n 19.

66 *Labsi v Slovakia* ECHR 33809/08, 15 May 2012.

67 *Kasymakhunov v Russia* ECHR 29604/12, 14 November 2013.

68 *GS v Bulgaria* ECHR 36538/17, 4 April 2019.

69 *The People's Republic of China v QJ* Swedish Supreme Court Ö 2479-19, 9 July 2019 [*PRC v QJ*]. We were provided with a certified translation of the case.

long as the general human rights situation is properly taken into account in the decision-making process, it is unnecessary for there to be a separate preliminary consideration.

[58] We accept that the Minister must take care to guard against an overly narrow approach to the decision-making process by concentrating on specific and isolated risks, without holistically considering those risks within the broader context of the general human rights situation in the country. We consider, however, that requiring the decision-maker to make a preliminary assessment could, in fact, result in the decision-maker not properly factoring the general human rights situation into the evaluation of the risk of torture or lack of a fair trial for the particular individual and whether the assurances obtained will remove this risk.

[59] Article 3(2) of UNCAT supports the conclusion that the general human rights situation should be considered in the context of assessing whether there are substantial grounds for believing that a particular individual would be in danger of being subjected to torture as opposed to as a separate preliminary question. Article 3 of UNCAT provides:

> 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[60] In our view, the Court of Appeal overstated the requirements in *Othman*. The ECHR explicitly noted that usually the decision-maker will first assess the quality of assurances given and second whether, in light of the receiving state's practices, they can be relied upon.[70] It did not require there to be a preliminary assessment of the human rights situation in all cases and recognised that it would only be in "rare cases" that the general situation of a country would mean that no weight at all could be given to assurances.[71]

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70 *Othman* (ECHR), above n 62, at [189].
71 At [188]. The Court of Appeal noted this: CA judgment, above n 11, at [71].

[61] In any event, the four cases cited in *Othman* do not stand for the proposition that a preliminary question should always be asked before assurances are sought. In all of the cases cited, the ECHR considered all the circumstances of the individual and the assurances themselves, despite each case involving countries where egregious human rights abuses were occurring.[72]

[62] We also do not accept Mr Kim's submission that the subsequent cases he cites are examples of a preliminary assessment of the human rights situation in a country being conducted. The Court in *Kasymakhunov*, the first of the ECHR cases cited by Mr Kim, still considered the individual circumstances of the applicant and the assurances proffered.[73] The same applies to *Labsi*[74] and *GS.*[75]

[63] As to the recent Swedish case relied on by Mr Kim, *PRC v QJ*, we do not consider that this case supports Mr Kim's position either.[76] In addition to examining the general situation in the PRC, the Court also considered QJ's individual position and the content of the assurances which had been sought but not yet obtained.[77] The Court also referred to problems verifying that a guarantee has been lived up to, which no doubt depended on the terms of the proposed assurances. Indeed, the proposed monitoring assurance in that case was limited to the (obviously inadequate) assurance that "the Swedish authorities will be allowed the opportunity to inspect his conditions in the future".[78]

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72 The European Court of Human Rights (ECHR) in *Othman* (ECHR), above n 62, at [188] cited *Sultanov v Russia* ECHR 15303/09, 4 November 2010; *Yuldashev v Russia* ECHR 1248/09, 8 July 2010; *Ismoilov v Russia* (2008) 49 EHRR 42 (ECHR); and *Gaforov v Russia* ECHR 25404/09, 21 October 2010. These four cases cited concerned extradition from Russia, with the requesting state being Uzbekistan for the first three and Tajikistan for the fourth. In each case, the general human rights situation and the circumstances of the individuals were discussed: see *Sultanov* at [69]–[74], *Yuldashev* at [81]–[86], *Ismoilov* at [118]–[128] and *Gaforov* at [128]–[139].

73 *Kasymakhunov*, above n 67, at [123]–[127]. We also note that in both this case and *Labsi*, above n 66, the applicants had already been transferred out of the requested states when the ECHR made its decision. However, these cases are still relevant because, to assess the responsibility of the state from which the applicants had been transferred, the Court had to assess whether the applicant had been at a real risk of ill-treatment at the time of transfer.

74 *Labsi*, above n 66, at [122]–[132].

75 *GS*, above n 68, at [86]–[93].

76 *PRC v QJ*, above n 69.

77 The Court noted that QJ argued that he was a political prisoner, with his participation in the Chinese Democracy movement the real reason he was being accused of the crime: at [9]. The Court said that, being a member of the Communist Party at the time of the alleged offences, QJ had an "especially great" risk of being subject to treatment that violated his right not to be subjected to torture or to inhuman or degrading treatment or punishment: at [59].

78 At [4].

Conclusion on preliminary question

[64] Contrary to the finding of the Court of Appeal, it was not necessary for the Minister to make a preliminary assessment as to whether the human rights situation in the PRC was such that assurances could not be relied upon. As is reflected in the caselaw both before and after *Othman*, the general human rights situation is a relevant factor in the overall decision, but normally, even where the general human rights situation is poor, consideration will also be given to the circumstances of the individual concerned and the particular assurances offered.[79]

[65] There may be rare cases where the human rights situation is so bad that assurances could not properly be given any weight at all, no matter how detailed. The decision-maker could certainly consider whether a case might come within that rare category of cases before seeking assurances, but this question can equally be considered after assurances have been received. The risk to the individual would then be assessed taking into account the assurances and the personal situation of the person at issue in light of the general human rights situation in the relevant jurisdiction at the time the decision is made.

In what circumstances is it possible to rely on assurances related to torture?

[66] The Commission submits that the Minister should not have relied on the assurances in this case because diplomatic assurances not to torture cannot be relied upon in circumstances where, absent assurances, there is a real risk of torture of the individual concerned.[80] As a back-up argument, it is submitted that such assurances cannot be relied upon from a state where torture is routine and systemic.

[67] The appellants submit that the arguments that assurances cannot be sought from states where torture is systemic or where the individual concerned would otherwise be at a real risk of torture conflict with the caselaw and in particular *Othman*, which they say is correctly decided.

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79 As was done in all the cases discussed above.

80 Mr Kim adopts this submission.

[68] In order to assess these submissions, we first summarise the information given to the Minister in the Ministerial briefings and the decision on these points in the Court of Appeal. After that, we will outline the issues that commentators have raised with torture assurances and examine the caselaw on whether and, if so when, it is appropriate to rely on assurances. We also discuss the New Zealand statutory framework with regard to assurances.

Ministerial briefings

[69] The Minister was briefed on general issues in relation to torture in her 23 November 2015 briefing. She was told that torture violates a peremptory norm of international law and that much of the existing international caselaw and commentary on assurances "weighs against the use of such assurances due to the absolute nature of the prohibition against torture, the obligation on states to prevent it, and the difficulty in monitoring and enforcing such assurances".

[70] The Minister was told, however, that two recent court decisions had considered and accepted the use of diplomatic assurances, and, in particular, assurances against torture: the Federal Court of Canada's decision in *Lai v Canada (Citizenship and Immigration)*[81] and the ECHR's decision in *Othman*.[82]

[71] Based on its analysis of the human rights situation in the PRC, particularly the recent improvements, as well as the experience of other countries with assurances from the PRC, the Ministry advised that it did not consider that the human rights situation in the PRC was such that New Zealand was precluded from relying on assurances from the PRC in this case.[83]

Court of Appeal judgment

[72] The Court of Appeal concluded that, even if there is evidence of systemic ill-treatment of defendants and prisoners in the PRC, New Zealand is not prohibited

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81 *Lai v Canada (Citizenship and Immigration)* 2011 FC 915, [2013] 2 FCR 56.

82 *Othman* (ECHR), above n 62. Both of these cases involved deportations, but the Minister was told the same would apply to extradition.

83 Supplementary Ministerial briefings prepared after the first judicial review provided the Minister with further information about disclosure of information and monitoring arrangements, but not any additional detail about the general question of accepting assurances.

by international law from accepting and relying upon diplomatic assurances when assessing the risk of torture faced by Mr Kim. The issue of whether or not assurances should be accepted requires an evaluative assessment of the evidence by the Minister.[84]

[73] The Court noted that the Extradition Act in s 30(3)(a) and s 30(6) clearly contemplates that assurances may be sought.[85] It also pointed out that art 3 of UNCAT does not prohibit extradition to a state where torture is known to occur. It rather focusses on the right of an individual to be free from torture.[86]

[74] The Court acknowledged the international commentary from human rights organisations, the United Nations Human Rights Committee and *General comment No 4* of the Committee against Torture.[87] It, however, considered this material does not support the view that, to act consistently with New Zealand's international obligations, assurances may not be accepted in any circumstances from a state that uses torture.[88] Nor did the Court consider the position was supported by caselaw.[89]

Issues raised about torture assurances by commentators

[75] We now summarise the various concerns raised by commentators regarding diplomatic assurances in relation to torture.

[76] First, although not advanced by the parties in this Court, we record that some commentators take a categorical approach regarding diplomatic assurances against torture, stating that they are never acceptable. The argument is based on the

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84 CA judgment, above n 11, at [70], citing *Lai*, above n 81, at [135]–[143].
85 At [58].
86 At [61].
87 Committee against Torture *General comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* UN Doc CAT/C/GC/4 (4 September 2018) [*General comment No 4*].
88 CA judgment, above n 11, at [65].
89 At [66]–[69].

universally binding prohibition on torture.[90] It appears this argument was put before the Court of Appeal.

[77] A step down from this is the primary argument advanced by the Commission in this Court: if, before assurances are considered, there are substantial grounds for believing that the person would be in danger of being subjected to torture or ill-treatment were they sent to the requesting state, diplomatic assurances cannot be used to "circumvent" the risk. As noted by the Commission, the Committee against Torture has expressed some support for this view in its concluding observations on states.[91]

[78] The Commission also referred to statements of United Nations Special Rapporteurs on Torture. For example, the current mandate holder, Professor Nils Melzer, stated that, where there are substantial grounds for believing that a person would be in danger of being subjected to torture, "diplomatic assurances, even in conjunction with post-return monitoring mechanisms, are inherently incapable of providing the required protection".[92]

[79] At times, the Committee against Torture and the Special Rapporteurs have expressed a less strict view, instead supporting the Commission's alternative submission that diplomatic assurances cannot be accepted from states with a systemic practice of torture.[93]

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90 See, for example, Louise Arbour, United Nations High Commissioner for Human Rights "Human Rights Day Statement: On Terrorists and Torturers" (United Nations, New York, 7 December 2005). In effect the argument is that extradition with assurances is in itself a breach of international law obligations and of UNCAT, above n 19.

91 All States Parties to UNCAT are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to UNCAT and then every four years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations". Examples of reports with statements supporting the Commission's submission are *Concluding observations of the Committee against Torture: Albania* UN Doc CAT/C/ALB/CO/2 (26 June 2012) at [19]; and Committee against Torture *Concluding observations on the third periodic report of Slovakia* UN Doc CAT/C/SVK/CO/3 (8 September 2015) at [17(c)].

92 Nils Melzer *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* UN Doc A/HRC/37/50 (23 November 2018) at [48]. See also Manfred Nowak *Report of the Special Rapporteur on the question of torture* UN Doc E/CN.4/2006/6 (23 December 2005) at [32]; and Juan E Méndez *Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* UN Doc A/HRC/16/52 (3 February 2011) at [63].

93 See the discussion in Philip Alston and Ryan Goodman *International Human Rights* (Oxford University Press, Oxford, 2013) at 452–454.

[80] These two positions – not accepting diplomatic assurances when, absent assurances, there is a real risk of torture, or not accepting assurances from a country where there is systemic torture – are both based on two main concerns.

[81] First, it is said that it is difficult to accept promises from states not to torture when the need to obtain assurances indicates they are regarded as being in breach of their legal obligation not to torture. Where a state has been found to violate international law by perpetrating torture, "it certainly cannot be expected to respect bilateral agreement".[94] It is argued that either the state does not view the law in question as valuable or important to uphold, or it does not have the capacity to do so.

[82] Second, torture is difficult to detect and is often surrounded by secrecy which makes effective monitoring of assurances difficult.[95] Perpetrators may be trained in torture methods designed to avoid its detection.[96] Those who might otherwise report incidents of torture, such as prison medical staff, are sometimes complicit in covering it up.[97] Those who are tortured in custody may also keep torture a secret, as they remain under the control of the torturers and therefore at risk of reprisals.[98] It is also said that because any detection of a violation of the assurances would tarnish the international image of both states involved and undermine their bilateral relationship, this disincentivises the sending state from following up on torture allegations.[99] With this in mind, detainees may also consider there is little possible upside from reporting torture, in that, at best, nothing will be done about their complaint.

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94 Margit Ammer and Andrea Schuechner "Article 3 Principle of Non-Refoulement" in Manfred Nowak, Moritz Birk and Giuliana Monina (eds) *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed, Oxford University Press, Oxford, 2019) 98 at [202].

95 At [200]; and Jeffrey G Johnston "The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11" (2011) 11 Int CLR 1 at 23.

96 Johnston, above n 95, at 23.

97 At 23.

98 Office of the United Nations High Commissioner for Human Rights (OHCHR) *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc HR/P/PT/8/Rev.1 (9 August 1999) [*Istanbul Protocol*] at [69], [91], [97], [130] and [268].

99 Mariagiulia Giuffré "An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)" (2013) 2 International Human Rights Law Review 266 at 288; and Lena Skoglund "Diplomatic Assurances against Torture – An Effective Strategy?" (2008) 77 Nordic J Intl L 319 at 358. A related issue is that states often have "a keen interest to expel, 'render', or return the persons concerned from their own territory". Therefore, they may not be very interested in investigating what happened to the person on return: Ammer and Schuechner, above n 94, at [200].

[83] It is because of these concerns that commentators and caselaw generally distinguish between diplomatic assurances about torture and those related to the death penalty and certain fair trial rights, with these latter two being more readily accepted as permissible.[100]

Caselaw on diplomatic assurances

[84] The position taken by specialist human rights bodies with regard to individual cases and other caselaw does not accord with the position taken with regard to assurances in the commentaries discussed above.

[85] The Committee against Torture, in its decisions on individual cases, has not ruled out the use of diplomatic assurances even where torture is routinely practised in the requesting country. It is sceptical of their utility but has not gone as far as ruling out reliance on assurances as its general recommendations to states might suggest.[101]

[86] In *Agiza v Sweden*, for example, it was only after having outlined the lack of a pre-arranged monitoring mechanism in the diplomatic assurances and the significant indications of risk personal to Mr Agiza that the Committee concluded the procurement of diplomatic assurances which provided no mechanism for their enforcement did not suffice to protect against the manifest risk.[102] The Committee did not rule them out generally, despite recognising that the use of torture was consistent and widespread in Egypt.[103] Given that the assurances provided no mechanism for their enforcement and the fact that the actual monitoring conducted fell well below best practice, this conclusion is hardly surprising. It cannot be taken as supporting the Commission's position that assurances can never be sought.

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100 See, for example, United Nations High Commissioner for Refugees *Note on Diplomatic Assurances and International Refugee Protection* (10 August 2006) at [22]–[24], as quoted in *Sultanov*, above n 72, at [61]; *Suresh*, above n 48, at [124]; and *India v Badesha* 2016 BCCA 88, [2016] BCJ No 365 at [66].

101 See above at [77] and [79].

102 Committee against Torture *Decision: Communication No 233/2003* UN Doc CAT/C/34/D/233/2003 (24 May 2005) [*Agiza v Sweden*] at [13.4]. Mr Agiza was considered a security risk by Sweden and was deported to Egypt on 18 December 2001 on the basis of assurances it had provided. A complaint was submitted on Mr Agiza's behalf against Sweden to the Committee against Torture in 2003: at [1.1].

103 At [13.4].

[87] Implicit acceptance that diplomatic assurances might be sufficient, provided they meet certain criteria (particularly with regard to monitoring), is also seen in the Committee's 2007 decision of *Pelit v Azerbaijan*.[104]

[88] The Commission submits that, in *Tursunov v Kazakhstan*, the Committee found a violation of art 3 without considering assurances received by Kazakhstan.[105] We disagree. It is apparent on reading the whole decision and the passage quoted by the Commission in context, that diplomatic assurances were rejected in that case because they insufficiently addressed the risk and fell short of the criteria stated in *Pelit*, as opposed to being rejected out of hand.[106]

[89] We also refer to the Human Rights Committee's decision in *Alzery v Sweden.*[107] The Committee's opinion explicitly accepted the content of diplomatic assurances and the existence and implementation of enforcement mechanisms as "factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists".[108]

[90] The Commission also says that the ECHR's overall jurisprudence supports its submissions, with the exception of *Othman*, which it argues was a departure from precedent that has not since been followed. We do not accept this submission.

[91] The ECHR's jurisprudence outlined above[109] indicates a strong view that skeletal assurances, where the state does no more than make general non-specific promises not to torture against a background where torture is routine and therefore highly likely to occur in a particular case, will not be sufficient. The cases did not,

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104 Committee against Torture *Decision: Communication No 281/2005* UN Doc CAT/C/38/D/281/2005 (5 June 2007) [*Pelit v Azerbaijan*] at [11].

105 Committee against Torture *Decision: Communication No 538/2013* UN Doc CAT/C/54/D/538/2013 (3 July 2015) [*Tursunov v Kazakhstan*].

106 The passage quoted by the Commission is at [9.10]. But compare this to [9.3] and [9.5], which clearly indicate the Committee considered all relevant circumstances, and that these circumstances included the assurances proffered.

107 Human Rights Committee *Views: Communication No 1416/2005* UN Doc CCPR/C/88/D/1416/2005 (10 November 2006) [*Alzery v Sweden*]. This case is connected to *Agiza*, above n 102, but this claim was brought before the Human Rights Committee under the ICCPR, above n 21. Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

108 *Alzery*, above n 107, at [11.3].

109 See above at [61]–[62].

however, rule out the use of assurances. They are thus consistent with *Othman*, to which we now turn.

[92] The United Kingdom considered that Mr Othman was a threat to national security and wished to deport him to Jordan. There, he would face a retrial for terrorism offences of which he had previously been convicted in absentia. After the case had been through a number of levels in the United Kingdom,[110] Mr Othman applied to the ECHR on the basis that there had been breaches of arts 3, 5, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[111] It is significant to the result in *Othman* that a memorandum of understanding (MOU) had been agreed between the United Kingdom and Jordan on 10 August 2005 relating to the treatment in detention of any persons returned to Jordan and to fair trial issues.[112]

[93] The ECHR said that, in deciding whether there is a real risk of ill-treatment, a court must consider both the general human rights situation in that country and the particular characteristics of the person involved.[113] In this case the ECHR found that torture in Jordan remained "widespread and routine" and continued to be practised with impunity within a criminal justice system that "lack[ed] many of the standard,

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110 Mr Othman was served with a Notice of Intention to Deport on 11 August 2005. He unsuccessfully appealed against the making of the order to the United Kingdom Special Immigration Appeals Commission (UKSIAC): *Othman v Secretary of State for the Home Department* UKSIAC SC/15/2005, 26 February 2007. The Court of Appeal of England and Wales then unanimously allowed his appeal (heard alongside the cases of two Algerian nationals) in *RB (Algeria) v Secretary of State for the Home Department* [2008] EWCA Civ 290, [2010] 2 AC 110 [*Othman* (EWCA)], but was then overturned by the House of Lords in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110 [*Othman* (HL)].

111 Convention for the Protection of Human Rights and Fundamental Freedoms 2889 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention on Human Rights]. Article 3 prohibits torture, art 5 protects the right to liberty and security, art 6 guarantees the right to a fair trial and art 13 guarantees all those whose Convention rights are violated an effective remedy before a national authority.

112 The terms of the memorandum of understanding are set out in *Othman* (ECHR), above n 62, at [76]–[79].

113 At [187]. In this regard, although the Commission notes that UNCAT, above n 19, and the European Convention on Human Rights, above n 111, are worded differently – with the European Convention containing no equivalent to art 3(2) of UNCAT explicitly requiring consideration of the "existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" – the ECHR clearly considers the general human rights situation an important factor.

internationally recognised safeguards to prevent torture and punish its perpetrators".[114] Moreover, as a high-profile Islamist, Mr Othman was considered part of a category of prisoners who were frequently ill-treated in Jordan.[115] As such, a lawful deportation was impossible without mechanisms to mitigate these risks.

[94] The ECHR noted that: "In a case where assurances have been provided by the receiving state, those assurances constitute a further relevant factor which the Court will consider".[116] It then affirmed a principle set out in *Saadi v Italy*, stating that:[117]

> However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.[118]

[95] The ECHR said that, aside from rare cases where a state's human rights situation means no weight at all can be given to assurances, the Court will assess "first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon".[119]

[96] The ECHR rejected the submission made on behalf of Mr Othman that, as Jordan could not be relied on to abide by its binding international multilateral obligation not to use torture, it could not be relied on to comply with non-binding bilateral assurances. The Court said that the extent to which a state has failed to comply with its multilateral obligations is "at most, a factor in determining whether its bilateral assurances are sufficient".[120]

[97] The ECHR also rejected Mr Othman's submission that assurances should never be relied on where there is a systemic problem of torture and ill-treatment. The

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114 At [191]. The ECHR's statement that torture was widespread and routine was based on *Concluding observations of the Committee against Torture: Jordan* UN Doc CAT/C/JOR/CO/2 (25 May 2010) at [10].
115 At [192].
116 At [187].
117 At [187].
118 *Saadi v Italy* (2009) 49 EHRR 30 (Grand Chamber, ECHR) at [148].
119 *Othman* (ECHR), above n 62, at [188]–[189].
120 At [193].

Court said that "it would be paradoxical if the very fact of having to seek assurances meant one could not rely on them".[121]

[98] Overall, the ECHR considered that the "specific and comprehensive" MOU at issue was "superior in both its detail and its formality" to any assurances which the Court had previously examined.[122] It also seemed to be superior to any assurances examined by the Committee against Torture and the Human Rights Committee.[123]

[99] The ECHR did, however, note shortcomings:

(a) The MOU would have been considerably strengthened if it had contained a requirement that the applicant be brought before a civilian judge within a short, defined period after his arrest (as opposed to before a military prosecutor).[124]

(b) Mr Othman was not to have a lawyer present during questioning by the Jordanian General Intelligence Directorate (GID).[125] Although this was "a matter of serious concern", the risk from it was "substantially reduced by the other safeguards contained in the MOU and the monitoring arrangements".[126]

[100] In Mr Othman's case the monitoring mechanism was through the Adaleh Centre for Human Rights Studies, which had signed a monitoring agreement with the United Kingdom Government.[127] The Court considered it was clear that the Adaleh Centre's "relative inexperience and scale" meant it did not have the same expertise or resources as leading international non-governmental organisations (NGOs), nor the same reputation as the Jordanian National Centre for Human

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121 At [193].

122 At [194]. The Court at [194], n 100 suggested comparing, for example, the assurances to those provided in *Saadi*, above n 118; *Klein v Russia* ECHR 24268/08, 1 April 2010; and *Khaydarov v Russia* ECHR 21055/09, 20 May 2010.

123 At [194]. The Court referred at [194], n 101 to *Agiza*, above n 102; *Alzery*, above n 107, at [3.1]; and *Pelit*, above n 104.

124 At [198].

125 The Jordanian General Intelligence Directorate shares responsibility for maintaining internal security and monitoring security threats in Jordan with the Public Security Directorate and the military.

126 At [199].

127 At [24].

Rights.[128] However, the capability of the Adaleh Centre had significantly increased in recent years, and, regardless, it "was the very fact of monitoring visits which was important".[129]

[101] Turning to its second question, the Court considered that compliance with both the letter and spirit of the bilateral agreement was likely for a number of reasons:[130]

(a) the high degree of formality of the MOU, as well as its comprehensiveness;[131]

(b) the fact that "the assurances were given in good faith by a government whose bilateral relations with the United Kingdom have, historically, been very strong";[132]

(c) approval of the assurances at the highest level of the Jordanian Government with the express approval and support of the King (such that, regardless of the status of the MOU in Jordanian law, the assurances had been given by officials who were capable of binding the Jordanian State);[133]

(d) the fact the assurances had the approval and support of senior officials of the GID;[134] and

(e) Mr Othman's high profile means any ill-treatment would have serious consequences for the bilateral relationship and cause international outrage.[135]

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128 At [203]. Leading NGOs referred to were Amnesty International, Human Rights Watch and the International Committee of the Red Cross.
129 At [203].
130 At [195].
131 At [194].
132 At [195].
133 At [195].
134 At [195].
135 At [196].

[102] The ECHR concluded that Mr Othman's deportation to Jordan would not be in violation of arts 3 and 5 or art 3 in combination with art 13 of the European Convention on Human Rights.[136] However, his deportation would be in violation of art 6 as there was a real risk of the admission at his retrial of evidence obtained by the torture of third parties,[137] which was not at that point the subject of an assurance.[138]

New Zealand's statutory framework

[103] Section 26(1)(a) of the Extradition Act provides that, where a court has determined a person is eligible for surrender under s 24, it must issue a warrant for the detention of the person. Section 30(1) provides that, where this has occurred, the Minister must determine whether the person is to be surrendered. The Minister must not surrender a person in cases where the circumstances set out in s 30(2) apply. In the circumstances set out in s 30(3), the Minister may decide a person is not to be surrendered.

[104] Section 30(6) of the Extradition Act provides that for "the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit". This power is not limited and clearly envisages that undertakings can be sought relating to any of the circumstances set out in s 30(2) and (3). This includes s 30(2)(b), which provides that the Minister must not determine a person is to be surrendered if it appears to the Minister there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country.

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136 At [207], [225] and [235].

137 At [285] and [287].

138 After the ECHR decision, the British Home Secretary sought further fair trial assurances from Jordan. The matter was brought before UKSIAC again, which was not satisfied that there was no risk the impugned statements could still be admitted against the appellant, and therefore prohibited deportation: *Othman (Abu Qatada) v Secretary of State for the Home Department* UKSIAC SC/15/2005, 12 November 2012 at [78]. This decision was upheld by the Court of Appeal: *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2013] EWCA Civ 277. But on 7 July 2013, after the ratification and entry into force of a "mutual legal assistance agreement" between the United Kingdom and Jordan, Mr Othman agreed to return to Jordan: Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan [2013] UKTS 25 (signed 24 March 2013, entered into force 1 July 2013). See generally Giuffré, above n 99.

[105] We also note that, under the truncated extradition procedure in Part 4 of the Extradition Act (related to Australia and other designated countries), once a court has decided on eligibility to surrender, it must (under s 47) make a surrender order unless the case is referred to the Minister under s 48. Under s 48(1), a case must be so referred if (among other things):

> … the court is satisfied that the grounds for making a surrender order otherwise exist but—
>
> …
>
> (b) it appears to the court that—
>
> (i) there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country; or
>
> (ii) the person has been sentenced to death or may be sentenced to death by the appropriate authority in the extradition country; …
>
> …

[106] Under s 49(1), the Minister must then determine whether a person is to be surrendered according to the grounds set out in s 30(2)–(4). Section 49(2), like s 30(6), provides that the Minister may seek undertakings when engaging in this exercise.

[107] It is clear from the above that one of the underpinnings of the Extradition Act is the receipt of undertakings (or assurances) and this must extend to undertakings (or assurances) related to torture.

The three questions

[108] We now provide our answers to the three general questions arising out of the submissions and the other material set out above:

(a) Does extradition to a country that practises torture breach UNCAT?

(b) Can assurances be sought where, absent assurances, there would be substantial grounds for believing the person to be extradited would be

in danger of being subjected to torture or in other words at a real risk of torture?[139]

(c) Can assurances be sought from a state where torture is systemic?

Does extradition to a country that practises torture breach UNCAT?

[109] We start with the wider argument that extradition to a country that uses torture is in itself a breach of UNCAT.[140]

[110] There is no doubt that a State Party to UNCAT is in breach of UNCAT if it tortures people, even if it gives and keeps assurances it will not torture a particular individual. UNCAT, however, places obligations on States Parties to eliminate torture in their own jurisdictions and in territories under their control. It does not impose obligations to eliminate torture practised by other states, subject to the non-refoulement obligation.

[111] We thus agree with the comment by the ECHR in *Othman* that it is not for the court to "rule upon the propriety of seeking assurances, or to assess the long-term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment".[141] It would of course be a breach of UNCAT (as well as the Extradition Act) to send someone to a jurisdiction where there are substantial grounds for believing they would be in danger of being subjected to an act of torture (as the appellants accept in this case).

Can assurances be sought where, absent assurances, there would be substantial grounds for believing a person to be extradited would be in danger of being subjected to torture?

[112] The Commission does not go so far as arguing that extradition to a state that practises torture would in itself be a breach of UNCAT but nevertheless argues that

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139 The alternative formulation of "real risk" is frequently used and has the same meaning as "substantial grounds for believing". For an explanation of what "real risk" means, see below at [269] and [280].

140 See above at [76].

141 *Othman* (ECHR), above n 62, at [186].

extradition should not occur where, absent assurances, there would be a real risk of torture for an individual, as assurances cannot remove this risk.

[113] We accept that several United Nations Special Rapporteurs have taken the stance supported by the Commission, including the current Special Rapporteur.[142] Likewise, statements from the Committee against Torture in its concluding observations to states support this proposition.[143] The Commission's position, however, does not accord with the caselaw of the Committee against Torture relating to individual complaints as we have discussed above, nor the other caselaw outlined.[144]

[114] We have not been referred to any case where there is a finding that diplomatic assurances are never permitted if, without them, there is a real risk of torture. Indeed, the caselaw, as discussed above, accepts that assurances can overcome concerns about the risk of torture, provided they are detailed, the authority giving the assurances has the requisite control and intends to exercise it, and the assurances are subject to mechanisms to ensure compliance, such as monitoring.

[115] Further, (and most importantly) New Zealand's statutory framework is predicated on the ability to seek undertakings or assurances including relating to the danger of torture.[145] This position accords with global state practice generally which shows recourse to, or at least receptivity towards, the use of assurances in various contexts.[146]

[116] The Commission refers to the Committee against Torture's development of *General comment No 4* in support of its submission. The draft form of *General*

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142 See above at [78].
143 See above at [77].
144 See above at [85]–[102].
145 See above at [103]–[107].
146 Subsequent practice in the application of a treaty can be taken into account in interpreting the terms of the treaty: Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(b). For state practice showing recourse to assurances, see below at [118]–[119]. See also David Anderson and Clive Walker *Deportation with Assurances* (Cm 9462, July 2017) at [1.3], [6.6], [6.17], [6.28] and [6.34].

comment No 4 did contain a "stinging rebuke"[147] of the practice of reliance on diplomatic assurances, stating that:[148]

> … diplomatic assurances from a State party to the Convention … are contrary to the principle of "non-refoulement", provided for by article 3 of the Convention, and they should not be used as a loophole to undermine that principle, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.[149]

[117] It thus, in very clear words, stated that diplomatic assurances in this context were not in line with the non-refoulement obligation of art 3 of UNCAT if the threshold of "substantial grounds" was met, as in the first argument of the Commission.

[118] But this aspect of the draft text was met with serious objection on the part of many Contracting States, including in joint observations submitted by Canada, Denmark, the United Kingdom and the United States.[150] They said:

> 4. Regarding paragraph 20, these States Parties also do not agree with, and are not aware of an accepted basis for, the assertion that diplomatic assurances are inherently "contrary" to the principle of non-refoulement provided for in Article 3. Although we agree with the Committee that assurances must not be used as a loophole to undermine the principle of non-refoulement, we note that when used appropriately, diplomatic assurances have served as an effective tool for States Parties to help ensure compliance with Article 3, including as a means of confirming that an individual would not face torture in a receiving State.[151]

[119] Other countries which opposed the draft included Germany, France, Ireland, the Netherlands and Spain.[152] Each referred to the factors set out in *Othman* as

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147 See Suzanne Egan *Extraordinary Rendition and Human Rights: Examining State Accountability and Complicity* (Palgrave Macmillan, Switzerland, 2019) at 123.

148 Committee against Torture *General Comment No 1 (2017) on the implementation of article 3 of the Convention in the context of article 22: Draft prepared by the Committee* UN Doc CAT/C/60/R.2 (2 February 2017) [*Draft General Comment*] at [20].

149 The Committee at [20], n 12 cited *Agiza*, above n 102, at [13.4]; and *Tursunov*, above n 105, at [9.10] as supporting this strong view. It also referred to several concluding observations on states.

150 *Joint Observations of Canada, Denmark, the United Kingdom and the United States of America on Paragraphs 19-20 of the Committee Against Torture's Draft General Comment No 1 (2017) on Implementation of Article 3 in the Context of Article 22* (31 March 2017) [*Joint Observations*].

151 These countries also observed that "in the cases that the Committee cites in footnote 12, the Committee itself did not prohibit the use of diplomatic assurances altogether, but instead determined that the assurances provided in those cases were insufficiently reliable to ensure compliance with the respective States Parties' Article 3 obligations" and that the Committee had adopted that approach in subsequent communications: at 2–3, n 4. We agree.

152 See discussion in Egan, above n 147, at 123.

providing useful guidance. New Zealand also submitted that the draft did "not accurately reflect the current state of international law in this area, or the fact that the practice of seeking diplomatic assurances is well established internationally".[153]

[120] Heeding these objections, the Committee against Torture deleted the aspect of the passage ruling out diplomatic assurances in such circumstances. *General comment No 4* now merely states that diplomatic assurances "should not be used as a loophole to undermine the principle of non-refoulement" where there are "substantial grounds for believing that the person would be in danger of being subjected to torture in that State".[154]

[121] With the passage that clearly ruled out diplomatic assurances having been removed because of these objections, *General comment No 4* cannot, contrary to the Commission's submission, be read as a condemnation of assurances. Instead, it reiterates that, if states wish to rely on diplomatic assurances, they must ensure the assurances are credible and reliable, so that there are no longer substantial grounds for believing that a person would be in danger of being subjected to torture in the state. We agree with the joint observations that:[155]

> The essential question in evaluating any particular use of diplomatic assurances is whether, taking into account the content of the assurances, their credibility and reliability, and the totality of other relevant factors relating to the individual and the government in question, there are substantial grounds for believing that the individual would be in danger of being tortured in the country to which he or she is being transferred.

Can assurances be sought from a state where torture is systemic?

[122] As noted, the Commission's back-up submission is that assurances cannot be sought from a state where torture is systemic. Again, this argument is based in part on the argument that assurances can never be effective in removing the risk of torture.

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153 *Observations of New Zealand on the Committee Against Torture's draft revised General Comment No 1 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22* (24 March 2017) at [3].

154 *General comment No 4*, above n 87, at [20]. Footnote 12 remains with one addition but now appears to be in support of this narrower statement only: see [20], n 26.

155 *Joint Observations*, above n 150, at [7] (footnote omitted).

[123] We do not accept this back-up submission either. As we have discussed above, the statutory scheme of the Extradition Act, with its provision for undertakings, is contrary to that position.

[124] We also note that the focus, both in terms of art 3 of UNCAT and s 30(2)(b) of the Extradition Act, is on the danger of an individual being subjected to torture if extradited. The general human rights situation in the country is relevant to that assessment, as provided for in art 3(2) of UNCAT, but there is nothing in UNCAT that suggests a prohibition on taking into account assurances received from states where torture is practised, even if it is systemic.[156]

[125] For the reasons we have already outlined, we also do not consider the cases relied on by the Commission support its submission that assurances cannot be sought or relied on if torture is systemic.[157] Despite findings that torture was widespread, the circumstances of the individual and the assurances proffered were still considered in those cases. We do accept that *Othman* was the only case cited to us which specifically found that removal to a country with a systemic practice of torture was possible. But we consider this is likely because countries where torture is systemically practised are unlikely to, in most instances, be open to providing the necessary detailed assurances or to allow for close monitoring of any person sent there.

[126] We accept further that, as per the criticisms of the Special Rapporteurs and other commentators, torture may be more difficult to detect in countries where it is systemic. There is no doubt that more extensive diplomatic assurances and closer monitoring will be required from such countries as compared to those where torture is not a recorded problem. We simply do not rule out the possibility that assurances may appropriately mitigate the danger of torture, even in such a state.

Conclusion

[127] Ultimately, to rule out diplomatic assurances where, without them, there would be a real risk of torture or where there is a systemic practice of torture comes close to

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156 Contrary to the Commission's submission above at n 113, we see no relevant difference between art 3 of UNCAT, above n 19, and art 3 of the European Convention on Human Rights, above n 111.

157 See above at [86]–[91].

a "Catch-22" proposition that, if you need to ask for assurances, you cannot rely on them. Such a paradox does not reflect the law. It would be akin to an absolute prohibition, an argument that was not pursued in this Court. Instead, the question to be decided is whether there is a real risk of a person being subjected to torture.[158] Assurances are part of the matrix to be considered when examining whether there is a real risk of torture or there are substantial grounds for believing a person would be in danger of being tortured.[159]

[128] Thus, it is possible for a Minister considering extradition to accept assurances in relation to a person at high risk of torture and a state where torture is systemic, provided the assurances are sufficiently comprehensive, there is adequate monitoring and there is a sufficient basis for concluding that the assurances will be complied with. We now turn to the assurances on torture in this case.

The assurances on torture in this case

[129] The assurances relevant to torture received from the PRC on 3 July 2015 are as follows:

> 1. As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [UNCAT], the People's Republic of China (PRC) will comply with the Convention to ensure Mr Kim Kyung Yup will not be subject to torture or other cruel, inhuman and degrading treatment or punishment. The PRC side will honour the above assurances.
>
> 2. After surrender to the PRC from New Zealand, Mr Kim Kyung Yup will be brought to trial without undue delay, pursuant to the Criminal Procedure Law of the People's Republic of China.
>
> 3. During all periods of Mr Kim Kyung Yup's detention following his surrender, including pre-trial detention, New Zealand diplomatic or consular representatives will be informed in a timely manner of where Mr Kim Kyung Yup is detained and of any changes to the place of his detention.
>
> 4. During all periods of Mr Kim Kyung Yup's detention following his surrender, including pre-trial detention, Mr Kim Kyung Yup will be able to contact New Zealand diplomatic or consular representatives at

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158 As "real risk of a person being subjected to torture" equates to "substantial grounds for believing that Mr Kim would be in danger of being subjected to an act of torture", we use this language interchangeably, just as the terms were used interchangeably in *Othman*. See above at n 139.

159 The ECHR in *Othman* (ECHR), above n 62, noted that this was the finding of the House of Lords in *Othman* (HL), above n 110, and endorsed it: at [57] and [193].

all reasonable times, and PRC authorities will provide the facilities for him to do so. Such contact may be by facsimile, email or telephone, and will not be censored or edited in any way. Any such contact with New Zealand diplomatic or consular representatives under this paragraph will be used for the sole purpose of obtaining information on the treatment of Mr Kim Kyung Yup and will not otherwise be disclosed to third parties.

5. During all periods of Mr Kim Kyung Yup's detention following his surrender, including pre-trial detention, New Zealand diplomatic or consular representatives may visit Mr Kim Kyung Yup at his place of detention and may be accompanied by one or more of the following people chosen by New Zealand diplomatic or consular representatives:

(i) an interpreter;

(ii) a medical professional(s) (including physician, dentist, and psychiatric expert) qualified to practise in the PRC;

(iii) a legal expert licensed to practise law in the PRC.

Such visits will be on a regular basis and permitted once every fifteen days. The PRC authorities will arrange additional visits on request by New Zealand diplomatic or consular representatives. Such visits will include the opportunity:

(i) to interview Mr Kim Kyung Yup. The interview will, on request by New Zealand diplomatic or consular representatives, be in private and without being monitored. The PRC will provide safe facilities for such interviews to take place;

(ii) for Mr Kim Kyung Yup, if he consents, to be examined by the medical professional(s) chosen by New Zealand diplomatic or consular representatives; such examination will be in private, although a medical professional chosen by the PRC authorities may be present at a physical examination;

(iii) to access the parts of the detention facility to which Mr Kim Kyung Yup has access, including his living quarters.

New Zealand diplomatic or consular representatives will have the opportunity to meet with other persons in private including prison staff, procuratorate, medical professionals, and, with Mr Kim Kyung Yup's consent, his lawyer.

New Zealand diplomatic or consular representatives will have the opportunity to access other information relevant to the treatment of Mr Kim Kyung Yup as well as his conditions of detention.

New Zealand diplomatic or consular representatives will conduct such activities for the sole purpose of obtaining information on the treatment of Mr Kim Kyung Yup and will not otherwise disclose the information to third parties.

> 6. There will be no reprisal against persons who supply information regarding Mr Kim Kyung Yup's treatment to New Zealand diplomatic or consular representatives, if the information is provided in good faith.
>
> …
>
> 10. The PRC will, on request, provide New Zealand diplomatic or consular representatives with full and unedited recordings of all:
>
> (i) pre-trial interrogations of Mr Kim Kyung Yup;
>
> (ii) court proceedings relating to Mr Kim Kyung Yup, including recordings during any period when the hearing is closed.
>
> Any recordings provided under this paragraph to New Zealand diplomatic or consular representatives will be used for the sole purpose of obtaining information on the treatment of Mr Kim Kyung Yup and in respect of paragraph 11,[160] and will not otherwise be disclosed to third parties.
>
> …
>
> 12. In the event of any issue arising in relation to the interpretation or application of these assurances, including any issue arising in relation to the treatment of Mr Kim Kyung Yup, the PRC and New Zealand will immediately enter into consultations in order to resolve the issue in a manner satisfactory to both sides. The Department of Treaty and Law of the Ministry of Foreign Affairs of the PRC, and the New Zealand Embassy in the PRC will facilitate contact between New Zealand and the PRC for all issues related to the above assurances.

[130] We first look at how to assess the risk in this case. We then summarise the material before the Minister, the Minister's decision, the Court of Appeal judgment and the submissions. We then set out the issues we will consider in relation to the assurances.

Assessing the risk in this case

[131] The statutory wording is that no one shall extradite a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to an act of torture.[161] In other words, this means that the question is whether there is a real risk that Mr Kim will be subjected to torture if surrendered to the PRC.[162]

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160 The eleventh assurance is that the PRC will comply with applicable international legal obligations and domestic requirements regarding fair trial.

161 Extradition Act, s 30(2)(b); and UNCAT, above n 19, art 3(1).

162 As noted above at n 139 and n 158.

[132] As will be clear from what we say above, we agree with the approach in *Othman*, which envisages a three-stage process in relation to considering whether there is a real risk that Mr Kim will be subjected to torture in the PRC:

(a) First, it is necessary to assess the risk to the individual considered in light of the particular characteristics and situation of the individual and the general human rights situation in the country where the person would be sent.[163]

(b) Second, it is necessary to assess the quality of assurances given, and whether, if they are honoured, they would adequately mitigate the risk the individual would otherwise face.[164]

(c) Third, a decision-maker must assess whether, in light of the situation in the receiving state and any other relevant factors (such as the strength of the bilateral relationship between the receiving and sending states), the assurances can be relied upon.[165]

[133] All three questions are intertwined. The assessment of the adequacy of the assurances will depend on the level of risk to the individual assessed at the first stage. The likelihood of the assurances being kept will depend in part on the general human rights situation in the country and, in particular, the prevalence of torture. How likely the assurances are to be kept also depends on the quality of the assurances and, in particular, how robust the monitoring regime is. This may also depend on the general human rights situation in a country.

[134] If the assurances received and the likelihood they will be honoured, considered in light of the general human rights situation and the level of risk to the individual, mean there are no substantial grounds for believing an individual will be in danger of being tortured, then they can be extradited without breaching s 30(2)(b) of the Extradition Act or art 3 of UNCAT. The assessment of the assurances and any

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163 *Othman* (ECHR), above n 62, at [187].

164 At [189].

165 At [189]. This is so unless it has been decided this is a rare case where no weight at all can be given to assurances because of the general human rights situation: at [188].

monitoring regime would, of course, have to take full account of the issues with relying on assurances and monitoring, outlined above.[166]

[135] It is important to remember that there are also other rights involved: the rights of individual victims of crime and their families and the rights of society generally to ensure those accused of crimes are tried and, if convicted, subject to suitable sanctions. Extradition serves those ends in the sense that it ensures that a person against whom there is a prima facie case is returned for trial. While the prohibition on torture is absolute, if there are no substantial grounds for believing the individual accused is at risk of torture because of assurances received, there should be no impediment to surrender. A person should not avoid prosecution for a serious crime where there are no substantial grounds for considering there is a risk of torture.[167]

Relevant considerations in the three-stage test

[136] As art 3(2) of UNCAT states, for the purposes of determining whether there are substantial grounds for believing that a person would be in danger of being subjected to torture if returned to another state, the authorities should "take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". As we have made clear, we consider that diplomatic assurances are part of these relevant considerations when undertaking the second and third steps of the three-stage assessment that we have adopted from *Othman*.

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166 In particular, those issues outlined above at [80]–[82].

167 Other reasons for not extraditing include the mandatory restrictions on surrender found in s 7 of the Extradition Act. These include where the offence for which the surrender is sought is of a political character (s 7(a)), where the surrender is actually sought for the purpose of prosecuting or punishing the person on account of their race, ethnic origin, religion, nationality, sex, or other status, or political opinions (s 7(b)), and where, on surrender, the person may be prejudiced at their trial or punished, detained, or restricted in their personal liberty by reason of their race, ethnic origin, religion, nationality, sex, or other status, or political opinions (s 7(c)).

[137] In respect of the second stage of assessing the quality of any assurances (as well as the third stage), the 11 non-exclusive factors given by the ECHR in *Othman* are valuable considerations:[168]

> (1) whether the terms of the assurances have been disclosed to the Court;
>
> (2) whether the assurances are specific or are general and vague;
>
> (3) who has given the assurances and whether that person can bind the receiving state;
>
> (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
>
> (5) whether the assurances concer[n] treatment which is legal or illegal in the receiving state;
>
> (6) whether they have been given by a Contracting State;
>
> (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
>
> (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
>
> (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
>
> (10) whether the applicant has previously been ill-treated in the receiving state; and
>
> (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

[138] There are also a number of safeguards found in international instruments as to medical attention and procedural legal rights.[169] These provide useful guidance as to the issues that must be addressed.

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168 *Othman* (ECHR), above n 62, at [189] (footnotes omitted). We note that in the present context, factor (6) would be whether the assurances have been given by a contracting state to the ICCPR, above n 21, and UNCAT, above n 19, and the extent to which they have accepted the additional investigation and individual complaints procedures, as well as the Optional Protocol, above n 19 (see below at [148]).

169 See the instruments discussed below at [141].

[139] The assessment at the third stage of the test as to the likelihood of the assurances being kept is a very important one. This is because, as pointed out by the commentators, even a comprehensive monitoring regime is not a guarantee that torture will not occur.[170]

Guidance on monitoring

[140] Monitoring serves two purposes: it provides a disincentive to torture because of the risk that breach of the assurances will be detected and it also provides the opportunity for redress if torture does occur.[171] A robust monitoring regime is therefore vital, particularly where the risk to the individual is high. The terms of monitoring should be agreed in advance between the sending and receiving states. In cases where the person is at high risk of torture, there would usually need to be reasonable confidence that the assurances would be kept, even absent monitoring.

[141] Guidance on effective monitoring regimes can be found in a number of instruments and documents published by international monitoring bodies, including the *Istanbul Protocol*,[172] which is the global standard for effective investigation and documentation of torture, the *United Nations Standard Minimum Rules for the Treatment of Prisoners*,[173] and guidelines on torture prevention by the Office of the United Nations High Commissioner for Human Rights.[174] Other useful guidance on monitoring to prevent torture comes from international organisations such as the Association for the Prevention of Torture, and human rights organisations.[175]

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170 See above, particularly at [82].

171 In this case through the consultation process set out in the twelfth assurance: see above at [129].

172 *Istanbul Protocol*, above n 98.

173 *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)* GA Res 70/175 (2016).

174 OHCHR *Preventing Torture: An Operational Guide for National Human Rights Institutions* (HR/PUB/10/1, May 2010); and OHCHR *Preventing Torture: The Role of National Preventive Mechanisms – A Practical Guide* (HR/P/PT/21, 2018).

175 See, for example, Association for the Prevention of Torture "Detention Monitoring Tool – Addressing risk factors to prevent torture and ill-treatment" (2013) <www.apt.ch>; Association for the Prevention of Torture "Comprehensive NPM Assessment Checklist" (2006) <www.apt.ch> (for regular visits to all places of detention under the Optional Protocol, above n 19); Human Rights Institute, Columbia Law School *US Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada* (December 2010); and guidance from bodies such as Human Rights Watch, Amnesty International and National Human Rights Institutions.

[142] The instruments and documents, and in particular the *Istanbul Protocol*, also contain useful practical guidance as to training and operational expertise of monitors. This includes training in obtaining statements from persons alleging torture, including not endangering the individual, and in recovering and preserving evidence.[176]

[143] We recognise that many of these instruments are dealing with systematic monitoring of detention facilities rather than monitoring of an individual's situation, but we consider that they nevertheless provide some guidance in a situation of individual monitoring as in Mr Kim's case.

Material before the Minister

Ministerial briefing of 23 November 2015

[144] The briefing covered the criminal justice system in the PRC, the law relating to torture, the prevalence of torture in the PRC, Mr Kim's position, the assurances received and the likelihood of them being kept. It incorporated submissions from Mr Kim, as well as an affidavit provided by Mr Kim from an expert on the PRC criminal justice system, David Matas.[177]

Criminal procedure

[145] The Minister was told that criminal procedure in the PRC, which is essentially inquisitorial, is divided into three phases: investigation, prosecution and trial. Investigation is conducted by the relevant public security organ (in Mr Kim's case, the Shanghai Municipal Public Security Bureau). This body detains suspects and gathers evidence. If the public security organ considers a suspect should be prosecuted, it submits its recommendation to the prosecution body, the procuratorate.[178]

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176 See for instance *Istanbul Protocol*, above n 98, at ch III, C.

177 Mr Matas was the lawyer for Lai Cheong Sing in *Lai*, above n 81. In that case, Mr Lai unsuccessfully challenged his deportation from Canada to the PRC, where he was to face charges in relation to alleged corruption, on similar grounds to the torture and fair trial concerns raised by Mr Kim in this case.

178 There is a hierarchy of procuratorates, with the Supreme People's Procuratorate being the highest. Procuratorates at the higher levels direct the work of those at the lower levels. The Supreme People's Procuratorate is responsible to the National People's Congress and its Standing Committee. The National People's Congress is the national legislature of the PRC.

[146] The procuratorate reviews cases to decide whether to approve arrest and prosecution. If the procuratorate decides to prosecute, it transfers all materials and evidence, including those favourable to the accused, to the court for the third stage (the trial) to take place.

Torture in the PRC: legal position

[147] The Minister was told that historically, since imperial times, there was a strong reliance on torture in the PRC with regard to criminal matters.[179] This is because confessions were regarded as of high probative value. However, the Minister was told that a number of developments since then had somewhat reduced the reliance on torture.

[148] The enactment of the Criminal Procedure Law and Criminal Law in 1979 made it illegal to obtain confessions by torture in the PRC. The PRC also ratified UNCAT on 4 October 1988. It has not, however, accepted the inquiry procedure under art 20 of UNCAT.[180] It has also not agreed to the Committee against Torture receiving individual complaints of any violations by it of UNCAT's provisions.[181] Nor is the PRC a signatory to the Optional Protocol to UNCAT.[182]

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179 Citing Ira Belkin "China's Tortuous Path toward Ending Torture in Criminal Investigations" (2011) 24 CJAL 273 at 278–279.

180 Article 20 of UNCAT, above n 19, allows the Committee against Torture to investigate where it receives reliable information which appears to contain well-founded indications that torture is being systemically practised in the territory of a State Party.

181 Article 22(1) provides that "A State Party to this Convention may at any time declare … that it recognizes the competence of the [Committee against Torture] to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the [Committee against Torture] if it concerns a State Party which has not made such a declaration."

182 Optional Protocol, above n 19. The Optional Protocol aims to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment: art 1.

[149] The Minister's briefing recorded that further significant amendments to the Criminal Procedure Law were made in 1996. One aspect of these changes was an attempt to deemphasise the importance of confessions by providing that:[183]

> In the decision of all cases, stress shall be laid on evidence, investigation and study; credence shall not be readily given to oral statements [ie confessions]. A defendant cannot be found guilty and sentenced to a criminal punishment if there is only his statement but no evidence; the defendant may be found guilty and sentenced to a criminal punishment if evidence is sufficient and reliable, even without his statement.

[150] In line with the focus on evidence other than confessions, it was also noted in the briefing that there has been significant investment in forensic services and technology to improve evidence gathering.[184]

[151] In 2012, amendments to the Criminal Procedure Law codified the rule requiring the mandatory exclusion of any evidence obtained through illegal means such as coerced confession.[185] It was noted by the Ministry that the Chinese exclusionary rule notably does not, however, incorporate the "fruit of the poisonous tree" doctrine.[186] The 2012 amendments also codified the requirement for interrogations to be recorded or videotaped if the alleged crime is punishable by life imprisonment or death and included a requirement that interrogations of suspects held in detention facilities take place at the facility. The Minister was told, however, that it appears that a suspect's lawyer is not entitled to be present during any interrogation.

General situation in the PRC relating to torture

[152] The Minister was told that, despite the enactment of the provisions above, in practice, "torture and ill-treatment has been routinely used to extract confessions and punish detainees". Commentators note that, while torture and ill-treatment occur in

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183 Citing Belkin, above n 179, at 283; and Criminal Procedure Law (1996 revision), art 46, which at the time the Minister made her decision was most recently revised in 2012 (with the corresponding article then being art 53), and has now again been revised in 2018 (with the corresponding article being art 55). Precise translations of the Criminal Procedure Law vary.

184 Citing *Sixth report of the People's Republic of China on its implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc CAT/C/CHN/5 (3 April 2014) at [32].

185 These are now arts 54–58 of the Criminal Procedure Law (2018 revision).

186 Citing Human Rights Watch *Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China* (May 2015) at 13 and 88.

ordinary criminal cases, the risk is especially high for political or religious dissidents, ethnic minorities and human rights defenders.[187]

[153] The Minister's attention was drawn to a series of reports on the situation in the PRC relating to torture. These included the report of the Special Rapporteur on Torture who visited the PRC between 20 November and 2 December 2005.[188] The briefing noted that the Special Rapporteur concluded that, as of 2005, there had been a steady decline of torture practised in the PRC over recent years. This was particularly the case in urban areas. However, torture remained widespread in the PRC.[189]

[154] The Special Rapporteur has not undertaken a further country visit since 2005 as he has not received another invitation from the PRC.[190] He did, however, issue a follow-up report in 2010 but had not received any input from the PRC, relying instead on NGO reports.[191] The Minister's briefing recorded that the Special Rapporteur remained concerned about many issues, including "the lack of investigations, prosecution and punishment of the perpetrators of torture".[192]

[155] A major report published by Human Rights Watch in May 2015, entitled *Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China*, was

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187 Citing *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture – China* UN Doc CAT/C/CHN/CO/4 (12 December 2008) [*Concluding observations on the fourth periodic report of China*] at [22]; and United States Department of State *China (Includes Tibet, Hong Kong, and Macau) 2013 Human Rights Report* (2014) at 4.

188 Manfred Nowak *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment – Mission to China* UN Doc E/CN.4/2006/6/Add.6 (10 March 2006) [*2005 Mission to China*].

189 Citing *2005 Mission to China*, above n 188, at [71]–[72].

190 Special Rapporteurs on Torture visit countries by invitation only. They will also only accept an invitation upon "an express agreement by the Government" to cooperate, which includes granting "freedom of inquiry" to visit any place of detention with or without prior notice. See Nowak, above n 92, at [20]–[23].

191 Manfred Nowak *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Follow-up to the recommendations made by the Special Rapporteur Visits* UN Doc A/HRC/13/39/Add.6 (26 February 2010) [*2010 follow-up report*].

192 Citing *2010 follow-up report*, above n 191, at [19].

summarised in the Minister's briefing.[193] The main point the Ministry drew attention to was the report's conclusion that "ordinary" criminals (not only members of well-known high-risk groups) have been subjected to torture in the PRC. The briefing also noted that the report had a "new" suggestion that murder suspects are at a higher risk of torture than other "ordinary" criminals.[194]

[156] The Minister was also briefed on the experience of MFAT, and corresponding agencies in other countries, as to the treatment of citizens detained in the PRC. The Minister was told that MFAT has advised that there are currently nine New Zealand citizens detained in PRC prisons or detention facilities. New Zealand provides active consular assistance, which includes monitoring of health and well-being, liaising with family members and ensuring access to legal advice. New Zealand officials also monitor detainees through visits, and by attending hearings at key times. The briefing alerted the Minister to one case where a New Zealander made a complaint of mistreatment and forced labour to the media following release and return to New Zealand. A formal complaint was not made to consular officials.

[157] The Minister was told that four other countries, who regularly visit their citizens in PRC prisons, advise that they have not received allegations of torture, although in some cases there have been allegations of physical violence.

Individual risk to Mr Kim

[158] In terms of individual risk to Mr Kim, the Minister was told that he is an "ordinary" criminal suspect in that he is not a member of any well-known high-risk groups in the PRC, such as political or religious dissidents, ethnic minorities, or human rights defenders. He is, however, accused of murder, which Human Rights Watch had identified as another high-risk group.[195] The Ministry said that it had not identified

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193 Human Rights Watch, above n 186. The Minister was told that the main research for the report consisted of interviews with 48 people, including 18 recent detainees, and analysis of verdicts published on the internet between 1 January and 30 April 2014 in which torture was alleged: citing Human Rights Watch, above n 186, at 8–10. She was also told that Human Rights Watch is an advocacy organisation whose work has been considered by international bodies and is thus relevant, although it is not authoritative or binding on her as a decision-maker, nor of the same weight as a United Nations report.

194 Citing Human Rights Watch, above n 186, at 34.

195 See above at [155].

any reports by other commentators or the United Nations supporting the Human Rights Watch view, so its accuracy is unclear.

[159] The briefing noted that, if returned, Mr Kim is likely to be detained and tried in Shanghai, where, as an urban centre, the material summarised above suggested torture was on the decline.[196] It said that the length of time spent in pre-trial detention appears to increase the risk of torture, but that Mr Kim's alleged role in the offending has already been investigated so he may spend less time than usual there. Recent steps, such as the use of video and audio recordings in interrogations, as well as New Zealand's monitoring role described below, could further reduce the risk of torture at this time. Finally, the briefing stated that the prima facie case against Mr Kim appears to be relatively strong, which means that there may be less need for a confession and therefore a lower risk of torture.[197]

Assurances

[160] The briefing analysed the assurances given in terms of the 11 factors set out in *Othman*.[198] The Ministry considered the assurances appropriately specific and given with the mandate of the PRC. The Minister was told that New Zealand can expect local authorities to abide by the assurances in this case and that there is a mechanism for any concerns to be raised with central authorities, who can instruct their local counterparts.

[161] The Minister was also told that MFAT advised that New Zealand and the PRC have a long-standing diplomatic relationship. Any mistreatment would have repercussions for this bilateral relationship, as well as on the PRC's international reputation.

[162] Also considered to be of relevance was the experience of New Zealand and other countries in relation to assurances previously provided by the PRC. New Zealand has previously received a death penalty assurance from the PRC, which

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196 See above at [153].

197 When making this point the briefing did still acknowledge the historical importance of confessions in the PRC but also that the extraction of confessions is not the only reason or context for torture.

198 See above at [137].

was honoured. Two countries also provided examples of situations where the PRC had given and honoured assurances.

Further Ministerial briefings and advice

[163] The 31 August 2016 and 19 September 2016 briefings supplemented the material considered for the first surrender decision. We divide our summary of the further material considered by the Minister into two parts: first, new information about the prevalence of torture in the PRC and Mr Kim's personal risk; and, second, further details about the assurances, including information provided by MFAT.

Further information as to the situation regarding torture in the PRC and Mr Kim's personal risk

[164] The 31 August 2016 briefing summarised new information from recent reports on torture in the PRC. It drew the Minister's attention to the Committee against Torture's *Concluding observations on the fifth periodic report of China*.[199] In this, the Committee commented positively on the 2012 amendments to the Criminal Procedure Law.[200] However, the Committee noted that there were consistent reports indicating that the practice of torture and ill-treatment is still deeply entrenched in the criminal justice system, which overly relies on confessions as the basis for convictions. It said that the majority of allegations of torture and ill-treatment take place during pre-trial and extra-legal detention and involve public security officers, who wield excessive power during the criminal investigation without effective control by procuratorates and the judiciary.[201] There were also reports that courts often shift the burden of proof back to defendants during the exclusionary procedures and dismiss the lawyers' requests to exclude the admissibility of confessions.[202]

[165] The Minister was also told that, in November 2015, Amnesty International (Amnesty) released a report on torture and forced confessions in the PRC.[203] Amnesty

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199 Committee against Torture *Concluding observations on the fifth periodic report of China* UN Doc CAT/C/CHN/CO/5 (3 February 2016).
200 At [4(a)], [12] and [32].
201 At [20].
202 At [32].
203 Amnesty International *No End in Sight: Torture and Forced Confessions in China* (ASA 17/2730/2015, November 2015).

reported that 16 of the 37 lawyers interviewed reported instances of torture of detainees to extract confessions or as punishment.[204] This was not confined to political prisoners.[205] The report noted systemic issues affecting prohibitions on torture, such as a lack of effective checks and balances among law enforcement and judicial bodies.[206] The report concluded that "the Chinese authorities are failing to implement the recent laws and regulations aimed at curbing the use of confessions extracted through torture" and that, as a result, "there has yet been very little improvement in eradicating the pervasive use of torture in the Chinese criminal justice system".[207]

[166] As for Mr Kim's personal risk, the briefing noted Professor Fu's advice that Mr Kim's case had already passed the time widely accepted as highest risk, when suspects are interrogated at a police station.[208] He will instead be detained and interrogated in a detention facility. Professor Fu also said that recent allegations of torture had been in relation to two types of cases: those endangering national security and those related to serious corruption. He stated that: "Torture within regular detention facilities in relation to ordinary criminal cases, including murder, has been rarely reported since 2012."

[167] The briefing noted that Mr Ansley, in contrast to Professor Fu, said that "all accused persons in China belong to a group specially at risk of torture" and "it would be astonishing if a person accused of homicide were not subject to torture".

[168] Mr Ansley also said that he was very familiar with Shanghai but had not seen any evidence of the alleged decline in torture. In fact, in recent years he had been involved in several cases there, where he had found clear evidence of torture.[209] The

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204 That torture is not only used to extract confessions aligns with the advice in the 23 November 2015 briefing: see above at [152] and n 197.

205 Amnesty International, above n 203, at 14. The 31 August 2016 briefing noted that other commentators and the Committee against Torture had been recorded in the 23 November 2015 briefing as also saying that "ordinary" criminals have been subjected to torture in the PRC: see above at [152].

206 At 28.

207 At 51.

208 The Committee against Torture had noted as much in the report summarised in the briefing: see above at [164].

209 The 31 August 2016 briefing noted that, in contrast to Mr Ansley's evidence, the 23 November 2015 briefing contained evidence from commentators and the Special Rapporteur on Torture that torture appears to be on the decline in urban areas, such as Shanghai: see above at [153].

briefing noted that Mr Ansley did not, however, provide any further details on these cases.

[169] The 31 August 2016 briefing made the following comments about Mr Ansley's evidence:

> 142.1. Mr Ansley does not address the adequacy of the assurances (it does not appear that he was provided with a copy of them).
>
> 142.2. There is limited discussion of the specifics of Mr Kim's case.
>
> 142.3. Mr Ansley does not address the recent material discussed in this briefing and the November 2015 briefing. Much of the material relied on and appended to his affidavit is not particularly up-to-date[210] or is not particularly relevant to Mr Kim's situation.
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> 142.4. Mr Ansley does not address the 2012 reforms to the [Criminal Procedure Law] and does not appear to have worked in the PRC for some time.

Further details about the assurances

[170] The briefing provided further details about the proposed monitoring regime. The 31 August 2016 briefing recorded MFAT advice that, if Mr Kim is detained in or near Shanghai, he will fall under the consular jurisdiction of the New Zealand Consulate-General in Shanghai, which will be instructed to prioritise monitoring. It said that the "Consulate-General has the capacity, training and experience to conduct monitoring visits to persons in detention" and detailed its resourcing. A letter from the Minister of Foreign Affairs and Trade, Mr McCully, confirmed this, describing MFAT as "extremely experienced" at providing such support and stating that he gave the Minister his "absolute assurance" that, if Mr Kim was incarcerated in Shanghai, he would instruct MFAT to prioritise its monitoring obligations.

[171] Mr McCully's second letter provided more details about this monitoring, and this advice was also noted in the 19 September 2016 briefing. He said that he had instructed officials to visit Mr Kim "as frequently as [the Minister] consider[s]

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[210] Citing Mr Ansley's references to Nicholas Bequelin "Beijing's Rule of Law Retreat" *The Wall Street Journal* (online ed, New York, 2 July 2007); and Murray Scot Tanner "Torture in China: Calls for Reform from within China's Law Enforcement System" (prepared statement to accompany testimony before the United States Congressional-Executive Committee on China, 26 July 2002).

necessary to ensure [Mr Kim's] well-being during the investigation phase". He also confirmed that there would be a "dedicated resource" in place at the Consulate in Shanghai to guarantee these visits occur, "whether every 48 hours or even daily, if that is what is needed".

[172] The second issue targeted was in relation to the non-disclosure clauses in the fourth, fifth and tenth assurances.[211] In advice given to the Minister and also included in the 31 August 2016 briefing, MFAT emphasised that it was confident that any issues would be resolved expeditiously through the consultation mechanism, such that limitations on disclosure would ultimately prove irrelevant. It then noted that limitations on the disclosure of information obtained about the treatment of people in prison are not uncommon, but that in any case the non-disclosure requirements in these assurances are not absolute: "limited and controlled disclosure of information is within scope of the assurances where disclosure may be consistent with monitoring and ensuring the proper treatment of Mr Kim". It added that the assurances "do not prevent New Zealand from sharing comments of a general nature with other countries or third parties on [its] experience with the PRC in respect of diplomatic assurances", just as New Zealand had obtained in this case. And it noted that, were the assurances to break down completely (which it emphasised it considered "extremely unlikely"), New Zealand would no longer be limited in its ability to provide information about Mr Kim's treatment to third parties.

[173] The third issue addressed was about the recordings of pre-trial interrogations. The 31 August 2016 briefing advised that it was likely that New Zealand representatives would not have access to recordings until up to two months later, based on the stages of investigation that Professor Fu had described. This concerned the Minister. She instructed her officials to discuss the matter with PRC representatives. The 19 September 2016 briefing records that the PRC responded by agreeing to provide New Zealand diplomatic or consular representatives with access to "full and unedited recordings of all pre-trial interrogations of Mr Kim during the investigation phase, within 48 hours of each interrogation having taken place". The briefing said that this would "provide an extra level of targeted precision and promptness over

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[211] This was the principal reason that the High Court Judge remitted Mr Kim's case in the first judicial review: first judicial review, above n 9, at [259].

New Zealand's ability to monitor the treatment of Mr Kim around the time of interrogations".

[174] The High Court Judge's concern with the recordings extended beyond their timely transfer, as she had also observed that the assurances do not specifically provide that there will be no unrecorded interrogations.[212] The 31 August 2016 briefing explained why the Ministry considered this omission did not materially alter the position. PRC law requires recordings of interrogations to be made in Mr Kim's case. The tenth assurance states that the PRC will, on request (or, following the additional negotiations, within 48 hours), provide New Zealand diplomatic and consular representatives with full and unedited recordings of all pre-trial interrogations. Logically, the PRC cannot comply with the tenth assurance unless all interrogations are recorded. The issue, the briefing stated, is whether the Minister is satisfied that the PRC will honour its assurances.

[175] Professor Fu also advised on the risk of manipulated recordings, about which the Human Rights Watch and Committee against Torture reports had expressed concern.[213] His responses were also included in the 31 August 2016 briefing. He said that there are specific rules made by the Ministry of Public Security, the Supreme People's Procuratorate and the Supreme People's Court to prevent manipulation of recordings. The law mandates that recordings cannot be selective, cut, deleted or altered. The court may also order the production of a recording to verify evidence, and in particular to examine whether any evidence has been obtained through torture and other unlawful means.

[176] In the 31 August 2016 briefing, the Ministry further advised that New Zealand diplomatic and consular representatives will use all available means, including drawing on the expertise of medical and legal experts in accordance with the assurances, to assess whether all recordings have been provided and whether they have been manipulated. They will ask Mr Kim about his treatment during interrogations when they visit him, assess his demeanour during the recorded interrogations and their

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212 At [260].

213 Human Rights Watch, above n 186, at 5; and *Concluding observations on the fifth periodic report of China*, above n 199, at [34] and [35(d)].

visits, and consider (and seek explanation of) any unexplained breaks in, or discrepancies in the apparent length of, the recordings.

[177] Finally, Mr McCully, MFAT and Professor Fu offered views as to whether the PRC would honour the assurances. Mr McCully's view was that PRC Ministers and officials will "give the very highest priority to living up to their assurances" in relation to the case. He said:

> The Chinese Government know that at this stage of their efforts to convince the rest of the world of the integrity and respectability of their systems, their performance in relation to the Kim case will have a critical influence on the future attitude of the New Zealand Government, and that of other governments.

[178] MFAT's advice described New Zealand's bilateral relationship with the PRC as "constructive, long-standing, wide-ranging and based on mutual trust and respect". Both States have, it said, "an interest in ensuring that there is a constructive and long-term basis for cooperation on legal and law enforcement issues, which is based on an expectation that both countries will meet their commitments in good faith". It also noted that if it became known that the PRC had not honoured the assurances in Mr Kim's case "this could have serious diplomatic and reputational repercussions for China both for its relationship with New Zealand and with other members of the international community".

[179] Professor Fu stated that the PRC "desperately" needs international cooperation in criminal matters. The reputational cost incurred from torturing Mr Kim to confess his crime would thus be too great.

Decisions and submissions

Minister's reasons of 3 October 2016[214]

[180] The Minister's reasons outlined the general situation regarding torture in the PRC and then assessed Mr Kim's personal circumstances, including the nature and quality of the assurances provided.

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[214] The Minister's second surrender decision was made on 19 September 2016, but reasons did not follow until 3 October 2016.

[181] The Minister noted that torture is illegal and that the PRC has made efforts to address torture, albeit that there are differing views as to the effectiveness of these. Overall, torture appears to have declined as a result of the reforms, but commentators and the United Nations consider it still to be a "significant problem". It is used both to extract confessions and to punish detainees.

[182] The Minister's view was that there were factors that reduced Mr Kim's personal risk. For instance, that Mr Kim is an "ordinary" criminal suspect and not a member of a well-known high-risk group, such as political or religious dissidents, ethnic minorities, or rights defenders. While Human Rights Watch has recently identified murder suspects as high risk, the Minister considered it is unclear how reliable that finding is and that there are other differentiating factors in Mr Kim's circumstances. For example, the prima facie case against Mr Kim appears to be relatively strong and includes scientific evidence which has been reviewed in New Zealand, meaning he may be at a lesser risk of torture to extract a confession. Further, Mr Kim's role in the alleged offending has already been investigated, meaning he may well spend less time in the riskier pre-trial detention. The Minister also considered that Mr Kim is to be tried in Shanghai, where commentators and the Special Rapporteur suggest incidences of torture are on the decline, although the Minister recorded Mr Ansley's disagreement on this point.

[183] The assurances, as part of the "extradition dimension" of the case, were a significant differentiating factor from most cases in the PRC. The Minister noted that the PRC has specifically said that it will comply with UNCAT in relation to Mr Kim and has allowed for proactive monitoring of this assurance. She focussed on the prompt provision of interrogation recordings and regular physical visits to Mr Kim, as well as the well-resourced MFAT operation to conduct monitoring. She also noted the MFAT advice that controlled disclosure of information about Mr Kim's treatment is permissible if it is consistent with monitoring and ensuring proper treatment, and full disclosure would be permitted were the assurances to break down.[215]

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[215] In its advice to the Minister, MFAT said that the assurances can be regarded as having "broken down" where the consultation provision in the twelfth assurance has failed to resolve, to New Zealand's satisfaction, any issues relating to Mr Kim's treatment.

[184] Relying on the above factors, the Minister considered that Mr Kim's situation could be contrasted to most other criminal suspects. The PRC will be aware his treatment is being monitored and any mistreatment is more likely to be detected. Disclosure of treatment to third parties is allowed in certain circumstances and any mistreatment that did occur would have repercussions for the bilateral relationship as well as the PRC's international reputation. Advice from two countries also indicated that they had not experienced any issues regarding the treatment of two individuals they had deported to the PRC subject to assurances. Overall, the Minister concluded that it "appears that monitoring and consular visits act as a deterrent to authorities in the PRC committing any act of torture". Having regard to the factors from *Othman*, she was satisfied that the "detailed and specific" assurances could be relied on in this instance, and overall there were no substantial grounds to believe Mr Kim would be in danger of being subjected to an act of torture in the PRC.

Court of Appeal judgment

[185] The Court of Appeal considered the Minister had erred in assessing the magnitude of the risk of torture faced by Mr Kim in the following respects:

(a) The fact Mr Kim is accused of murder. The Court noted the Human Rights Watch report and the evidence of Mr Ansley. The Court held that the Minister should have made further inquiry on this point and could not have reasonably concluded that it could be put to one side.[216]

(b) The fact that a senior local Communist Party member possibly had an interest in Mr Kim being convicted.[217] This could take this case outside of the run of "ordinary criminal cases".[218]

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216 CA judgment, above n 11, at [120]. The Court said that Professor Fu's evidence did not go so far as to conclude on this basis that murder accused were not at high risk of torture: at [119].

217 At [100], referring to the first judicial review, above n 9, at [71] and [255].

218 At [119].

[186] The Court held that the Minister's conclusion that Mr Kim was not in a high-risk group was, on the material before her, a view of the facts that could not "reasonably be entertained" and amounted to an error of law.[219]

[187] The Court of Appeal also held that the Minister had overlooked the following findings in the first judicial review and had no further evidence to show they were no longer relevant:[220]

(a) The High Court had found that the Minister had erred in relying on the stage of the investigation and the strength of the case against Mr Kim. This view gave no weight to a relevant factor: the heavy reliance the PRC's criminal justice system still places on confessions.

(b) The High Court also held that the Minister's reliance on Shanghai as the place where Mr Kim would be tried could not reasonably be given much weight, given the limited information upon which that was based.

[188] The Court of Appeal said that the Minister did not receive evidence in the period between her first and second surrender decisions to provide any firmer foundation for her conclusion that the location of the trial reduced the risk of torture. While it is true that the Minister had material from the Special Rapporteur to suggest the incidence of torture is on the decline in Shanghai, that told her nothing in absolute terms as to how prevalent torture is in Shanghai – only that it is less prevalent than it once was. The evidence before her was that torture remains widespread in the PRC.[221] The Court of Appeal held that the deficiency in evidence of these issues was material and that the Minister was in error.[222]

[189] The next issue addressed was whether the assurances were adequate to protect Mr Kim. The Court said that it assessed the reasonableness of the Minister's conclusion in context, which included that torture is illegal in the PRC; that the law

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219 At [120], citing *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 (PC) at 388, which in turn was citing *Edwards v Bairstow* [1956] AC 14 (HL) at 29.

220 At [121]–[122], referring to the first judicial review, above n 9, at [84].

221 At [124].

222 At [126].

provides that statements obtained by torture are to be excluded; and that a cultural shift away from torture in the PRC is underway. Nevertheless, also part of that context was that confessions obtained through torture are regularly admitted in evidence and torture remains widespread. The Court considered that it logically follows that there are inadequate systems in the PRC to prevent torture.[223]

[190] The Court considered that the Ministry, in advising the Minister, had failed to grapple with the whole of this background in relying upon the illegality of torture and various procedural reforms.[224] That torture occurs when the state says it should not raises an obvious issue as to the effectiveness of an undertaking by the state that Mr Kim will not be tortured.[225] The Court considered that the Minister erred in failing to address how the assurances could protect against torture when, among other things, torture is already against the law, yet there is reliable evidence that it persists,[226] and there are substantial disincentives for anyone – the detained person, co-workers or Chinese doctors – to report the practice of torture.[227] The Court considered that Mr Kim's access to a lawyer is unlikely to provide adequate protection as the assurances do not give him the right to a lawyer during interrogation.[228] There was extensive material before the Minister that videotaping of interrogations in the PRC is selective, and that, notwithstanding rules about recording interrogations, torture often occurs outside the recorded session.[229]

[191] The Court noted that the Minister had placed reliance on the skill and experience of those monitoring Mr Kim. But the Court noted the international consensus that there are very real difficulties in monitoring individual cases to detect torture.[230] The Court also identified as a defect in the monitoring regime permitted by the assurances that it does not allow without-notice, or even short-notice, visits by

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223 At [128].
224 At [129].
225 At [130].
226 At [128] and [130].
227 At [135]. For example, the Court noted that, even if Mr Kim were to complain, he would remain under the control of those who had allegedly perpetrated the torture and there was nothing in the assurances to address this risk.
228 At [136].
229 At [134].
230 At [132].

consular staff. A requirement that visits be scheduled naturally makes it easier for signs of torture to be concealed.[231]

[192] Having upheld a number of arguments advanced, the Court found that this ground of appeal must succeed and that the High Court had erred by not identifying the deficiencies in the Minister's decision-making process.[232]

Appellants' submissions

[193] It is submitted that the Minister did embark on a comprehensive consideration of the general situation in the PRC with regard to torture. Then she assessed the personal risk to Mr Kim, including the particular characteristics of the case (non-political) and the assurances and monitoring. The appellants submit the monitoring regime is sophisticated and at least equivalent to the *Othman* regime. The appellants also argue that there should be recognition of the Minister's expertise in matters of international and bilateral diplomatic relations and thus her assessment of the likelihood of compliance with the assurances given.

Mr Kim's submissions

[194] With regard to the assurances, Mr Kim submits that the Minister's foreign policy expertise is just one component of the necessary assessment of assurances. It is not part of the Minister's comparative expertise to assess whether the assurances properly address risk and are capable of effective monitoring. It is submitted those factors were not properly assessed. It is also asserted that the Minister erred in failing to take into account the factors outlined by the Court of Appeal.

Intervener's submissions

[195] The Commission accepts that the Court can give weight to the Minister's assessment where the Minister possesses particular expertise or competence relative to the Court. In this case, however, the Minister also had access to international expertise in the particular area of torture, for example reports from the Committee

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231 At [133].
232 At [139].

against Torture and other international bodies. The Commission argues that the expertise of these bodies in this area should have been given great weight.

[196] Generally, the Commission expresses concern about the efficacy of non-binding assurances. Torture is carried out in secret and is difficult to detect. But even where it could be detected, the Commission also submits that post-return monitoring by a sending state is not effective as it depends on that state's political commitment and ability to enforce the assurance: the only monitoring that could be effective in these circumstances would be by independent persons with expertise in exposing torture and with oversight of compliance with the assurances. This is particularly the case where Mr Kim would not have the option of recourse to the Committee against Torture or to the UNHRC under the ICCPR.[233]

Issues arising with regard to the assurances

[197] The following issues arise (in terms of our approach outlined above):[234]

(a) Did the Minister err in assessing the individual risk to Mr Kim, considered in light of the general human rights situation in the PRC?

(b) Did the Minister err in assessing the quality of the assurances given?

(c) Did the Minister err in the assessment of the likelihood of the assurances being honoured?

(d) Did the Minister err in concluding that there were no substantial grounds for believing Mr Kim would be in danger of being subjected to an act of torture if surrendered?

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233 See above at [148].
234 See above at [131]–[139].

Risk to Mr Kim

[198] As we have said earlier, the risk to Mr Kim must be assessed in light of the general human rights situation in the PRC and, in particular, in light of evidence relating to the prevalence of torture.

[199] The Ministerial briefings outlined in detail the general situation in the PRC and in particular as it relates to torture.[235] The situation in the PRC can be summarised as having progressed from a long-standing system where torture and forced confessions were the primary method of criminal investigation to a legal structure in which torture is illegal and where efforts are being made to make sure the legal framework is complied with, including through the promotion of investigation techniques not involving torture. Despite these procedural and other reforms, however, torture persists. Some groups are at higher risk than others but there remains a risk of torture for all those facing criminal charges and also, although to a lesser degree, for convicted persons in prison.

[200] In light of this background, it was always accepted by the appellants that Mr Kim would be at risk of torture without assurances. The Minister was therefore, at this stage of the analysis, always engaged in an exercise of assessing the relative risk of torture assuming no assurances. In other words, she was engaged in an exercise of deciding where Mr Kim was placed on the spectrum of risk from a position where the risk of torture is very high (for high-risk groups) to where it is still very possible but less likely. Assessing the relative level of risk is relevant to assessing the adequacy of any assurances offered and, indeed, to the question of whether this is one of those rare cases where no assurances could remove the risk.[236]

[201] In our view, the Minister understood this was her task. Her assessment that the risk to Mr Kim was not high (before assurances were considered) did not then mean it was low in absolute terms (given the acceptance that the risk of torture remains for all

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235 See above at [147]–[157] and [164]–[169].

236 See above at [65]. In *Othman* (ECHR), above n 62, the ECHR effectively went straight to the second and third stages rather than assessing relative risk, given the parties agreed there was a real risk of torture absent assurances (at [192]). We comment that, given the nature of the alleged crimes in *Othman* and the fact some of the other evidence may have been extracted by torture, the relative risk of torture would likely have been assessed as being high had the ECHR undertaken this first step.

those in detention), but in a comparative sense: a lesser risk compared to the high-risk groups identified in the briefings and the various reports referred to, such as political prisoners and certain minority groups. Mr Kim did not fall into these categories.

[202] On the information before her, the Minister was entitled to conclude that Mr Kim's risk was diminished through the criminal justice reforms having been more successful in urban areas. We acknowledge that Mr Ansley said in his evidence that he had been involved in recent years with several Shanghai cases where there was evidence of torture but, as pointed out in the 31 August 2016 briefing, no detail was given.[237] By contrast, it was the Special Rapporteur's view, based on governmental and non-governmental information and his own fact-finding during his 2005 mission to the PRC, that the incidence of torture was on the decline in urban areas.[238]

[203] The Minister did not conclude the risk of torture was not present in urban areas, just that it was less prevalent than in other areas. It is true, as the Court of Appeal said,[239] that the Special Rapporteur's material did not provide information on how prevalent torture was in Shanghai in absolute terms – only that it is less prevalent than it once was. Nevertheless, in the context of assessing relative risk, the Special Rapporteur's view was able to be taken into account by the Minister – but only if, as we explain further on,[240] it had been confirmed through an assurance that Mr Kim would be tried and detained in Shanghai.

[204] The Minister was also entitled to consider the risk diminished by the fact there had already been a thorough investigation by police and the fact that the prima facie case appeared strong.[241] Again, this diminished the risk but did not eliminate it and the Minister did not say that it did. We also note that the investigation into Mr Kim's case was an example of standard forensic investigation and is therefore indicative of the move in the PRC to reduce the reliance on confessions and the incentive to torture.[242]

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237 See above at [168].
238 See above at [153].
239 CA judgment, above n 11, at [124].
240 See below at [223].
241 See above at [182].
242 See above at [150].

[205] There were two further areas where the Court of Appeal said that the Minister underestimated the risk:

(a) the alleged interest in conviction by a local party official;[243] and

(b) the fact Mr Kim is a murder suspect.[244]

[206] As to the local party official's alleged interest in Mr Kim's conviction because his daughter, Mr Kim's ex-girlfriend, may have been guilty of the crime, Judge Gibson in his eligibility decision held it was a "long stretch" on the evidence available to suggest that the ex-girlfriend was implicated.[245] We thus consider that the Minister was entitled to disregard the alleged motive of protecting a guilty relative as providing an incentive to torture Mr Kim in order to obtain a confession.[246] Likewise, any suggestion that Mr Kim would be tortured for making such an accusation was unsubstantiated.

[207] The information about the risk faced by murder suspects came from both a Human Rights Watch report and Mr Ansley.[247] On the other hand, as pointed out in the 23 November 2015 briefing, those accused of murder have not been mentioned as being at particular risk by the United Nations and were not included in a table compiled by the Special Rapporteur for his *2005 Mission to China* report of those who experienced torture.[248] The 31 August 2016 briefing noted advice from Professor Fu that torture in regular detention facilities in ordinary criminal cases (including murder) had been rarely reported since 2012.[249]

[208] Contrary to the view of the Court of Appeal, the Minister was entitled to prefer (as she clearly did) the evidence of Professor Fu over that of Mr Ansley. We consider, however, that the Minister should not have dismissed the Human Rights Watch report

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243 CA judgment, above n 11, at [119]–[120].

244 At [118]–[120].

245 DC eligibility judgment, above n 7, at [30]. The Minister was told this in the 23 November 2015 briefing.

246 Similarly, and contrary to the finding in the CA judgment, above n 11, at [119]–[120], Professor Fu did not need to take this into account. The fact that he was not aware of the accusation does not mean that his evidence is any less reliable.

247 See above at [155] and [167].

248 See above at [152]. See also *2005 Mission to China*, above n 188, at [42].

249 See above at [166].

from consideration (as she appears to have done) on the basis it was unclear how reliable the report was.[250]

[209] Human Rights Watch was accepted as a credible source in the Ministerial briefing. The report was based on interviews with an (albeit limited) number of people, including recent detainees, on the ground in the PRC and an analysis of verdicts over a four-month period.[251] We note the conclusion of Amnesty's report, which is also based on interviews with those actually working in the system,[252] that torture is not confined to political prisoners and that, despite reforms, it remains pervasive in the PRC criminal justice system.[253] That Amnesty finding is consistent with, although does not directly support, the Human Rights Watch determination that murder suspects are a high-risk category. Further, as the Court of Appeal pointed out, the reforms in 2010 to 2012 occurred against the backdrop of a high-profile murder case involving a coerced confession.[254]

[210] In light of the above, the Human Rights Watch report should have been treated as a relevant consideration.[255] This means that the Minister somewhat underestimated Mr Kim's relative risk given that he is a murder suspect. That relative risk, however, is still diminished by the other factors identified by the Minister: that he did not belong to a minority group and was not a political prisoner, that he would be held in an urban area, the strength of the prima facie case against him and the advanced stage of the investigation.[256]

[211] To the extent that Mr Kim's relative level of risk may have been underestimated by the Minister, this means that there has to be more emphasis on the second and third stages of the inquiry. It does not invalidate her decision.[257] As we note above, individuals at high risk of torture from a state where torture is systemic can

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250 See above at [182].
251 See above at n 193.
252 Which, as Mr Kim points out, Professor Fu does not.
253 See above at [165].
254 CA judgment, above n 11, at [118]. The "murder victim" turned out to still be alive.
255 Unless on further investigation it was shown to be unreliable.
256 See above at [182], provided, once again, that an assurance had been obtained that Mr Kim would be held in Shanghai.
257 Considering whether the assurances nonetheless adequately protected Mr Kim, after holding the Minister had wrongly assessed the level of risk, was the approach of the High Court in the first judicial review, above n 9, at [84].

nevertheless be extradited as long as any assurances adequately protect the individual against the risk of being subjected to torture.[258]

Quality of assurances

[212] We now move to the second stage of the inquiry: assessing the quality of the assurances in this case.

First assurance

[213] For convenience, we repeat the first assurance:

> As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [UNCAT], the People's Republic of China (PRC) will comply with the Convention to ensure Mr Kim Kyung Yup will not be subject to torture or other cruel, inhuman and degrading treatment or punishment. The PRC side will honour the above assurances.

[214] This assurance would have been too general if it stood alone. This is because it is clear that torture persists in the PRC, despite it being a party to UNCAT and despite the procedural and other reforms designed to eliminate torture.

[215] Given the persistence of torture, specific assurances and a robust monitoring regime are required to supplement the general assurance. We do, however, recognise that this first general assurance provides a framework for the more detailed assurances that follow. It is also not devoid of content: it is a specific assurance by the PRC that it will abide by its responsibilities under UNCAT insofar as they relate to Mr Kim.

[216] Before examining the remaining assurances to assess whether they are sufficiently comprehensive, we deal with Mr Kim's submission that the PRC may have a different view of what is captured by art 3 of UNCAT. Mr Kim submits that, when the PRC says that it will not torture Mr Kim, its understanding of what amounts to

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258 See above at [122]–[128].

torture may be different from that of New Zealand.[259] This is based on the Committee against Torture's concern about the use of the "interrogation chair", expressed in its *Concluding observations on the fifth periodic report of China*.[260] The PRC defended the use of the chair, saying it is justified "as a protective measure to prevent suspects from escaping, committing self-injury or attacking personnel".[261]

[217] We accept that there may be instances where some form of restraint may be necessary for the above reasons. Nevertheless, it is clear that the Committee against Torture in 2016 had concerns about the use of restraints by the PRC. It said that the use of restraints should be strictly regulated and a measure of last resort and that the use of an "interrogation chair" during interrogations should be prohibited.[262] The PRC gave the first assurance in full knowledge of the view taken by the Committee against Torture and, given the bilateral nature of the assurances,[263] must have intended to accept a definition of torture and cruel, inhuman and degrading treatment or punishment that is mutually acceptable to the PRC and New Zealand. We further accept the appellants' submission that there could be consultation (under the twelfth assurance) about this if problems arise with inappropriate use of restraints or any other issues with differing views on the definition of torture or cruel, inhuman and degrading treatment or punishment.

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259 The UNCAT, above n 19, definition of torture is contained in art 1(1): "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Article 16(1) further requires States Parties to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1".

260 *Concluding observations on the fifth periodic report of China*, above n 199, at [26]. "Interrogation chairs", which are also known as "tiger chairs", are a form of restraint which immobilises suspects during interrogations.

261 At [26].

262 At [27(d)].

263 As evidenced by the twelfth assurance.

Second assurance

[218] The second assurance is:

> After surrender to the PRC from New Zealand, Mr Kim Kyung Yup will be brought to trial without undue delay, pursuant to the Criminal Procedure Law of the People's Republic of China.

[219] This assurance is relevant to torture because it is clear that torture is more likely during the investigation phase. The longer this phase, the more opportunity there is for torture to occur.

[220] Professor Fu indicated that he would expect Mr Kim to spend a maximum of two months in custody after arrest for the investigation phase and a maximum of one month in custody while the procuratorate decides whether to initiate proceedings.[264] MFAT advised ahead of the 19 September 2016 briefing that the investigation phase might even take less than a month due to the amount of work already done. The assurance means that any delays would need to be justified.[265]

Third assurance

[221] The third assurance is that New Zealand officials will be informed where Mr Kim is being detained:

> During all periods of Mr Kim Kyung Yup's detention following his surrender, including pre-trial detention, New Zealand diplomatic or consular representatives will be informed in a timely manner of where Mr Kim Kyung Yup is detained and of any changes to the place of his detention.

[222] The crime was allegedly committed in Shanghai and has been investigated by the Shanghai Public Security Bureau. According to the 23 November 2015 briefing, the PRC authorities have "indicated that Mr Kim will be detained and tried in Shanghai". There is, however, no assurance to that effect and, consistent with the assurances, he could be sent elsewhere (and there may be legitimate reasons to do so).

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[264] While Professor Fu acknowledged the possibility of extensions in complicated cases, he opined that extensions are unlikely given the circumstances of the case and the evidence against Mr Kim.

[265] Any issues can be raised under the twelfth assurance.

[223] In assessing the risk of torture, weight was placed on the fact Mr Kim would be detained in Shanghai.[266] Moreover, the effectiveness of the monitoring measures discussed above is similarly predicated on Mr Kim being detained in Shanghai, as monitoring will be done by the New Zealand Consulate-General there. There should, therefore, have been an explicit assurance that Mr Kim would be tried in Shanghai and detained there, both in the investigation and trial phases and after conviction if he is convicted.

Fourth assurance

[224] The fourth assurance permits Mr Kim to contact New Zealand diplomatic or consular representatives "at all reasonable times", with the PRC authorities to provide facilities for this. It also provides that his communications will not be censored or edited in any way. This contact is only permitted for the purpose of obtaining information on the treatment of Mr Kim and "will not otherwise be disclosed to third parties".

[225] The ability for Mr Kim to contact consular officials at all reasonable times and without censorship is important for the efficacy of monitoring. It also provides a disincentive to torture as it allows any ill-treatment to be immediately reported and thus more likely to be able to be verified.[267]

[226] The condition in this assurance that any information obtained may not be disclosed to third parties is also present in assurances five and ten discussed below. At first blush, this restriction limits their utility significantly. The High Court, in the first judicial review, noted that the apparent inability to disclose treatment to third parties meant that Mr Kim's treatment could only ever be a diplomatic issue between the two States. It did not appear possible to report any problems to other states or international bodies and this was insufficient protection for Mr Kim's rights.[268]

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266 And we consider that, if Mr Kim will be detained in Shanghai, the Minister was correct to place weight on this factor: see above at [202]–[203].

267 We recognise of course the disincentives to report and the ways torture can be performed without leaving evidence, as noted above at [82].

268 First judicial review, above n 9, at [259].

[227] Following the first judicial review, MFAT provided the Minister with further information as to the meaning of the non-disclosure conditions. The advice obtained is outlined above.[269] The Minister considered this advice was sufficient to find that disclosure would be possible in appropriate circumstances, and so the effectiveness of the assurances would not be undermined.

[228] We accept that the advice received by the Minister from MFAT confirms that information (at least in a general sense) could be provided to other countries should any problems arise, thereby acting as a disincentive. We also accept that there would be no restrictions on disclosure were the assurances to break down entirely.

Fifth assurance

[229] The fifth assurance deals with monitoring. It is set out in full above.[270] In summary, it provides that during all periods of Mr Kim's detention following his surrender, monitoring visits by New Zealand representatives will be "on a regular basis and permitted once every fifteen days". The PRC authorities also agree to arrange additional visits on request by New Zealand representatives. The representatives may be accompanied by an interpreter, a medical professional qualified to practise in the PRC and a legal expert licensed to practise in the PRC. Visits, including interviews, are to be private and will not be monitored. There is also access to the parts of the detention facility to which Mr Kim has access and the opportunity to meet with persons such as prison staff and the procuratorate. There is provision for medical examination, although the PRC is permitted to nominate a practitioner to attend any such examination.

Importance of a robust monitoring regime

[230] It is important that a monitoring regime is robust for a number of reasons. First, it increases the possibility that ill-treatment will be detected. Second, as discussed in the next section, it increases the likelihood that assurances will be kept. Third, it increases the likelihood that a detainee will disclose ill-treatment. The Committee

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269 See above at [172].
270 See above at [129].

against Torture has emphasised that a detainee's view of the monitoring arrangements is important.

[231] In *Pelit*, the Committee against Torture said that monitoring needed to be "in fact and in the complainant's perception, objective, impartial and sufficiently trustworthy".[271] We agree this is important. If Mr Kim does not have faith in the monitoring arrangements, he will be less likely to report ill-treatment, given that generally there are disincentives to report torture for fear of reprisal at worst or inaction at best.[272] In this case, Mr Kim will know assurances have been given and that his is somewhat of a "test case" for the PRC. This may mean he will be less reticent to speak up than others might be if any ill-treatment occurs.[273]

Timing of visits

[232] When the Minister made her first surrender decision, no arrangements had been made for monitoring to occur. However, as noted above, after the High Court held that it was not clear that the monitoring would be sufficiently proactive, the Minister made additional monitoring arrangements with the Minister of Foreign Affairs and Trade.[274] It was organised between the Ministers that Shanghai-based MFAT consular officials should visit at least once every 48 hours during the investigation phase and no less than once every 15 days from then until the completion of the trial. The Minister said in her decision letter regarding the second surrender decision that this proactive monitoring is "in addition to any assistance or visits sought by [Mr Kim]".

[233] We consider that the Minister was right to require visits at least once every 48 hours during the investigation phase in light of the information before her that the risk of torture is at its greatest at that time. Visits every 15 days would not have been sufficient. She was also right to specify that these visits should be in addition to those that Mr Kim may request to be arranged by New Zealand officials.

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271 *Pelit*, above n 104, at [11].
272 See above at [82].
273 This lessens the concern expressed by the Court of Appeal about disincentives on detainees to report torture: see above at [190].
274 See above at [171].

[234] The issue, however, is that 48-hourly visits are not expressly provided for under the terms of the assurance. While the assurance says that the "PRC authorities will arrange additional visits on request by New Zealand diplomatic or consular representatives", it is not certain that this envisages regular visits every 48 hours. As New Zealand officials must request these additional visits, it is also not clear that these additional visits will always be permitted by the PRC authorities. For example, the PRC could plausibly deny visits due to some logistical issue.[275] The ability to visit Mr Kim every 48 hours and more often if necessary clearly underpinned the Minister's decision. For example, she explained to him that, if issues as to his treatment arose, a "heightened level of visits can be pursued" to check on his well-being. But there is no record of her considering whether or not these visits would be permitted in terms of the assurances received.

[235] As such, an assurance should have been obtained that specifically allows visits at least every 48 hours during the investigation phase. It should also have been confirmed that a request for a visit by Mr Kim through New Zealand officials would mean additional visits were allowed within a short time period during this phase.

Notice of visits

[236] Another issue is the need to arrange visits through a request to the PRC authorities. Even with the visits every 15 days, it was not made clear how these are to be arranged and so these would likely require a request to authorities as well. This means that without-notice visits are impossible, which is contrary to best practice.[276] We agree with the Court of Appeal that ideally the assurances should have provided for the possibility of without-notice visits.[277] However, we consider that the 48-hour timeframe, if confirmed, and when combined with Mr Kim's ability to ask New Zealand officials to arrange further visits,[278] means in effect that visits would be

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275 This is not to suggest bad faith: there are a range of understandable reasons why a visit may be inconvenient.

276 See *Nelson Mandela Rules*, above n 173, at r 84.

277 CA judgment, above n 11, at [133].

278 As noted, under the terms of the fourth assurance, Mr Kim can contact New Zealand representatives at "all reasonable times". He could therefore request extra visits, which they would in turn organise with PRC officials.

allowed within a timeframe that would allow any allegations of ill-treatment to be investigated by consular officials in a timely manner.

Continued monitoring

[237] The monitoring arrangements outlined by MFAT do not disclose any plan for visits to continue if Mr Kim is convicted. This is likely to be because the Consulate-General has a regular practice of visiting all New Zealand detainees. We accept that these visits would include Mr Kim.

[238] We stress that continued visits are vital as the desire to extract confessions is not, in the words of the 23 November 2015 briefing, "the only reason or context for torture". There was evidence before the Minister that torture or ill-treatment may be inflicted by prison authorities on ordinary prisoners for disciplinary and other reasons.[279] Moreover, Mr Kim may be less likely to describe ill-treatment before trial if he thought that monitoring would cease if he is convicted.

Private visits

[239] A strength of the monitoring assurances is that they expressly provide for private visits, allowing for candid conversations with Mr Kim and others. The monitoring is, however, to be done by New Zealand diplomatic or consular representatives. This arguably makes the assurances weaker than those in *Othman*, where an independent body, which had received training in torture detection, was funded by the United Kingdom to conduct monitoring.[280]

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279 See above at [152], n 197 and [165].

280 *Othman* (ECHR), above n 62, at [24] and [80]. That body was, however, still relatively inexperienced: at [203].

[240] In this case, the issue does not involve alleged terrorist activities and so the particular issues that are raised in that context relating to disincentives for state officials of both states to raise issues of torture do not arise to the same extent.[281]

[241] Outside of that context, independent monitoring may not always be better. Consular monitoring may even have more leverage if the relationship between the two countries is long-standing and strong, as MFAT says it is in this case.[282] There is nothing to suggest that New Zealand officials would not act in an ethical manner. They would thus be expected to raise any instances of torture detected during the monitoring with the PRC authorities.

[242] The Minister was also assured by the Minister of Foreign Affairs and Trade that the officials in the New Zealand Consulate-General in Shanghai have the training, capacity and experience to conduct the monitoring and that there would be a commitment to visit every 48 hours or daily if necessary.[283]

Medical examinations

[243] The assurances provide for medical examinations. In this regard, New Zealand is limited to choosing a PRC-qualified doctor. It is understandable that the PRC would wish any medical practitioner to be qualified to practise in the PRC. This would mean they would be subject to professional discipline in the PRC. It would, however, have been preferable if New Zealand had been free to choose any suitably qualified practitioner.

[244] The Court of Appeal noted the evidence of Mr Ansley that "a Chinese doctor would not ever report torture by prison staff, police or prosecutor".[284] This evidence

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281 For instance, Giuffré explains that, where assurances are obtained before expulsion of a person who is an alleged terrorist, an enemy of, or a threat to the expelling country, both states involved have an interest in ensuring that any torture or ill-treatment does not become public for a number of reasons, including that the two governments may share the common interest of acquiring intelligence information and cooperating on counterterrorism issues and that admission of ill-treatment could potentially endanger good relations with the other state in other areas, such as control and prevention of irregular migration: Giuffré, above n 99, at 288. These concerns are not as relevant to the present case.

282 See above at [161] and [178].

283 See above at [170]–[171].

284 CA judgment, above n 11, at [135]. We note that the Minister did not have this evidence before her as it was first provided for the second judicial review.

was again referred to in submissions before this Court. The appellants did not provide evidence to counter this view. We do note, however, that the choice of medical practitioner does rest with New Zealand and New Zealand can therefore try and appoint someone it considers would accurately report the results of their examination.[285]

[245] We accept that this medical practitioner's task is still complicated because this assurance does not provide for a private physical medical examination, instead stating that "a medical professional chosen by the PRC authorities may be present at a physical examination".[286] We understand that the PRC would wish for an independent verification of any medical findings. This could have been provided for sequentially (that is, a visit by the PRC-nominated practitioner after any examination by the doctor nominated by New Zealand).

[246] However, despite the concern that the presence of a PRC-nominated practitioner would inhibit Mr Kim in raising any issues during the medical examination, we consider there would be adequate opportunities for him to raise any issues in the private interviews he is able to have with consular staff, who in turn can meet privately with the medical practitioner. Therefore, even though the medical examinations are not as valuable as they might have been if they had been private, they still provide some additional protection.[287]

Sixth assurance

[247] The sixth assurance is that there will be no reprisals against those who supply information about Mr Kim's treatment to New Zealand officials, provided this is done "in good faith".

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285 The medical practitioner would also have the benefit of the no reprisals assurance (sixth assurance) discussed below.

286 Best practice under the *Istanbul Protocol* is that individuals are examined in private. In cases where, in the opinion of the examining doctor, the individual poses a serious safety risk to health personnel, only then can security personnel of the health facility (not police or other law enforcement officials) be present, provided the health facility security personnel are out of earshot and only within visual contact: *Istanbul Protocol*, above n 98, at [124].

287 There would be more protection if the medical practitioner was trained in torture detection.

[248] The description of the human rights situation in the PRC and the express requirement for "good faith" means it is highly unlikely that anyone would pass on information other than anonymously (and this makes the ability to meet with officials privately of vital importance). This sixth assurance, therefore, does not add greatly to the efficacy of the monitoring regime already outlined but, as an assurance, it is also unlikely to be capable of improvement. Any alleged reprisals suffered by an informant in breach of the sixth assurance can, of course, be subject to discussion under the twelfth assurance and presumably concerns in this regard that arise can be passed on to other jurisdictions privately.

Seventh assurance

[249] The seventh assurance guarantees Mr Kim's entitlement to a lawyer. However, this lawyer is not entitled to be present while Mr Kim is interrogated. It would have been preferable for the lawyer to have the right to be present during interrogations to protect against torture.[288] We do not regard this as fatal, however, because we consider that a combination of the monitoring arrangements and the requirement to provide recordings of all interrogations discussed below provides adequate protection for Mr Kim.

[250] A similar conclusion was reached by the ECHR in *Othman*. When assessing the risk of torture, the Court noted that it was unlikely the applicant would have a lawyer present during questioning by the GID.[289] The Court considered this a "matter of serious concern", as the "right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment".[290] However, it concluded that the risk was "substantially reduced by the other safeguards contained in the MOU and the monitoring arrangements".[291]

Tenth assurance

[251] The tenth assurance provides that New Zealand officials will be supplied on request with "full and unedited recordings" of all pre-trial interrogations. The

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288 We also discuss this issue later in relation to the right to silence: see below at [365]–[367].
289 *Othman* (ECHR), above n 62, at [199].
290 At [199].
291 At [199].

High Court, in the first judicial review, considered this assurance might have been strengthened by including a promise that there will be no unrecorded interrogations.[292]

[252] The Ministry, in its 31 August 2016 briefing, took the view that the assurance already provided for this as it promises that all pre-trial interrogations will be provided to New Zealand officials. This promise would not be honoured if some of those pre-trial interrogations were not recorded.[293] We agree.

[253] The Minister was originally advised that these recordings would be disclosed after the investigation phase was complete, which meant they were expected to be provided up to two months after interrogations had taken place. This concerned the Minister such that further negotiations were entered into, after which the PRC, through its Embassy in Wellington, agreed to provide the recordings "within 48 hours of each interrogation having taken place".[294] The Minister was right to be concerned, but we consider the current timeframe acceptable.

[254] New Zealand officials have indicated that they will carefully examine the recordings, both to assess Mr Kim's demeanour for any signs of ill-treatment and to ascertain whether any editing has occurred. They will seek explanation of any unexplained breaks or discrepancies in the apparent length of recordings.[295] We agree this is an important safeguard and assume that the Consulate will consult suitable experts to perform these tasks in a timely fashion.

[255] Mr Kim refers in his submissions to the Court of Appeal's comment that the Minister had material before her suggesting that recordings as a means of monitoring have significant limitations, including the risk that torture by officials could occur outside of the recorded sessions.[296] We consider that the monitoring mechanisms have to be looked at as a whole. This means that the recordings have to be considered alongside the heightened frequency of visits and other measures discussed above. In

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292 First judicial review, above n 9, at [209].
293 See above at [174].
294 See above at [173].
295 See above at [176]. Professor Fu also advised as to the laws which prohibit manipulation: see above at [175].
296 CA judgment, above n 11, at [134].

that context, the Minister was entitled to put weight on the monitoring of the recordings as an added safeguard.

Twelfth assurance

[256] The final relevant assurance is that, if there are any issues arising in relation to the interpretation or application of the other assurances including in relation to the treatment of Mr Kim, the PRC and New Zealand will "immediately enter into consultations in order to resolve the issue in a manner satisfactory to both sides". Contact on issues will be facilitated by the Department of Treaty and Law of the Ministry of Foreign Affairs of the PRC, and the New Zealand Embassy in the PRC. There is, therefore, a clear mechanism by which any poor treatment by local authorities could be brought to the attention of the central government.[297] This mechanism also draws on what MFAT has said is the long-standing and strong bilateral relationship, which increases the possibility that issues will be able to be resolved.[298]

Likelihood that the assurances will be honoured

[257] As was recorded in an affidavit filed in the first judicial review,[299] diplomatic assurances are often used by states in the context of individual criminal cases, including extradition. Although they are not formally binding under international law, it is a fundamental principle that states conduct their dealings with each other in good faith. Diplomatic assurances provided in good faith amount to moral and political obligations on the state providing them.

[258] In this case, the Minister was entitled to consider that the diplomatic assurances were provided by officials with the requisite authority, who can bind the State and intended to do so.[300] The composition of the PRC delegation which negotiated the assurances included senior officials from agencies responsible for detention facilities

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297 It thus provides a clear disincentive for local authorities to torture.
298 See above at [161] and [178].
299 This was the affidavit of John Adank, the divisional manager of the Legal Division at the Ministry of Foreign Affairs and Trade.
300 See above at [160].

in the PRC.[301] The seniority of the members of the PRC delegation is indicative of the commitment of the PRC to these assurances.[302] Additionally, the Minister was told that the central authorities wield significant influence over local authorities in the PRC and thus they would be expected to follow the directions of the central government.[303]

[259] The Minister was also entitled to take the view that the PRC has strong reasons to honour the assurances. This was based on the MFAT assessment of the strength of the bilateral relationship between the PRC and New Zealand, which would be damaged were the PRC to breach the assurances.[304] It was also based on the evidence that the PRC is motivated to demonstrate the reliability of its assurances and the integrity of its systems on the international stage.[305] This in turn means the central authorities are strongly motivated to ensure the assurances are complied with at the local level.

[260] As outlined above, the Minister was advised that New Zealand can at any time share information with other countries in the same way as New Zealand obtained information from other countries about their experience monitoring their citizens detained in the PRC in this case. The PRC will therefore be aware that New Zealand may share its experiences privately, even if it cannot do so publicly.[306] If any reports are negative, this will significantly inhibit the PRC from furthering what the New Zealand Minister of Foreign Affairs and Trade identified as an important objective of the PRC, being obtaining future extradition of "economic fugitives" and other criminals.

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301 The affidavit of Christopher Hurd, a senior solicitor in the Office of Legal Counsel at the Ministry of Justice, states that the PRC delegation was comprised of the PRC Ambassador to New Zealand, senior officials from the Ministry of Foreign Affairs, the Ministry of Public Security, Supreme People's Procuratorate, the Ministry of Justice as well as an Assistant Judge of the Supreme People's Court.

302 This is consistent with Chinese culture which places weight on the social rank of negotiators: John L Graham and N Mark Lam "The Chinese Negotiation" (2003) 81(10) Harvard Business Review 82 at 87–88.

303 See above at [160].

304 Graham and Lam, above n 302, at 86 would suggest that ties of this nature are important in the context of a Chinese worldview.

305 See above at [177]–[179]. In making this assessment, the Minister was entitled to rely on the assessment by MFAT officials and the Minister of Foreign Affairs and Trade as to the strength of the bilateral relationship, in addition to the information about the motivations of the PRC from Professor Fu.

306 See above at [172].

[261] Further, if Mr Kim now confessed, there would be questions as to why, and a real suspicion would arise that the confession was extracted by torture. This factor does not simply operate after the fact: rather, it reduces the incentive to torture in the first place.[307]

[262] Finally, a robust monitoring regime also means the assurances are more likely to be kept because of the possibility of detection if torture occurs. While the recommended improvements to the monitoring could not be guaranteed to detect all instances of torture were torture to occur,[308] the more robust the monitoring regime is, the higher risk of exposure and therefore the greater the incentive to keep the assurances. In this case, provided the matters we address above are attended to, we consider the monitoring regime is robust.

Conclusion on risk of torture

[263] Whether there are substantial grounds for believing Mr Kim to be in danger of being subjected to an act of torture if surrendered to the PRC must be assessed by reference to the level of individual risk faced by Mr Kim against the background of the general human rights situation and the prevalence of torture in the PRC. The assessment of risk requires an assessment of the quality of the assurances and the likelihood they will be kept, remembering there is a symbiotic relationship between the two.[309]

[264] It will be clear from what we say above that we do not consider this to be one of those rare cases where there can be no extradition even with assurances.[310] We have, however, outlined some areas where further assurances should be obtained. If these additional assurances are received, there would be a sufficient basis for the Minister to conclude that there are no substantial grounds to believe that Mr Kim would be in danger of being subjected to torture were he to be surrendered.[311]

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307 Important, also, is the fact that Mr Kim is not a member of a high-risk group.
308 For the reasons outlined above at [82].
309 See above at [133].
310 See above at [57].
311 As we note below at [473], on re-assessment of the decision, it is possible that some or all of these assurances may not be necessary or that the issues can be addressed in a different manner.

Fair trial issues

[265] We now turn to the fair trial issues. We first discuss the test for determining whether there will be a fair trial. We then discuss the background to the assurances provided in this case, the decisions below on fair trial issues and the general submissions made, and the assurances received in this case.

What is the proper test for assessing whether there will be a fair trial?

Court of Appeal judgment

[266] The parties agreed before the Court of Appeal that the relevant inquiry is whether Mr Kim is at a "real risk" of a trial that would constitute a flagrant denial of justice.[312] The Court of Appeal referred to *Othman*,[313] where the test was described as follows:[314]

> A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of art 6 [of the European Convention on Human Rights] if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by art 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article.

[267] Counsel in the Court of Appeal had referred to the test as a "very high" test. However, the Court of Appeal did not think that the language of "high test" should be used, as it considered this deflects from the critical inquiry. The Court also saw some force in the observations of William Young J in *Radhi v District Court at Manukau* as to his reservations about the use of the word "flagrant" in the extradition context, because "flagrant" is a word usually denoting high-handed, brazen or scandalous conduct.[315]

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312 CA judgment, above n 11, at [176].

313 At [177].

314 *Othman* (ECHR), above n 62, at [260]. The Court of Appeal, above n 11, at [177], n 143 noted that this test was endorsed by *Harkins v United Kingdom* (2018) 66 EHRR SE5 (Grand Chamber, ECHR) at [64], and referred further to *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at [24].

315 CA judgment, above n 11, at [178], citing *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 at [45]. The other Judges in *Radhi* made no comment on this point.

[268] Further, the Court had reservations about the nullification language used in *Othman*. The Court recognised that the threshold permits some degree of difference between countries' legal systems, which is appropriate in light of the public interest in extradition.[316] But it said that the language of nullification or destruction expresses the matter in such absolute terms that it errs on the side of setting the threshold too high. The Court considered that "the appropriate threshold is whether there is a real risk of a departure from the standard such as to deprive the defendant of a key benefit of the right in question".[317]

[269] The Court saw "real risk" as "a risk which is real and not merely fanciful" and not one requiring proof on the balance of probabilities.[318] It also recognised that the prospect of unfairness may arise in respect of an individual or categories of individual, or it can be systemic and arise for every individual.[319] Once the person can show that there is a real risk of a trial that might be unfair in this sense, the Court held that it is for the requesting state to "dispel any doubts" about that risk.[320]

Appellants' submissions

[270] The appellants submit that the correct test is that set out in *Othman* of a real risk of a flagrant denial of justice, a long-standing test that originated in *Soering v United Kingdom* in 1989.[321] The idea is to strike a balance between the public interest in extradition and ensuring the most fundamental of rights in the criminal justice process are protected. This balancing is why there is a high threshold. The threshold also, the appellants say, ensures that sufficient latitude is given to other states' legal systems, rather than requiring fair trial equivalence across the world. The test requires something so fundamental that it nullifies the very essence of a fair trial.

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316 CA judgment, above n 11, at [179], citing *Bujak v The Minister of Justice* [2009] NZCA 570 at [36]–[43].

317 At [179].

318 At [180].

319 At [180], citing *Kapri v Lord Advocate* [2013] UKSC 48, [2013] 1 WLR 2324; and *Kapri v Her Majesty's Advocate (for the Republic of Albania)* [2014] HCJAC 33, 2015 JC 30.

320 At [180], citing *Othman* (ECHR), above n 62, at [261].

321 *Soering v United Kingdom* (1989) Series A no 161 at [113]. In *Soering*, the test was framed as "flagrant denial of a fair trial in the requesting country" but has been shortened in subsequent decisions of the ECHR to "flagrant denial of justice": see, for example, *Ahorugeze v Sweden* ECHR 37075/09, 27 October 2011 at [115].

[271] In the appellants' submission, the Court of Appeal test creates a lower threshold and requires equivalence to domestic standards. The Court also wrongly required an assessment against each of the elements of art 14 of the ICCPR, instead of a general overall assessment of whether a trial is fair.

Mr Kim's submissions

[272] On behalf of Mr Kim, it is submitted that the Court of Appeal was not applying domestic standards but instead correctly found there to be simple denials of elementary trial protections.

Intervener's submissions

[273] The Commission submits that the Minister's discretion under s 30(3)(e) of the Extradition Act must be interpreted consistently with the Bill of Rights and New Zealand's international obligations, including the right to a fair trial. The appropriate standard should be whether there are substantial grounds for believing that there is a real risk of an unfair trial.

[274] If, however, that is wrong and the test is a "flagrant denial of justice", it is submitted that this standard is satisfied by a real risk of conduct that is "manifestly contrary" to the right to a fair trial as set out in art 14 of the ICCPR, which provides minimum international standards for a fair trial.

Ministerial briefing of 23 November 2015

[275] The Minister was advised that the Extradition Act does not provide specifically for consideration of whether an individual will receive a fair trial in the requesting state. However, s 30(3)(e) provides that the Minister may determine that an individual is not to be surrendered "for any other reason the Minister considers that the person should not be surrendered". It was pointed out that, although this is a discretionary consideration, she must take into account New Zealand's obligations under international law and interpret the section in a manner consistent with the Bill of Rights.[322] As a result, the Minister was told that if she considered that Mr Kim would

[322] The relevant rights are those protected by ss 23–25 of the Bill of Rights.

not receive a fair trial on return to the PRC, she may determine that he should not be surrendered.[323]

[276] The Minister was told that in determining whether Mr Kim would receive a fair trial, the courts were likely to apply the "flagrant denial of justice" test. However, because of the absence of an extradition treaty between New Zealand and the PRC, the briefing recorded that Crown Law considered, and the Ministry and MFAT agreed, that there was less reason for New Zealand to accept a lower standard of procedural fairness on the basis of comity. Instead, the Minister should ask herself whether she was satisfied "on all the information available, including the assurances provided by the PRC, that Mr Kim will receive a trial in the PRC that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14 of the ICCPR". In answering this question, the Minister was told that she need not apply the standards in art 14 as they are applied in New Zealand.

Our assessment

[277] We do not consider that we should formulate an alternative to the long-standing test that was also used in *Othman* for considering fair trial issues: whether there is a real risk of a flagrant denial of justice.

[278] We note that when applying this test, whether a trial is fair should not be judged by domestic standards, nor by domestic or international best practice. The issue is instead whether the trial would fall below the fair trial requirements contained in art 14 of the ICCPR. As the Commission points out, the requirements in art 14 of the ICCPR are minimum international standards designed to accommodate different legal systems and, in particular, both common law and civil law systems. The language of "nullification" of the right should be understood as meaning a trial clearly falling below those minimum international standards. The test does not require any departure from fair trial standards to be high-handed, scandalous or brazen.[324] It does, however, require any departure to be more than trivial or insignificant. In assessing whether the

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323 Nothing additional as to the proper test for fair trial was noted in the supplementary briefings.

324 See above at [267], citing *Radhi*, above n 315, at [45] per William Young J.

minimum standards are met, it will be helpful to consider the essence of the requirements, and as part of that, the reasons for the particular requirements.

[279] We accept that whether a trial will fall below minimum international standards is judged overall rather than in relation to each individual requirement in art 14. This does not, however, mean that it is unnecessary to have regard to the individual requirements in art 14 as each have been deemed necessary to ensure a fair trial. It is possible that falling below minimum standards in one area may be compensated for by higher standards in another area. But, equally, an absence of one of the requirements may mean in and of itself that there can be no fair trial. For example, if there is no right to an interpreter at any stage of the proceedings, this is likely to mean, assuming the accused needs an interpreter, that a trial could not meet the minimum standards, no matter how well the other requirements for a fair trial might be met.

[280] We also accept that it is necessary to consider departures from fair trial standards that are systemic, but only to the extent that the systemic issues risk affecting the particular individual. We agree with the Court of Appeal's comments on the meaning and application of the "real risk" standard.[325]

[281] Overall, we consider that the test we suggest is more consistent with human rights than the alternative set out in the Ministerial briefing: whether there will be compliance with fair trial standards "to a reasonable extent". This is too indeterminate as a test. A trial is either fair or it is not. A somewhat fair trial would not suffice. We also note that we do not accept that there should be a balancing of the right to a fair trial and the public interest in extradition. There can be no public interest in extradition to an unfair trial.

[282] We have six further comments. First, if the Ministerial briefing was suggesting that, because s 30(3)(e) of the Extradition Act is discretionary, it is possible to extradite a person to face an unfair trial, it was evidently mistaken. The Extradition Act must be interpreted consistently with the Bill of Rights and with New Zealand's international obligations. In any event, the whole point of extradition in cases such as

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325 See above at [269].

this is to return a person accused of criminal offending for trial. It is implicit in this that any trial must be fair.

[283] Second, the task of the Minister was to assess Mr Kim's individual risk of not receiving a fair trial against the background of any relevant general systemic issues. We accept, however, that there may be exceptional cases where the general circumstances in a jurisdiction are so extreme that extradition would lead to a violation of the fair trial right in all cases.[326]

[284] Third, the minimum international standards should be judged against current minimum international practices: in other words, a dynamic rather than an originalist or static approach. International practice and commentary, including of the bodies monitoring compliance with human rights obligations, will be useful in assessing this. However, we stress that the issue is the minimum international standards and not best practice.

[285] Fourth, for similar reasons outlined earlier in relation to torture,[327] in considering whether there is a real risk of an individual facing an unfair trial, assurances can be taken into account. Indeed, assurances are more readily considered acceptable in relation to fair trial matters.[328] The issue in such cases will be whether the assurances have removed the real risk the individual will not receive a fair trial. A similar three-stage process to that required for torture is necessary.[329] This applies, contrary to the Commission's submission, and subject to the next point, even where departures from minimum fair trial standards are systemic. This is because the issue is whether any trial will be fair for the individual involved and not whether trials generally in the relevant jurisdiction are fair or not.

[286] Fifth, it would not be consistent with judicial independence to rely on assurances by the executive that purport to bind judges to make particular decisions. To do so would amount to pre-determining the case and interfering with judicial

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326 See above at [57].
327 See above at [108]–[128].
328 See above at [83].
329 See above at [132], citing *Othman* (ECHR), above n 62, at [187]–[189].

independence.[330] The same concern does not apply to assurances in relation to prosecutors, even in inquisitorial systems. We see no reason why prosecutors cannot give assurances as to how they will conduct the case as long as the assurances do not conflict with their obligations under the law of the relevant jurisdiction. Further, there is not the same judicial independence objection to procedural assurances of this kind being given by the executive on behalf of prosecutors.

[287] Finally, it will be obvious from the above that we do not consider that the Court of Appeal's reformulation of the test for whether a trial will be fair (whether there is a "real risk of a departure from the standard such as to deprive the defendant of a key benefit of the right in question"[331]) was necessary. Further, we note that although the Court of Appeal did understand that it should be looking at international minimum standards and not domestic standards,[332] there is some force in the appellants' submission that, in applying its version of the test, the Court wrongly benchmarked against New Zealand's domestic standards in some areas as we discuss below.

Background: fair trial issues

Assurances related to fair trial

[288] The assurances specifically related to fair trial received from the PRC on 3 July 2015 are as follows:

> …
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> 2. After surrender to the PRC from New Zealand, Mr Kim Kyung Yup will be brought to trial without undue delay, pursuant to the Criminal Procedure Law of the People's Republic of China.
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> …
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> 7. Mr Kim Kyung Yup will be entitled to retain a lawyer licensed to practise law in the PRC to defend him. He shall also have the right to dismiss that lawyer and retain another of his choosing. Mr Kim Kyung Yup shall be entitled to meet with his lawyer in private without

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330 Here, the PRC is able to offer a death penalty assurance in advance in a manner that accords with judicial independence and the legal framework governing extradition in the PRC. The Supreme People's Court has determined that, if convicted, Mr Kim will not face the death penalty: see above n 1.

331 CA judgment, above n 11, at [179].

332 At [179].

being monitored. In addition, he has the right to receive legal aid according to Chinese law.

8. New Zealand diplomatic or consular representatives will be informed of, and will be able to attend, any open court hearing relating to Mr Kim Kyung Yup. If, pursuant to the Criminal Procedure Law of the People's Republic of China and the Criminal law of the PRC, the hearing is closed, those periods shall be as short as possible.

9. New Zealand diplomatic or consular representatives will be provided with information about the status of the case by the PRC authorities.

10. The PRC will, on request, provide New Zealand diplomatic or consular representatives with full and unedited recordings of all:

    (i) pre-trial interrogations of Mr Kim Kyung Yup;

    (ii) court proceedings relating to Mr Kim Kyung Yup, including recordings during any period when the hearing is closed.

    Any recordings provided under this paragraph to New Zealand diplomatic or consular representatives will be used for the sole purpose of obtaining information on the treatment of Mr Kim Kyung Yup and in respect of paragraph 11, and will not otherwise be disclosed to third parties.

11. The PRC will, in its dealings with Mr Kim Kyung Yup, comply with applicable international legal obligations and domestic requirements regarding fair trial.

…

Court of Appeal's concerns

[289] The Court of Appeal held that the High Court erred in finding no reviewable error in the Minister's decision that there was no risk of departure from the fair trial standards justifying refusal of surrender.[333]

[290] There were five particular areas of concern for the Court of Appeal:

(a) judicial independence;[334]

(b) the right not to be forced to testify or confess guilt, including interrogation not in the presence of a lawyer;[335]

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333 At [257].
334 At [211]–[221].
335 At [255]–[256].

(c) the right to legal assistance (the position of defence counsel);[336]

(d) disclosure;[337] and

(e) the right to examine witnesses.[338]

Appellants' submissions

[291] In the appellants' submission, it was reasonably open to the Minister to conclude that the substantive and monitoring assurances will ensure a fair trial. The appellants detail specific assurances, and argue that the overall regime is "sophisticated". While arguing that the standards in each right outlined in art 14 of the ICCPR are met, the appellants also say that this does not need to be the case for the Minister to satisfy herself that Mr Kim will receive a fair trial.

Mr Kim's submissions

[292] It is submitted on behalf of Mr Kim that, as the PRC is not a party to the ICCPR and thus has no relevant international obligations, the assurance that the PRC will meet international obligations is meaningless. It is submitted further that the Court of Appeal correctly identified simple denials of elementary trial protections.

Intervener's submissions

[293] It is the Commission's submission that diplomatic assurances cannot be relied on to overcome the structural problems in the PRC's legal system identified by the Court of Appeal.

Discussion of main fair trial assurances received

[294] The principal fair trial assurance is that:

> The PRC will, in its dealings with Mr Kim Kyung Yup, comply with applicable international legal obligations and domestic requirements regarding fair trial.

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336 At [239]–[240].
337 At [238].
338 At [241]–[242].

[295] We do not accept the submission made on behalf of Mr Kim that this assurance regarding compliance with international law is meaningless.[339] The assurance can only sensibly be understood as indicating that the PRC will comply with the fair trial standards set out in the ICCPR.[340] Further, it seems, as we will come to, that the current legal framework in the PRC largely meets the international minimum fair trial standards. This means a promise to comply with PRC domestic law necessarily means a promise to comply with art 14 of the ICCPR. It would appear, however, that practice may not always follow the law. Where this is the case, more detailed assurances directed specifically at those points of possible divergence may be required.

[296] It is also significant that the general assurance as to compliance with the ICCPR and domestic law does not stand alone. Another general safeguard of Mr Kim's fair trial rights is the fact that New Zealand officials will be provided with information about the case and be able to attend open court hearings. Hearings may be closed but only for periods as short as possible. The Minister was told that PRC officials had indicated that the court would only be closed where necessary to protect the privacy of the deceased or her family. The PRC will, however, provide New Zealand officials with recordings of the proceedings, including where the hearing is closed, if requested to do so.[341]

[297] We consider that the Minister was entitled to place weight on this monitoring of the trial as providing a strong incentive to the PRC to ensure a fair trial but also to enable any departure from fair trial standards to be identified by New Zealand authorities and raised with the PRC authorities under the twelfth assurance.

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339 Nor do we accept the concession to that effect made by the appellants.

340 We note in any event that the PRC signed the ICCPR (on 5 October 1998) and this gives it certain obligations. The effect of arts 11–18 of the Vienna Convention on the Law of Treaties is that signature, where ratification is required (as in this case: ICCPR, above n 21, art 48(2)), expresses only the willingness of the state to continue the treaty-making process but does not express consent by the state to be bound. However, under art 18 of the Vienna Convention, signature creates an obligation on the state to refrain from acts that would defeat the object and purpose of the treaty: Vienna Convention on the Law of Treaties, above n 146. The PRC acceded to the Vienna Convention on 3 September 1997.

341 The trial monitoring outlined here is of course in addition and interrelated to the monitoring regime set out above in relation to torture.

[298] We also note that the assurances discussed in relation to torture are relevant in the fair trial context.[342] First, Mr Kim could not be considered to have the right to silence if there was a real risk of torture, as torture is often designed to force confessions. Second, the assurances described in relation to torture create a regime through which Mr Kim has regular contact with New Zealand officials, enabling him to raise any concerns he might have with his fair trial protections. This might be particularly important if he encounters issues obtaining disclosure of the evidence or getting access to his lawyer.[343] As noted above, the mechanism provided in the twelfth assurance provides an avenue through which these concerns can be communicated to the PRC authorities by New Zealand officials and resolved.

[299] We now turn to the particular issues identified by the Court of Appeal, but before doing so, we note as a general point that the PRC's criminal law system is still largely inquisitorial in nature and that minimum standards may operate in a different way in civil law systems than in assessing the minimum standards for a fair adversarial trial.

Judicial independence

[300] We start this section with a brief description of the court system in the PRC. We then summarise the procedural history in relation to the issue of judicial independence, outline some further material that was not before the Minister or the Courts below and summarise the submissions of the parties and the intervener. We then discuss the minimum international standards relating to independence of the judiciary before assessing the situation with regard to Mr Kim.

Court structure

[301] The hierarchy of courts in the PRC corresponds to the hierarchy of procuratorates,[344] with the Supreme People's Court being the highest. The next level of courts are the High People's Courts established at the provincial and equivalent level. These hear appeals from the Intermediate People's Courts, which are

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342 Set out above at [129].
343 See below at [390] (disclosure) and [371] (lawyer).
344 See above n 178.

established at prefecture and equivalent level.[345] It appears that, because the alleged offending occurred in Shanghai, Mr Kim would be tried by a collegial panel in an Intermediate People's Court in Shanghai.[346]

[302] The Constitution of the PRC and the Criminal Procedure Law both provide that procuratorates and the courts exercise their powers independently, without interference by any administrative organ, public organisation or individual.[347] There remain concerns, however, that there is inadequate separation of powers and that the judiciary is not in practice independent from political interference.[348]

[303] There is also an issue of the extent to which the actual decision on outcome is made by the panel that hears the case. Each People's Court, whatever its level in the judicial hierarchy, establishes its own judicial committee.[349] This is considered an internal court body and is the "highest authority in the court".[350] It consists of the court's president, vice-presidents and other senior members of the court.

[304] Article 180 of the Criminal Procedure Law (2012 revision) empowers a collegial panel to refer a "difficult, complicated, or significant case" to the president

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345 Yifan Wang, Sarah Biddulph and Andrew Godwin *A Brief Introduction to the Chinese Judicial System and Court Hierarchy* (Briefing Paper 6, Asian Law Centre, Melbourne Law School, 2017) at 7.

346 When the Minister made her decision, collegial panels in such cases were mandated by art 178 of the Criminal Procedure Law (2012 revision), which is now art 183 of the Criminal Procedure Law (2018 revision). They will normally consist of three judges or two judges and one people's assessor: Wang, Biddulph and Godwin, above n 345, at 21. As these authors also explain at 14, the Intermediate People's Courts have original jurisdiction over cases endangering state security, cases involving terrorist activities or cases of crimes punishable by life imprisonment or the death penalty.

347 Constitution of the People's Republic of China (2004 revision), arts 126 and 131 (which under the 2018 revision are arts 131 and 136 respectively); and Criminal Procedure Law (2012 revision), art 5 (which is still art 5 under the 2018 revision).

348 In this regard, see these publicly available materials that were cited to the Minister in the 23 November 2015 briefing: Arch Puddington (ed) *Freedom in the World 2014: The Annual Survey of Political Rights and Civil Liberties* (Rowman & Littlefield, Lanham, 2015) at 165–167; Amnesty International *Briefing on China's 2013 Criminal Procedure Law: In line with international standards?* (ASA 17/021/2013, 15 July 2013) at 5; and United States Department of State, above n 187, at 14.

349 These are also called "adjudication committees", "adjudicative committees" and "trial committees".

350 Wang, Biddulph and Godwin, above n 345, at 23. See also Mavis Chng and Michael W Dowdle "The Chinese Debate about the Adjudication Committee: Implications for What 'Judicial Independence' Means in the Context of China" (2014) 2 CJCL 233 at 233–238; and Xin He "Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court" (2012) 46 Law & Society Review 681 at 682.

of the court to decide whether to submit it to the judicial committee for determination.[351] The collegial panel shall execute the decision of the judicial committee.

Ministerial briefing of 23 November 2015

[305] The Minister was told that there remain concerns, despite the criminal justice reforms, about judicial independence. The Ministerial briefing said that it is well known that there is political oversight of the PRC's criminal justice system.[352] She was also told that there are concerns that aspects of the law are not strictly followed in practice, particularly in cases involving high-risk groups.

[306] The Minister had also been provided with material from Professor Randall Peerenboom.[353] This material recognises that, in a single-party socialist state, it is inevitable that the party will exercise some degree of influence over the courts, including influence in ideology, policy and personnel matters, and that it sometimes is involved in deciding the outcome of particular cases. However, it was said that this does not mean that the PRC courts are simply party organs or that the party determines the outcome of all or even most cases.[354] In Professor Peerenboom's view, party interference in court proceedings is "generally overstated" and there have been "considerable improvements".[355] Interference is more likely in political or politically sensitive cases.[356] Politically sensitive criminal cases are, however, a "tiny fraction"

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351 This is now art 185 of the Criminal Procedure Law (2018 revision). Similar provisions were found in art 10 of the Organic Law of the People's Courts (2006 revision), and were re-enacted in art 37 of the Organic Law of the People's Courts (2018 revision).

352 She was told that both the United States Department of State and Mr Matas state that the Communist Party's Law and Politics Committee has the authority to review and influence court operations, although it is more likely to become involved in politically sensitive cases: United States Department of State, above n 187, at 14.

353 Randall Peerenboom "Judicial Independence in China: Common Myths and Unfounded Assumptions" in Randall Peerenboom (ed) *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, New York, 2010) 69; and Fu Yulin and Randall Peerenboom "A New Analytic Framework for Understanding and Promoting Judicial Independence in China" in Randall Peerenboom (ed) *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, New York, 2010) 95. This material was not summarised in the briefing itself but these two chapters were provided to the Minister along with Dr Ellis's submissions.

354 Peerenboom, above n 353, at 78–79.

355 At 78.

356 At 78–81 and 86.

of criminal cases.[357] There is limited systemic interference from party organs in "routine" criminal cases.[358]

[307] The possibility that Mr Kim's case would be referred to a judicial committee was noted in the briefing: "If the collegial panel considers it difficult to make a decision, the president of the court may submit the case to the judicial committee for determination". A footnote cited art 180 of the Criminal Procedure Law (2012 revision)[359] and commented that "People's courts at all levels set up judicial committees to discuss important or difficult cases and other issues relating to judicial work." There was no further description of these committees.

First surrender decision

[308] In the reasons for her first surrender decision, the Minister said she did not consider a lack of judicial independence and potential state interference were risks in Mr Kim's case for three reasons: the assurances (including the monitoring of the trial), that Mr Kim was not a member of a high-risk group and that the case against him appeared relatively strong. She did not address the risk that the matter could be referred to a judicial committee.

Evidence for first judicial review

[309] Mr Ansley's affidavit in the first judicial review provided much more detail about state interference and judicial committees than the Minister had in front of her at the time of the first surrender decision. Mr Ansley said that, where the Chinese Communist Party's interests are involved, it "provides Chinese judges with strict and detailed instructions, which are always followed to the letter, on what the judgment should be".

[310] Mr Ansley then described judicial committees and explained how, in his view, they facilitate state interference. He first explained what happens when cases are referred to judicial committees. He described the trials for these cases as "simply

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357 Fu and Peerenboom, above n 353, at 121–122.
358 At 123.
359 See above at [304].

theater", having "no impact on the ultimate judgement in the case", with the only power retained by the tribunal which heard the case being to make a recommendation to the judicial committee. These committees are a "completely invisible group" of judges, making decisions "on batches of cases collectively, without ever having heard the evidence in any of them". Mr Ansley said that judicial committees were established and are maintained to "facilitate the control of the courts by the [Chinese Communist] Party, and to do it invisibly".

[311] Mr Ansley described as "patently false" a suggestion that the trend is for fewer cases to be referred to judicial committees: he said the "trend is in fact in the opposite direction". He said that although "in the beginning the purported expectation was that only very important or 'sensitive' cases would be referred", the reality is that "most cases" are referred and continue to be. This level of referral is driven by both judges and senior officials, with the former preferring to avoid taking responsibility, and the latter wanting to tighten their control over the judicial system.

Second surrender decision

[312] In her second surrender decision, the Minister again concluded that there was no risk of political interference in Mr Kim's trial. She did not mention judicial committees.[360]

Court of Appeal judgment

[313] The Court of Appeal said that the essence of the right to a hearing before an independent and public tribunal is the right to be tried before a tribunal that decides the case on the evidence before it, free of political pressure to decide the case other than on the basis of the law and those facts. On the material before the Minister by the time of the second surrender decision, the Court considered that it was not reasonably open to her, at least without further inquiry, to conclude that the assurances

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[360] This is unsurprising given the High Court Judge's conclusion that the Minister's decision in relation to interference and judicial committees had been reasonable, and that Mr Ansley's evidence was unlikely to have led the Minister to reach a different conclusion about Mr Kim's right to a fair and public hearing before an independent and impartial tribunal: first judicial review, above n 9, at [125].

provided met the fair trial concerns raised on Mr Kim's behalf in respect of the lack of independence of the judiciary.[361]

[314] The Court considered that the evidence before the Minister supported the conclusion that political influence in general, and in particular through the role of the judicial committees, is pervasive in the PRC's criminal justice system.[362] The Court considered the lack of independence of the judiciary to be systemic. It is also structural in the sense that it is how the system is designed to operate, rather than being the consequence of poorly controlled human behaviour undermining the intended operation of the system.[363] The Court had no doubt that a trial before a tribunal subject to direct political influence by reason of the design of the system within which it operates would amount to a departure from the relevant ICCPR standard, constituting a denial of justice.[364]

[315] The Court said that the only assurance provided of any substance on this point is that Mr Kim's case will be dealt with in accordance with domestic law. In the view of the Court, that did not meet the concern. The system operates in a way which, on Professor Fu's evidence, prioritises stability and crime control over procedural rights and which enables a decision to be made by a body other than the body that heard the case. The procedural rights, which are largely discretionary, do not in the Court's view alter the fundamental structure of the system.[365]

Additional material on judicial committees

[316] The role of judicial committees generally was not addressed in depth in the hearing before us. We therefore called for further submissions, directing the parties' and the intervener's attention to material that had not been before the Minister or the

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361 CA judgment, above n 11, at [211].

362 At [217]. The Court also had concerns as to the differing treatment in the Ministerial briefings of the evidence of Mr Ansley and the report provided by Professor Fu. The Court said at [215] that Mr Ansley's evidence is criticised for lack of currency but it is not clear that Professor Fu has ever worked in the PRC's criminal justice system and he refers to no published research or studies to support his assertions: see above at n 252.

363 At [217].

364 At [218].

365 At [219].

Courts below.[366] The Court asked the parties and the intervener to address the likelihood of Mr Kim's case being referred to a judicial committee, the composition of the committee, the material that would be considered by it, any ability to make oral submissions before the committee, the function the committee would perform and the extent of any written judgment.

[317] We provide a summary of the additional material under the following headings: referral criteria, number of referrals, process and eligibility to attend.

Referral criteria

[318] The "Implementation Opinions on Reforming and Improving the Judicial Committee System of the People's Court" (2010 Opinions), issued by the Supreme People's Court in 2010, differentiated between cases where referral is mandatory and those where referral is discretionary.[367] Under this instrument, mandatory referral applies, for example, to cases heard by the intermediate people's courts where the collegial panel proposes to impose a lesser penalty or to acquit, cases involving a question of application of the law and cases "whose circumstances are considered to be important and complicated".[368] Discretionary referral may occur where any collegial panel has significant disagreements between members, for cases involving unclear law, for cases in which the outcome may bring "significant social impact" and for other "hard, complicated and important cases".[369]

[319] On 4 February 2015, the Supreme People's Court adopted the "Opinions of the Supreme People's Court on Comprehensive Deepening of Reform of People's Courts – The 4th Five-Year Outline of the Program for Reform of People's Courts

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366 This was by minute on 26 March 2020. The parties were referred to material set out in Lin Feng *The Future of Judicial Independence in China* (Centre for Judicial Education and Research, City University of Hong Kong, Working Paper Series No 2, May 2016) at 1–2 and to some further developments after that study was published. We also asked if the parties or the intervener wished for a further oral hearing on this matter, but this was not requested.

367 Supreme People's Court "Implementation Opinions on Reforming and Improving the Judicial Committee System of the People's Court" (11 January 2010) [2010 Opinions]. The 2010 Opinions were not discussed in Professor Lin's article but were referred to by Mr Kim in his supplementary submissions. As we understand it, the Supreme People's Court opinions are designed to supplement what was, at the time of the Minister's decision, art 180 of the Criminal Procedure Law (2012 revision) (above at [304]) (which, as we have noted, is now art 185 of the 2018 revision).

368 2010 Opinions, above n 367, at [9].

369 At [11].

(2014–2018)" (2015 Opinions).[370] The 2015 Opinions stated that the courts should establish mechanisms for initial filtering of matters discussed by judicial committees, including standardising the scope of the cases discussed by them. This appears to indicate a desire to reduce the rate of referral. The 2015 Opinions also said that judicial committees should primarily discuss questions on the application of law, except in circumstances provided by law or in major and complicated cases involving national diplomacy, security and social stability.[371]

[320] On 2 August 2019, the Supreme People's Court adopted the "Opinions of the Supreme People's Court on Improving and Perfecting the Working Mechanism for the Judicial Committees of People's Courts" (2019 Opinions).[372] The 2019 Opinions define the "sensitive" cases for which referral is mandatory as those "involving national security, foreign affairs or social stability as well as major, difficult or complicated cases".[373] Mandatory referral is retained in relation to significant questions of law, proposed acquittals and proposed lesser penalties.[374] Categories for discretionary referral are also maintained, as well as a general rule that "Other cases that need to be submitted to the judicial committee for deliberation and decision" can be referred.[375] The collegial panel can either submit the case for deliberation and decision, or the court president may request that the judicial committee deliberate and make a decision.[376]

[321] It appears that one of the motivations for cases being referred to a judicial committee beyond those that might strictly fit the criteria above was (and perhaps

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370 "Opinions of the Supreme People's Court on Comprehensive Deepening of Reform of People's Courts – The 4th Five-Year Outline of the Program for Reform of People's Courts (2014–2018)" (4 February 2015) [2015 Opinions].

371 At [32].

372 "Opinions of the Supreme People's Court on Improving and Perfecting the Working Mechanism for the Judicial Committees of People's Courts" (2 August 2019) [2019 Opinions].

373 At [8(1)].

374 At [8(4)]–[8(6)].

375 At [9(5)].

376 At [10].

remains) the sharing of responsibility for decisions, as Mr Ansley said.[377] Professor Xin He writes that:[378]

> … when asked when a case will be submitted for review, many judges responded that they do so when they need to share the responsibility for it. As mentioned, even if the committee upholds the suggested opinion of the adjudicating judges and that decision is later proven to have been wrong, the responsibility of the adjudicating judges will be minimized because it has become the committee's decision. A shared and thus reduced responsibility in the collective decision-making process certainly gives judges an incentive not to decide difficult cases by themselves.

Number of referrals

[322] The study of a Shaanxi court by Professor He found that 96.8 per cent of criminal cases heard in that court were referred to the judicial committee.[379] A later empirical study conducted of the Shanghai No 2 Intermediate People's Court found that between 1 April 2014 and 31 August 2014, the judicial committee of that Court discussed only 39 cases.[380] The vastly different results in these two studies speak to the difficulty in establishing the rate of referral in courts across the PRC.

[323] It is worth mentioning that on 3 March 2016, the Supreme People's Court issued a new White Paper, *Judicial Reform of Chinese Courts*.[381] This paper reported on measures undertaken since 2013, including a pilot programme in the Shanghai courts.[382] One measure set out in the 2016 White Paper is that, for cases that are regarded as major, difficult or complicated, the president, vice-presidents and judicial committee members should form a collegial panel to hear the case.[383] This reform may reduce the instances of referral as the members who would decide the case at the

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377 See above at [311].

378 He, above n 350, at 701 (citation omitted). A similar view was espoused by He Jiahong "Empirical studies on the de-functionalization of criminal trial in China" (2013) 1 Renmin Chinese L Rev 159 at 168.

379 He, above n 350, at 689.

380 Tao Wang "China's Pilot Judicial Structure Reform in Shanghai 2014–2015: Its Context, Implementation and Implications" (2016) 24 Willamette J Intl L & Dispute Resolution 53 at 76–77.

381 Supreme People's Court *Judicial Reform of Chinese Courts* (White Paper, 3 March 2016) [*2016 White Paper*].

382 See Lin, above n 366, at 10; and Wang, above n 380, with the latter focussing on discussion of reforms affecting Shanghai.

383 *2016 White Paper*, above n 381, at ch IV; and Lin, above n 366, at 10.

judicial committee may well be involved in judging significant cases directly at trial.[384]

Process

[324] The 2010 Opinions provided that collegial panels handing over a decision to a judicial committee had to submit a "case hearing report".[385] This must outline the facts and evidence and the opinions of the parties, and explain the issues in dispute and the different opinions and contents of the rulings to be made by the collegial panels. Professor He, however, said that in practice this was usually an oral report, with communication difficulties often eventuating. For example, reporting judges might find it difficult to articulate the issues and facts clearly, especially when the case is complicated.[386]

[325] The 2019 Opinions follow but expand upon the reporting requirements, providing that if there are referrals, the collegial panel hearing the case must provide a written report that shall:[387]

> … objectively and comprehensively reflect the facts and evidence of the case as well as the opinions of the parties or of the prosecutor and the defender, and specify the application of law to be discussed and decided by the judicial committee, opinions of the specialized (presiding) judges at meetings, and the retrieval of similar and correlated cases, including proposed handling opinions and reasons provided by the collegial panel. In case of any dissenting opinions, different opinions and reasons shall be summarized.

Members of the judicial committee are expressly required to examine the meeting materials in advance.[388]

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384 We also note an article by Mei Ying Gechlik "Judicial Reform in China: Lessons from Shanghai" (2005) 19 CJAL 97 at 123–125. The author says that generally judges in Shanghai are more qualified and competent because of Shanghai's ability to recruit nationwide and offer intensive training. As at 2005, 87 per cent of all judges in Shanghai had a degree, although not necessarily in law. This compares to a national average of 43 per cent at the time. Professor Peerenboom, above n 353, at 74–75 also makes the point that courts in developed areas like Shanghai have been able to attract and retain highly qualified judges. The relevance of these articles is of course dependent upon the Minister obtaining an assurance that Mr Kim will be tried in Shanghai, as we noted likewise for weight being placed on this in relation to the risk of torture.

385 2010 Opinions, above n 367, at [12]. See also Susan Finder "2010 Reforms in the Chinese Courts: Reforming Judicial Committees" (2010) 3(5) Bloomberg Law Reports.

386 He, above n 350, at 698.

387 2019 Opinions, above n 372, at [12].

388 At [15].

[326] When the Minister made her decision, there was no requirement for written reasons from the judicial committee, with the collegial panel instead incorporating whatever decision was handed down into its judgment.[389] However, now the decision and reasons of the judicial committee appear to be recorded in the written judgment, except as otherwise prescribed by law.[390] It appears also to be envisaged that the judicial committee proceedings should be recorded.[391]

Eligibility to attend

[327] The 2010 Opinions specified persons other than the members of the judicial committee that either must or could attend meetings. All members of the collegial panel and the persons in charge of the trial departments for the case being discussed must attend. The chief procurators or others nominated by the chief procurator may be present, as may other persons chosen by the person presiding over the judicial committee meeting. However, none of these persons could vote.[392]

[328] The 2019 Opinions maintain an ability for non-members to sit in on meetings, in a non-voting capacity. The collegial panel and persons responsible for tribunals or departments handling cases must attend, while the judicial committee may invite persons such as people's congress delegates, political consultative conference members and expert scholars.[393] The president of the people's procuratorate of the same level is always entitled to attend meetings in a non-voting capacity.[394]

International standards

[329] Much of the caselaw with regard to fair trial rights has concentrated on the requirement for an independent and impartial tribunal. In this regard, it is clear that legal systems and tribunals have been accepted that do not meet the standards that would be required in New Zealand. This is because the issue, as we note above, is whether a trial would fall below minimum international and not domestic standards.

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389 See He, above n 350, at 688; and Chng and Dowdle, above n 350, at 238–239.
390 2019 Opinions, above n 372, at [24].
391 At [26].
392 2010 Opinions, above n 367, at [13].
393 2019 Opinions, above n 372, at [18].
394 At [19]. They may delegate attendance to another person.

This is assessed by looking at the essence of the requirement and the reasons for it in the context of deciding if a trial will be fair for the particular individual.

[330] Article 14(1) of the ICCPR provides that all those accused of a criminal charge "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". As explained in *The Bangalore Principles of Judicial Conduct* of 2002, independence requires that a judge:[395]

> … shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

[331] Judges must be independent of the parties and society in general.[396] They must be free from inappropriate connections with and influence by the executive and legislative branches of government,[397] as well as independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.[398] The appearance of independence must also be maintained.[399]

[332] Impartiality applies not only to the decision itself but also to the process by which the decision is made. It requires the performance of judicial duties without favour, bias or prejudice.[400]

[333] We therefore consider that the essence of the requirement[401] for an independent and impartial tribunal in any individual case is whether the person involved will receive a trial in which the outcome is dependent on an assessment of the evidence and the law by judges free from influence by their judicial colleagues,[402] the executive, legislature and other external bodies, and free of bias or prejudice.

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395 Judicial Group on Strengthening Judicial Integrity *The Bangalore Principles of Judicial Conduct* (2002) [*Bangalore Principles*] at [1.1]. See also United Nations *Basic Principles on the Independence of the Judiciary* endorsed in GA Res 40/32 (1985) and GA Res 40/146 (1985) at [2]. The *Bangalore Principles* provide guidance to judges whereas the *Basic Principles on the Independence of the Judiciary* are addressed primarily to states.

396 *Bangalore Principles*, above n 395, at [1.2].

397 At [1.3].

398 At [1.4].

399 At [1.3].

400 At [2.1]. They must also be seen to be impartial: at [2.5].

401 See above at [278].

402 This of course only applies to those not sitting on the case as part of a collegial panel.

Issues

[334] There are three issues raised between Mr Kim and the Commission with regard to judicial independence and impartiality. The first is the view that courts in the PRC are only concerned with social and crime control and that a fair trial is therefore impossible in the PRC. The second relates to political influence on the courts and judges. The third relates to the operation of judicial committees, both in the sense of the external influences on judges and in the sense of decisions being made by judges who have not heard the evidence and without input from the defendant. We discuss each in turn.

Role of the PRC courts

[335] Mr Kim's submission, based on the evidence of both Mr Ansley and Professor Fu, is that the procedural protections in the PRC are subordinate to the purposes of social stability and crime control.[403] In Mr Kim's submission, criminal investigations and trials are rightly described as "rituals" designed to convict the identified suspect. He points to very low acquittal rates as evidence of this.

[336] Crime (and social) control is of course, to a degree, the role of courts generally, including in New Zealand. The aims of social stability and crime control, however, would not be served by the conviction of those who were not guilty of the crimes of which they are accused.[404] Courts would therefore be expected to convict only those they consider (rightly or wrongly) to be guilty.[405]

[337] We do not consider that high conviction rates, such as the 98–99 per cent conviction rate the Minister was told occurs in the PRC,[406] necessarily suggest bias in the court system. Instead, high conviction rates may mean that greater filtering occurs

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403 See above at [315].

404 We are not talking here about those who are considered high risk because of political or protest involvement or who are otherwise members of high-risk groups.

405 The fact that miscarriages of justice may nevertheless occur is apparent in the setting up in New Zealand and other comparable jurisdictions of criminal cases review mechanisms.

406 Citing United States Department of State, above n 187, at 15; and Puddington, above n 348.

in determining which cases go to trial or, as the following quote from a former judge suggests, that cases where the evidence seems insufficient may be withdrawn:[407]

> If the court really wants to acquit the defendant, the court's [judicial] committee gets the police and the procuratorate together to get them psychologically prepared for what the court is thinking and why it thinks that way. If the police are okay with it, the procuratorate usually withdraws the prosecution and there wouldn't be a verdict. Because if there is an acquittal, it means acknowledging that the police wrongly arrested someone, that the procuratorate wrongly indicted someone, and that there will be a need for state compensation.

[338] In any event, as the High Court in the second judicial review noted,[408] the real issue is not the systemic issues in the court system in the PRC, but whether Mr Kim, in his particular circumstances, will get a fair trial if extradited.

Political influence

[339] We consider the Minister was entitled to find that, because Mr Kim's alleged offending is ordinary criminal offending and not "political" offending, the likelihood of political interference with the ordinary operation of the courts with regard to his trial is low.[409]

[340] We note too that the monitoring of the trial by New Zealand officials would detect a verdict that did not appear to accord with the evidence. This would provide a further reason to honour the assurance to abide by the ICCPR and domestic law.

Operation of judicial committees

[341] As noted above, the essence of the requirement for judicial independence and impartiality is that judges should decide a case on the basis of the evidence before

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407 This quote was included in the Ministerial briefing of 23 November 2015.

408 Second judicial review, above n 10, at [94].

409 This conclusion is strengthened by the likely location of the trial, assuming, as we have noted, the Minister is able to obtain an assurance that Mr Kim will be tried in Shanghai. It has been noted that judges in Shanghai suffer the least political interference due largely to better economic development and Shanghai officials affording greater respect for the law: Yanrong Zhao "The Way to Understand the Nature and Extent of Judicial Independence in China" (2019) 6 Asian JLS 131 at 151–152, although we note this is based on much earlier research. See also the comments at 150 on the Chinese Communist Party's interest in the establishment of a "rule by law" and a professional and autonomous court system in the interests of social stability. We also note the comments at 147 on the differences between urban and rural areas in terms of judicial independence.

them and on their understanding of the law, free of outside influence and, in particular, from the other branches of government.

[342] A very common criticism of the judicial committee system has been that it "leads to a separation between the trial process and the actual decision-making. Judges who are involved in the trial do not deliver the final judgment and members of the judicial committee who do not hear a case make the final decision for the judges".[410] The system "directly results in excluding the judges who know the cases better from making the decision, which result[s] in [the] criminal trial losing its function in China".[411] Further, it seems that the parties cannot make oral or written submissions directly to the judicial committee.[412] This "denies those individuals whose interests are directly affected by the judgment opportunity to present their case before the actual decision maker".[413]

[343] Although the material we have referred to was not before the Minister, it is consistent with the evidence given by Mr Ansley for the first judicial review, which was before her when she made her second surrender decision. The uncontradicted evidence from Mr Ansley was that most cases are referred to judicial committees and that it is those bodies, rather than the court which had heard the evidence, that decide on the verdict.[414] In addition, there is regular input from external figures at judicial committee level and no opportunity for input by the accused.

[344] We do not accept the appellants' submission that, because it was reasonable for the Minister to conclude that political interference in Mr Kim's case is unlikely, it would also have been reasonable to conclude that referral to a judicial committee would not occur. As noted, the Minister had uncontested evidence before her that referral was very common for reasons beyond the exertion of political influence. As such, this conclusion would not have been available on the evidence. In any event,

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410 Yuwen Li "Judicial Independence: Applying International Minimum Standards to Chinese Law and Practice" (2001) 15 China Information 67 at 79. See also Lin, above n 366, at 9.

411 He "Empirical studies on the de-functionalization of criminal trial in China", above n 378, at 177, adopting Liu Pinxin (ed) *刑事错案的原因与对策* (China Legal Publishing House, Beijing, 2009) at 43.

412 Wang, Biddulph and Godwin, above n 345, at 24.

413 Chng and Dowdle, above n 350, at 240 (footnote omitted).

414 The appellants accept that the material before the Minister was that "in practice, most cases were referred to a judicial committee", despite the laws that were in place.

the Minister did not in fact reach a conclusion on this issue, shown by the fact that her first decision letter does not mention judicial committees and her second surrender decision refers to concerns regarding political interference in judicial decision-making but again does not deal with judicial committees specifically.

[345] On the basis of the evidence before her at the time of her second surrender decision, it was not possible for the Minister to have come to the conclusion that Mr Kim's case would be decided by the judges who had heard the evidence rather than by a judicial committee. Nor was it possible to consider that the judicial committee would decide the case on the basis of the evidence and free of outside influence, and in particular influence from party representatives. Even if that influence would not be political in the sense discussed above, it is nonetheless influence from external bodies in a judicial decision-making process. It was therefore not open to the Minister to have considered that Mr Kim would be tried by an independent and impartial tribunal.

[346] There is, however, more information before us on judicial committees than was before the Minister and the Courts below. We now consider whether that new information changes the above assessment.

[347] From the referral criteria in the 2019 Opinions,[415] it seems Mr Kim's case will have to be referred to the judicial committee if a question of law arises or where there is a possibility of an acquittal. It may also be that it will be considered mandatory to refer Mr Kim's case because it could be seen as a case involving foreign affairs, given that diplomatic assurances are involved. Mr Kim's case may in any event, because of the international dimension, be a case where a sharing of responsibility for the decision may provide a motive to refer the case to a judicial committee.[416] We therefore consider that, absent further inquiries changing the above assessment, any Minister making a decision about extradition would have to consider there was a real possibility that Mr Kim's case would be referred to a judicial committee.

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415 Discussed above at [320]. We are assuming that these would be the operative provisions, but this would need to be checked by the Minister.

416 See above at [321].

[348] Subject to the issues of process and outside influences discussed below, we do not consider there is an issue with referral to a judicial committee on issues of law. This can be seen as similar to appeals on questions of law available in New Zealand.[417] Referrals are not, however, limited to questions of law. Questions of law are only one reason cases must be referred to a judicial committee and, with regard to the other reasons such as diplomacy or proposed acquittals, judicial committees do not appear to be limited to legal questions. We examine below whether this is an insurmountable obstacle to there being a fair trial.

[349] In terms of process, before Mr Kim's case was referred to a judicial committee, the 2019 Opinions would require a full report to be made by the collegial panel that sets out the evidence and the submissions of the parties, the issues of law involved and a proposed disposition with reasons. The judicial committee members are required to have read that report. The collegial panel must attend the judicial committee meetings, presumably to answer any questions and to expand on the views expressed in the report as necessary. It would seem that the judicial committee would have access to the full transcript of the proceedings before the collegial panel, including all the evidence and submissions made to that panel, and that the judicial committee would be able to call for any further material needed to fully understand the case.[418]

[350] If this is in fact the procedure followed (and the Minister would need to be satisfied that it is), it would seem that the judicial committee would have access to all the evidence, the parties' submissions and the views of the collegial panel. The proceedings before a judicial committee could therefore be seen as akin to a preliminary general appeal decided on the papers.[419] While this would not meet fair trial standards in New Zealand, we consider that a Minister may be entitled to conclude that judicial committee proceedings conducted in this way in Mr Kim's case would

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417 Criminal Procedure Act 2011, Part 6 Subpart 8. This is subject to the caveats discussed below with regard to equality of arms and outside influence on the judicial committee.

418 Whether these assumptions are correct would need to be investigated. We do note that the extent to which the judicial committee would need to access material other than the report will of course depend on the issue that has been referred. For example, a narrow question of law may not require a full review of the evidence.

419 We understand that there is also a right of appeal after conviction by a court, including under art 216 of the Criminal Procedure Law (2012 revision), which is now art 227 of the 2018 revision. Whether this applies to a judicial committee decision (which becomes the court's decision) was not dealt with explicitly in the evidence before us.

meet minimum international trial standards, subject to the issue of equality of arms and outside influence to which we now turn.

[351] As we understand it, a defendant does not normally have the right to make submissions directly to the judicial committee. However, a full report of the evidence and submissions of the parties is required to be part of the report prepared by the collegial panel and the judicial committee members are required to have examined this. As long as the prosecutor or any other state body has no additional rights to make submissions to the judicial committee on the particular case, we do not consider the lack of the right to make direct submissions to the judicial committee is fatal, provided it is clear that the submissions made to the collegial panel (and set out in the report of that panel) cover the matter or matters at issue before the judicial committee.

[352] It is unclear whether the actual prosecutor in the case is entitled to attend and contribute to the judicial committee deliberations (albeit without voting rights).[420] If the prosecutor or any other state representative for the prosecution can attend and make submissions or contribute to the discussions, then, assuming the defendant does not have a similar right, this would similarly breach the principle of equality of arms, an important characteristic of a fair trial.[421] The same procedural rights must be afforded to both parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[422] For example, this principle is "violated if the accused is excluded from an appellate hearing when the prosecutor is present".[423] This issue would have to be further investigated and, if necessary, assurances obtained in this regard.[424]

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420 The 2019 Opinions, above n 372, say that the persons responsible for trial tribunals or departments handling cases and relevant matters must attend: at [18(2)]. We are unsure who that person or persons would be and their role before the judicial committee. This should be further investigated. If the role is purely administrative, then it may not be objectionable.

421 William A Schabas *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised ed, NP Engel, Kehl, 2019) at 372.

422 At 372, citing Human Rights Committee *Views: Communication No 1972/2010* UN Doc CCPR/C/112/D/1972/2010 (19 November 2014) [*Quliyev v Azerbaijan*] at [9.3].

423 At 372.

424 It might be that the president of the people's procuratorate is able to attend because it might be necessary to make submissions on systemic matters arising in a particular case in the same way that the Attorney-General would do in New Zealand. If there were also a right for the defendant in such a case to make submissions before the judicial committee on any issues arising, then this would not be objectionable.

[353] As noted above, in addition to the procuratorate, political representatives and others are able to attend judicial committee deliberations and offer views but with no voting role.[425] There is thus another possibility of direct influence on members of the judicial committee from outside the court system and in a private forum.[426] Subject to the comments in the next paragraph, the Minister would need to be satisfied that such persons will not attend the meetings or otherwise be consulted if Mr Kim's case is referred to a judicial committee.

[354] We recognise that certain outside persons may have a legitimate policy or systemic interest in issues that may arise in a particular case. If the outside party's role in the judicial committee proceedings is limited to making submissions on such issues, it is possible that this could be seen as being akin to the role of an intervener in our system. It thus may not be objectionable as long as Mr Kim is given the opportunity to respond to any submissions made of this nature.

Conclusion on judicial committees

[355] We cannot come to any definitive conclusion, on the basis of the material before us, as to whether referral to a judicial committee would breach Mr Kim's fair trial rights. It would be for the Minister to make further inquiry in relation to the matters outlined above and to consider after that inquiry (and any further assurances) whether the judicial committee system as it may operate in Mr Kim's case would meet minimum international standards for independence and impartiality.

Right to silence

Background: law and practice in the PRC

[356] Under this issue we focus, as did the Courts below, on whether Mr Kim has the right to silence during pre-trial interrogation (which goes to the right not to be compelled to confess guilt).[427]

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425 See above at [328].

426 As noted above, even if that influence is not "political", it nonetheless has the potential to be executive or other outside influence in the particular case. We do not include in this the presence at the judicial committee of those who might be providing purely administrative assistance to the committee at the direction of its members.

427 First judicial review, above n 9, at [203] and [260]; and CA judgment, above n 11, at [256].

[357] Article 50 of the Criminal Procedure Law was amended in 2012 to provide that judges, prosecutors and investigators are strictly prohibited from forcing suspects to provide evidence of their own guilt.[428] Article 50, however, sits uneasily with art 118 of the Criminal Procedure Law (2012 revision) which provides that criminal suspects must answer the investigators' questions truthfully, with the only exception being the right to refuse to answer any questions that are irrelevant to the case.[429]

[358] Professor Fu's advice on the conflict between these two provisions was that, while art 118 is still law, it is "qualified by a number of important legal rules". Additionally, he noted that art 118 is not "consequential", meaning that "refusal to answer questions does not constitute a crime and is not an aggravating factor in sentencing". This corresponds to the advice PRC officials had given before the first surrender decision.[430]

[359] The 31 August 2016 briefing noted that Mr Kim will be in a different situation to most criminal suspects who are interrogated by the police for the first time. He has detailed knowledge of the case against him. In addition, as a result of the current proceedings, he will also know that there are no consequences in PRC law if he refuses to answer questions. However, the Minister was told that Mr Kim will not have a lawyer present to remind him of his rights when he is being interrogated.

Court of Appeal judgment

[360] The Court of Appeal accepted that, although legally obliged to answer questions, Mr Kim may not face legal consequences for failing to do so, as he will now be aware. But the Court considered that such legal niceties are very likely to be lost sight of within the human dynamic of an interrogation, especially when that interrogation may extend on and off over a period of months.[431]

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428 This is now art 52 of the Criminal Procedure Law (2018 revision).

429 This is now art 120 of the Criminal Procedure Law (2018 revision).

430 As recorded in the first judicial review, above n 9, at [99] and [130]. Despite recognising the existence of this advice, the uncertainty in the legal provisions was a matter of concern for the High Court and was one of the matters on which the Minister's decision was quashed and remitted: at [260]. Professor Fu's advice on these matters was sought after the first judicial review.

431 CA judgment, above n 11, at [255].

[361] The Court said that, in New Zealand's legal system, the right to legal representation is seen as a necessary incident of the right to silence. The Court accepted that it is conceivable that the right not to be compelled to confess guilt can be secured in other ways. But, given the provisions of art 118, the Court did not consider that access to a lawyer before and after interrogation is sufficient for this purpose. Nor was the filming and monitoring of the interrogations. The Court considered that the Minister should have required an assurance that Mr Kim would be able to have a legal representative present during all interrogations.[432]

Our assessment

[362] PRC officials have told New Zealand officials that Mr Kim will not suffer consequences if he refuses to answer questions. Whether he does in fact suffer legal consequences is objectively verifiable – for instance, if he is charged with any offence relating to a breach of art 118. New Zealand officials can therefore monitor this. Further, New Zealand will have access to the full unedited copies of all interrogations within 48 hours. This may allow breaches of his right to silence to be established: if Mr Kim was wrongly told, for example, that he did not actually have the right to silence.

[363] An assurance could have been sought in this regard, but the reality is that, as PRC officials have already given a clear indication as to how the law is applied and an assurance that international and domestic requirements regarding fair trial will be complied with, any reliance on art 118 to the detriment of Mr Kim is likely to jeopardise other countries' willingness to return other individuals for whom the PRC might seek extradition in the future to the same extent as if there were a formal assurance.[433]

[364] We consider therefore that the Minister was entitled to conclude, on the basis of the material before her, that Mr Kim will effectively have the right to silence as there will be no consequences if he fails to answer any questions put to him.

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[432] At [256].

[433] See above at [177]–[179] and [259] where we discuss the motivations to keep the assurances.

[365] This leaves the question of legal representation during interrogations. We accept that in the course of a long interrogation session, there is a risk that Mr Kim could forget that there are no consequences if he fails to answer any questions put to him. The issue for us, however, is whether the fact that his lawyer will not be present during interrogations will breach minimum international standards for a fair trial.

[366] Article 14(3)(b) of the ICCPR guarantees the right of accused persons to communicate with counsel of their own choosing. Article 14(3)(d) guarantees the right to defend themselves in person or though legal assistance of their own choosing. Article 14(3)(g) guarantees the right not to be compelled to testify against themselves or to confess guilt.

[367] There is, however, nothing explicit in art 14 of the ICCPR that gives a suspect the right to have a lawyer present during interrogations. It would certainly be best practice to allow this.[434] But we do not consider the lack of such a right means that Mr Kim's trial would fall below minimum international standards for a fair trial as long as Mr Kim cannot be compelled to testify or confess guilt and the rights to counsel in art 14 are otherwise respected (as appears to be the case).[435]

Position of defence counsel

Background: law and practice in the PRC

[368] The Minister was told that, under PRC law, suspects may instruct a lawyer after they are interrogated for the first time by the investigating organ or as of the date compulsory measures (such as arrest) are taken.[436] Mr Kim will be arrested on arrival in the PRC and thus would have an immediate right to consult a lawyer.

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434 See *2005 Mission to China*, above n 188, at [55].

435 We consider this an area where the Court of Appeal perhaps applied domestic, rather than international, minimum fair trial standards. We note in any event that in New Zealand, an accused can waive the right to legal assistance: Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, 2015, LexisNexis, Wellington) at [20.7.60]–[20.7.62] and [22.5.27]–[22.5.28]. It is therefore not considered essential to a fair trial in New Zealand that a lawyer is present during interrogations as there can be waiver of the right (however unwise that might be).

436 Criminal Procedure Law (2012 revision), arts 32–33 (which are now arts 33–34 of the 2018 revision).

[369] The Minister was also told that defence counsel rarely collect evidence themselves, although they are allowed to do so with the consent of the witnesses involved. If the witnesses do not consent, defence counsel can ask the procuratorate or the court to collect evidence or to require a witness to appear in court and give testimony.

[370] The Minister was told that defendants have the right to present a defence under PRC law.[437] The PRC also promises, in the seventh assurance, that Mr Kim will have the following rights: to a defence by a PRC-licensed lawyer; to meetings with that lawyer in private;[438] to dismiss that lawyer and retain another of his choosing; and to receive legal aid according to Chinese law. The Minister was informed that lawyers have reported that the process of gaining access to their clients in detention has been greatly expedited, in particular for routine criminal cases.[439]

[371] The Minister was, however, told that there remain concerns about the position of the defence bar in the PRC. Mr Ansley's evidence given to the Minister for her second surrender decision was that defence lawyers are denied access to clients and are "harassed, beaten, intimidated and often incarcerated simply for being too vigorous in acting on behalf of their clients".

[372] She was also told that concern has been expressed about art 306 of the Criminal Law of the PRC. This provides that it is an offence punishable by imprisonment for a defence lawyer to destroy or falsify evidence or assist parties concerned in destroying, falsifying evidence, threatening, luring witnesses to contravene facts, change their testimony or make false testimony.

[373] The concern, held by a number of commentators and the United Nations, is that art 306 has been interpreted and applied in a way that intimidates defence lawyers.[440] Despite seeming "consistent with many rule-of-law norms", art 306 has

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437 Criminal Procedure Law (2012 revision), arts 11 and 14 (which are still arts 11 and 14 of the 2018 revision).

438 The Minister was told that law reforms in 2007 were the basis for this right.

439 Citing United States Department of State, above n 187, at 10; and United Kingdom Foreign & Commonwealth Office *Human Rights and Democracy: The 2013 Foreign & Commonwealth Office Report* (Cm 8870, June 2014) at 176.

440 See, for example, *Concluding observations on the fourth periodic report of China*, above n 187, at [18]; and Human Rights Watch, above n 186, at 60.

been criticised for, in practice, "open[ing] up avenues for abuse".[441] Defence counsel may for example run afoul of art 306 for "enticing [a witness] to change testimony in defiance of the 'facts', as determined by the state".[442] This could arise in circumstances where, for example, there is insufficient disclosure and counsel leads evidence apparently contrary to what the defendant had told the public security organ or procuratorate in the investigation and prosecution phases. In such cases, defence counsel may be assumed to have induced the defendant to change their evidence. Because of the risk of prosecution under art 306, most defence lawyers reportedly engage in passive defence, finding flaws and weaknesses in the prosecutors' evidence rather than actively collecting evidence or conducting their own investigations.[443]

[374] There were some reforms in 2012 that affect the application of art 306 of the Criminal Law. Under art 42 of the Criminal Procedure Law (2012 revision),[444] art 306 no longer applies only to defence counsel.[445] The new art 42 also now provides that an investigation against a lawyer charged under art 306 must be undertaken by investigatory authorities that were not involved in the case in which defence counsel was originally engaged.

[375] Although these reforms may have reduced the impact of art 306, defence counsel report that they continue to shy away from collecting evidence because of the threat it poses.[446] And even after the 2012 reforms, the Committee against Torture in its *Concluding observations on the fifth periodic report of China* has recommended that the PRC "stop sanctioning lawyers for actions taken in accordance with recognized professional duties, such as legitimately advising or representing any client or client's cause or challenging procedural violations in court, which should be made possible without fear of prosecution".[447]

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441 Sida Liu and Terence C Halliday *Criminal Defense in China: The Politics of Lawyers at Work* (Cambridge University Press, Cambridge (UK), 2016) at 57.

442 *Lai v Canada (Minister of Citizenship and Immigration)* 2007 FC 361, [2008] 2 FCR 3 at [46].

443 United States Congressional-Executive Commission on China *Annual Report: 2011* (10 October 2011) at 82.

444 This is now art 44 of the 2018 revision.

445 Jianfu Chen notes that presumably this now also applies to police: Jianfu Chen *Criminal Law and Criminal Procedure Law in the People's Republic of China: Commentary and Legislation* (Brill, Leiden, 2013) at 84.

446 Liu and Halliday, above n 441, at 60.

447 *Concluding observations on the fifth periodic report of China*, above n 199, at [19].

Court of Appeal judgment

[376] The Court of Appeal said that defence counsel must be able to represent an accused person honestly and responsibly, without fear of repercussion, in order to ensure a fair trial. The Court considered that the Ministerial briefing contained sufficient material that at least required further inquiry as to the position of the defence bar in the PRC before a decision to surrender could be made. In particular, inquiry was needed as to the impact of the art 306 offence.[448]

[377] The Court considered the issue to be whether, as Mr Ansley claims, this has a chilling effect on counsel's representation of an accused. If the defence bar does operate in an environment where they fear prosecution for their representation of their clients, the Court had no doubt that would have the effect of depriving defendants of the benefit of legal representation.[449] This issue cannot be dismissed on the basis that it is a systemic issue and does not necessarily relate to Mr Kim's case.[450]

[378] The Court also said that the Minister would need to address who would be an appropriate legal counsel for Mr Kim, given the information as to pressures brought to bear upon the legal profession in the PRC.[451]

Our assessment

[379] The right to be legally represented when charged with a criminal offence and be represented by a lawyer at trial is an important requirement for a fair trial.[452] It is, as noted above, guaranteed by art 14(3)(b) and (d) of the ICCPR.

[380] Mr Kim does have the right to instruct a lawyer of his own choosing, both in terms of PRC law and under the assurances. Article 37 of the Criminal Procedure Law (2012 revision) provides that Mr Kim is entitled to meet his lawyer within 48 hours of any request and that this meeting must not be monitored.[453] Although not explicitly

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448 CA judgment, above n 11, at [239].
449 At [239].
450 At [240]
451 At [256].
452 Human Rights Committee *General Comment No 32 – Article 14: Right to equality before courts and tribunals and to a fair trial* UN Doc CCPR/C/GC/32 (23 August 2007) [*General Comment No 32*] at [34].
453 This is art 39 of the 2018 revision.

set out in the assurances, this falls under the eleventh assurance that the PRC will follow domestic legal requirements regarding fair trial. If New Zealand obtains an assurance that officials may visit Mr Kim every 48 hours during the investigatory phase, they will also be able to bring a lawyer then.[454]

[381] For the reasons discussed above in the section on torture, the Minister was entitled to consider the assurances would be honoured.[455]

[382] The position of the defence bar in the PRC and in particular art 306, which may impact upon the effectiveness of legal representation, is undoubtedly problematic.[456] It goes without saying that the fundamental right to be represented by counsel means the right to effective representation. We do not consider the concerns about the defence bar and art 306 could properly be dismissed by the Minister on the basis that they are systemic issues and would not necessarily relate to Mr Kim's case.[457] As the Court of Appeal said, that is precisely the problem: the position of the defence bar affects how all defence counsel operate.[458] There is thus, before considering the assurances, a real risk that it could prejudice Mr Kim's right to effective legal representation.

[383] However, any lawyer assisting Mr Kim would recognise the protection provided by the monitoring of Mr Kim's trial and the international attention upon the matter and should therefore not be inhibited in pursuing normal and responsible defence strategies.[459] If Mr Kim's lawyer was charged with an art 306 offence in circumstances where all the lawyer did in defending Mr Kim was to act in accordance

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454 See subparagraph (iii) of the fifth assurance set out above at [129].

455 See above at [257]–[262].

456 To this end, we note also the finding recorded in the report from the United States Congressional-Executive Commission on China, above n 443, at 82, that, as of the time of the report's publication, 80 to 90 per cent of criminal defendants in the PRC were unable to hire a lawyer, and the higher proportion of risks associated with criminal defence work affected the quality of criminal representation available.

457 This appears to have been the Minister's view, although she did not actually address this in her reasons for her decisions. In her reasons for her second surrender decision, she considered that substantial revisions of the Criminal Procedure Law in 1996 and 2012 had addressed most of the law's major fair trial deficiencies. She made no comment on the defence bar or how the systemic problems may affect Mr Kim; rather she relied on the assurances.

458 CA judgment, above n 11, at [240].

459 We do note in any event that at this stage Mr Kim has not pointed to any evidence or trial strategies he would wish to pursue that may be affected by a lawyer's concern about art 306.

with normal international practice,[460] this would severely prejudice the PRC's efforts to have other countries extradite alleged criminals to the PRC. As a result, we consider that there are sufficient safeguards to ensure that Mr Kim's right to effective legal representation will not be affected by the existence of art 306 and other general issues affecting the defence bar.

Disclosure

Background: law and practice in the PRC

[384] As noted above,[461] there are three phases in the criminal process in the PRC: investigation by the relevant public security organ, examination by the procuratorate to decide whether or not to prosecute and, assuming the decision is to prosecute, trial.

[385] If the public security organ considers that an accused should be prosecuted, it transfers the case to the procuratorate with a recommendation to initiate prosecution.[462] Article 160 of the Criminal Procedure Law (2012 revision) requires the public security organ to "prepare a written prosecution opinion" and submit it to the procuratorate, together with the case file and evidence. At the same time, the public security organ must inform the criminal suspect and the defence lawyer of the transfer of the case.

[386] Article 36 of the Criminal Procedure Law (2012 revision) provides that, during the investigation period, the defence lawyer may find out from the public security organ the alleged offence and "relevant case information", as well as "offer opinions".[463] This would address a defendant's right to be informed of the nature of the offence with which they are charged in accordance with art 14(3)(a) of the ICCPR. It appears, however, that, while the defendant's lawyer can access "information" under

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460 Such as the United Nations *Basic Principles on the Role of Lawyers* UN Doc A/CONF.144/28/Rev.1 (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990) 117 at 117–123.

461 See above at [145]–[146].

462 Criminal Procedure Law (2012 revision), art 160. Article 161 provides that if during the investigation it is discovered that the "criminal suspect shall not be subject to criminal liability" the case is dismissed (it is not transferred to the procuratorate). These are arts 162 and 163 of the 2018 revision respectively.

463 This is art 38 of the 2018 revision.

art 36 during the investigation phase, there is no access to evidence until the examination phase.

[387] Under art 38 of the Criminal Procedure Law (2012 revision), a defendant's lawyer may consult and reproduce the case file materials from the date the procuratorate receives the case for prosecution under art 160.[464] There is no explicit mention in art 160 of a requirement to transfer possibly exculpatory evidence, but, as it is the procuratorate that makes the final decision on whether to proceed with trial,[465] this would seem to be implicit. We also consider this to be implicit under arts 37 and 39 discussed below. Access to the file should give access to any potentially exculpatory material. We recognise that there will be scope for debate as to whether evidence gathered is relevant and whether it is exculpatory and thus whether it should have been passed on.

[388] Under art 37, the defendant's lawyer may, from the date on which the case is transferred to the procuratorate for examination, verify relevant evidence with the defendant, in meetings which shall not be monitored.[466] Where a defendant's lawyer believes the public security organ has failed to submit evidence that can prove that the suspect or defendant is innocent to the procuratorate for examination, the lawyer can apply to the procuratorate or court under art 39 to obtain that evidence.[467]

[389] Under art 47 of the Criminal Procedure Law (2012 revision), a lawyer who believes that the lawful exercise of a defendant's procedural rights is being hindered by the public security organ, the procuratorate or the court can file a petition or complaint to the procuratorate at the same or higher level.[468]

[390] Mr Ansley's evidence, however, was that in practice the system does not operate in accordance with the law. He says that exculpatory evidence is often not investigated at the investigation phase and that there are difficulties in defence counsel

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464 This is art 40 of the 2018 revision.

465 Article 169 of the Criminal Procedure Law (2012 revision) (now art 172 of the 2018 revision) provides that within a month of the case being transferred to the procuratorate, it must make a decision whether to proceed with prosecution. This can be extended for half a month in a "significant or complicated case".

466 This is art 39 of the 2018 revision.

467 This is art 41 of the 2018 revision.

468 This is art 49 of the 2018 revision.

accessing the file once it has passed to the procuratorate. He says that, in practice, police, prosecutors and judges hold meetings on the file and that all the prosecution evidence is seen before the trial by the judges, but the defence is never permitted access to material that might help the accused. It was also noted in the 23 November 2015 Ministerial briefing that disclosure of additional evidence is discretionary and that the defence would require some knowledge of the evidence to apply for its disclosure.

Court of Appeal judgment

[391] The Court of Appeal considered that the right to prepare and present a defence requires that those accused of crimes and their representatives understand the case they will have to meet. The Court noted that Mr Ansley's account is of a system in which the prosecution, police and judges have access to the evidence well in advance of the defence.[469]

[392] The Court said that the Ministry had noted in its briefings the ability to apply for evidence to be transferred (art 39), but it also recorded Mr Matas's view that the right is difficult to exercise when the defence does not know what evidence the public security organ holds and when the grant of the application for disclosure is discretionary.[470]

[393] The Court considered that the Minister could have, but did not, seek specific assurances regarding the timing and content of disclosure of the case against Mr Kim.[471] Without such an assurance, it was not open to the Minister to conclude that the assurances met the fair trial concerns in connection with the rights under art 14 of the ICCPR.[472]

469 CA judgment, above n 11, at [238].
470 At [225] and [238].
471 At [238].
472 At [243].

International standards

[394] The right to disclosure is not explicitly provided for in art 14 of the ICCPR.[473]

[395] Article 14(3)(a), however, provides that all accused have the right to be informed promptly and in detail of the nature and cause of the charge against them. The United Nations Office on Drugs and Crime (UNODC) and International Association of Prosecutors (IAP) say that this advice must be presented in a format that enables the accused to fully comprehend the case against them and the charges they are facing, and that disclosure not meeting these objectives may prevent a fair trial.[474]

[396] Further, art 14(3)(b) provides that accused persons shall have adequate time and facilities for the preparation of their defence. The Human Rights Committee in *General Comment No 32* has said that "adequate facilities" must include access to documents and other evidence, including all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (for example, indications that a confession was not voluntary).[475]

[397] *General Comment No 32* seems to fall short of requiring a comprehensive disclosure regime along the lines of that contained in New Zealand's Criminal Disclosure Act 2008, under which effectively all relevant evidence must be disclosed, whether or not the prosecution is to call it at trial.[476] *General Comment No 32* does, however, have a relatively expansive definition of exculpatory evidence.

[398] We have no doubt that a regime such as New Zealand's current disclosure regime is now considered to be best practice. But it also seems such comprehensive

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473 See also discussion in John D Jackson and Sarah J Summers *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, Cambridge (UK), 2012) at [9.3.2].

474 *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide* (United Nations, New York, November 2014) [*The Status and Role of Prosecutors*] at 59.

475 *General Comment No 32*, above n 452, at [33].

476 See Criminal Disclosure Act 2008, s 12(2).

schemes are relatively new around the world.[477] We therefore do not consider that the absence of a comprehensive disclosure regime would constitute a departure from minimum international fair trial standards (as against falling short of best practice).

[399] We also note that disclosure obligations take different forms in common law and civil law systems, owing to different rules of evidence and procedure. In civil law jurisdictions, the right that common law systems call "disclosure" or "discovery" tends to be defined as the right to access the file.[478] Any minimum standards must accommodate these differences.

[400] We therefore consider that the obligation in art 14(3)(b) should, at the minimum, encompass an obligation to disclose all the evidence the prosecution will be relying on at trial in time to allow adequate time for the preparation for a defence at trial. It should also encompass the disclosure of exculpatory material which is held by the prosecution or investigating authorities. This level of disclosure seems to us to be essential to conducting a defence.[479]

[401] Timing of disclosure is not mentioned in *General Comment No 32*. The guidance from the UNODC and IAP only says that prosecutors should ensure there is "fair" disclosure of material that may be relevant to the accused's innocence or guilt

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477 In England and Wales, the development of a statutory disclosure regime came in the 1980s and 1990s: see The Royal Commission on Criminal Procedure *Report* (Cmnd 8092, January 1981) at 175–180; Criminal Procedure and Investigations Act 1996 (UK), Part 1; and the Criminal Procedure Rules 2020 (UK), Part 15. In Canada, see the Crown duty of disclosure principles as determined in *R v Stinchcombe* [1991] 3 SCR 326; Department of Justice Canada *Disclosure Reform: Consultation Paper* (November 2004); and Department of Justice Canada Steering Committee on Justice Efficiencies and Access to Justice *Report on Disclosure in Criminal Cases* (2011). Many states have now embraced international standards in their domestic law and prosecutorial guidelines such as the standards published by the United Nations Office on Drugs and Crime and the International Association of Prosecutors in *The Status and Role of Prosecutors*, above n 474.

478 *The Status and Role of Prosecutors*, above n 474, at 59 and 59, n 127. According to Máximo Langer and Kent Roach "Rights in the criminal process: a case study of convergence and disclosure rights" in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds) *Routledge Handbook of Constitutional Law* (Routledge, Abingdon, 2013) 273 at 275, the right to access the file is reflected by expressions such as *droit de consulter le dossier* in French, *Akteneinsichtsrecht* in German, and *derecho a examinar el expediente* in Spanish. See also Jackson and Summers, above n 473, at [9.3].

479 We thus adopt the *General Comment No 32*, above n 452, level of disclosure as constituting the minimum level of disclosure required.

so that they are assisted in the timely preparation and presentation of the defence case.[480]

Our assessment

[402] In this case, as the advice to the Minister noted, Mr Kim has been provided with details of the charge and access to information about the case against him for the purposes of the preliminary hearing before the District Court. This satisfies the requirement in art 14(3)(a) of the ICCPR.

[403] Turning now to art 14(3)(b), there is the right under art 38 of the Criminal Procedure Law (2012 revision) to consult the file once it has been transferred to the procuratorate.[481] This would give a wider right of disclosure of prosecution evidence than required under *General Comment No 32*, thereby meeting minimum international standards, as it would give access not just to the material that was to be used at trial but to everything on the file. This is assuming that the way in which we have described the law and practice is accurate, which should be checked by any Minister considering surrender. As noted above, the file should contain any exculpatory evidence collected.[482]

[404] Contrary to the view of the Court of Appeal, we do not consider that the timing of access to the file constitutes a departure from international minimum fair trial standards. Access to the file at the time it is transferred to the procuratorate allows adequate time for trial preparation, particularly as in this case Mr Kim already knows the prima facie case against him.

[405] Although we accept that there is evidence from Mr Ansley that the right to consult the full file does not always exist in practice, it is clear that the legal right does. If any issues with access arise, these can be discussed and resolved in accordance with the twelfth assurance.[483] We also note that if disclosure meetings conducted as

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480 *The Status and Role of Prosecutors*, above n 474, at 59.
481 This is art 40 of the 2018 revision.
482 See above at [387].
483 We do recognise that this is not a complete answer in that, if Mr Kim does not learn about material that has not been disclosed, it follows that any non-disclosure could not be raised.

Mr Ansley describes take place here without the defence receiving the same material, this may also breach the equality of arms principle.[484]

[406] It is also not sufficient to point to issues with the criminal justice system in the PRC, systemic or otherwise, without identifying in a concrete fashion how that might affect the individual involved. The only exculpatory evidence suggested by Mr Kim up to now has been that there may be evidence that his former girlfriend was the killer, a suggestion rejected as a "long stretch" by the District Court Judge.[485]

[407] For the above reasons, and contrary to the view of the Court of Appeal, we do not consider that there are issues with disclosure that would breach Mr Kim's minimum fair trial rights or that would require any further assurances to be sought. However, the Minister must check that meetings for disclosure such as those described by Mr Ansley do not take place without the defence being provided with all the same material.[486] The Minister should also check that the way we have described the law and practice is correct.

Examining witnesses

Background: law and practice in the PRC

[408] The Minister was told in her briefing of 23 November 2015 that the process under the Criminal Procedure Law (2012 revision) for examining witnesses follows these stages:

(a) The prosecutor reads out the bill of prosecution; the defendant and victim may make statements about the alleged crime; and the prosecutor and the judges may question the defendant.[487]

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484 As we explained above at [352]–[353].
485 DC eligibility judgment, above n 7, at [30]. See also at [25] and [34].
486 See above at [390].
487 Criminal Procedure Law (2012 revision), art 186. This is art 191 of the 2018 revision.

(b) The prosecutor and the defence present their evidence.[488] With the permission of the presiding judge, the prosecution and defence may express their views on the evidence and debate with each other.

(c) If, during the hearing, the collegial panel has doubts about the evidence, it may adjourn the hearing to carry out an investigation to verify the evidence.[489] The parties can request further witnesses be summoned, new physical evidence submitted, or further investigations made.[490]

(d) The collegial panel may question witnesses, including expert witnesses, if they are required to appear in court.[491] With the permission of the presiding judge, the prosecution and defence may also question witnesses and expert witnesses.[492] Other than in those circumstances, the evidence of witnesses is usually provided by formal written statement.

[409] Traditionally, in the PRC, evidence has not been presented orally. Amendments were made to the Criminal Procedure Law in 2012 with a view of encouraging more oral evidence at trials as one of the ways to align PRC criminal procedure with processes prevailing in common law courts.[493] There is little evidence this has yet led to any change; the oral appearance rate of witnesses in "contested" cases was 10 per cent before the reforms but has not since increased in any discernible

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488 Article 190, which is now art 195.

489 Article 191, which is now art 196.

490 Article 192, which is now art 197.

491 Articles 187 and 189, which are now arts 192 and 194. A witness must appear in court if a party raises any objection to their witness statement which has a material effect on the case and the court deems it necessary for them to appear. Expert witnesses must appear if a party raises any objection to their expert opinion and the court deems it necessary for them to appear.

492 Article 189, which is now art 194.

493 Zhuhao Wang and David R A Caruso "Is an oral-evidence based criminal trial possible in China?" (2017) 21 E&P 52 at 54. The authors consider it erroneous to base the PRC's traditional lack of oral evidence on its inquisitorial model, as that suggests there is an absence of oral evidence in inquisitorial courts and also ignores the issues of court manipulation that can take place in the absence of orally testing and challenging evidence.

way.[494] Nevertheless, as noted above, there is the right to apply for the compulsory attendance of certain witnesses.[495] Further, PRC officials told MFAT that, if the court declined to require a witness to appear in court, the defendant's lawyer could apply for a reconsideration or raise the matter on appeal.

[410] It is worth pointing out that art 59 of the Criminal Procedure Law (2012 revision) provides that evidence of a witness may only be admitted after the witness has been questioned and cross-examined in the courtroom by the prosecution and defence.[496] It appears that this provision is, despite its apparently clear terms, not applied. It seems to be interpreted as a requirement to review the supplied written material rather than a provision for the admission of oral evidence.[497]

Court of Appeal judgment

[411] The Court of Appeal said that the evidence as to the ability to examine witnesses suggests that the norm in the PRC is that witnesses do not appear and so will not be available for cross-examination. The Court referred to the evidence of Professor Fu, who said:[498]

> A trial is not only a judge-led event with lawyers playing a relatively minor role, but also relies extensively on documents, rendering a trial virtually a trial by affidavits. As it happens, few witnesses testify in courts in China.

[412] The Court commented that this may be the product of the fact that the procedural right to examine witnesses depends upon the making of an application, which a judge has a discretion whether or not to grant. It may be a cultural phenomenon. However, the evidence that witnesses seldom appear suggested further inquiry was justified. The Court expected "closer consideration" to be given to

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494 At 54–55. Indeed, Wang and Caruso note at 55 that other commentators have criticised the 2012 amendments as merely adding red tape and procedural "fluff" to an already deficient and inefficient trial process. On the other hand, we note that having witnesses give oral testimony has also been criticised in common law jurisdictions as over-legitimising, for example, eyewitness memory testimony or judgement of a witness's demeanour in making a credibility determination: see, for example, the work of Elizabeth F Loftus such as "Reconstructing Memory: The Incredible Eyewitness" (1975) 15 Jurimetrics Journal 188; and *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116.

495 Criminal Procedure Law (2012 revision), art 187 (which is now art 192 of the 2018 revision).

496 This is now art 61 of the 2018 revision.

497 Wang and Caruso, above n 493, at 60.

498 CA judgment, above n 11, at [241].

whether there is in substance a right for the accused to examine witnesses as well as whether a specific assurance can be provided to ensure witnesses will be available for cross-examination.[499]

International standards

[413] Article 14(3)(e) of the ICCPR provides that defendants have the right to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.

[414] The international minimum fair trial rights must necessarily accommodate all systems, including inquisitorial and adversarial criminal justice systems. In contrast to an adversarial trial, the judge in an inquisitorial trial has a role to act in the wider public interest by investigating evidence which exculpates as well as incriminates, in a wider search for the truth.[500] While noting that no state's legal system is purely one model[501] and that its summary does not capture all the variations, Te Aka Matua o te Ture | Law Commission (the Law Commission) has identified the main differences between the two models.[502] The features identified that are most relevant to this case are:

(a) Responsibility for marshalling evidence at trial.[503] In an adversarial system, responsibility for gathering evidence rests with the parties, with an independent evaluation of that evidence left to the trial. In an inquisitorial system, an independent prosecutor (as in neither the police nor the defence) can seek particular evidence, direct lines of inquiry favourable to either prosecution or defence, interview complainants,

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499 At [242].

500 Jacqueline Hodgson "Conceptions of the Trial in Inquisitorial and Adversarial Procedure" in Antony Duff and others (eds) *The Trial on Trial Volume 2: Judgment and Calling to Account* (Hart Publishing, Portland (OR), 2006) 223 at 224.

501 See generally Jackson and Summers, above n 473, at ch 1; and John Henry Merryman and Rogelio Pérez-Perdomo *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd ed, Stanford University Press, Stanford, 2007) at 127.

502 Te Aka Matua o te Ture | Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at Appendix 1.

503 At 54.

witnesses and suspects, and ultimately determine whether there is sufficient evidence to try the case.

(b) Relative faith in the integrity of pre-trial processes (which include both investigation and examination).[504] In an adversarial system, the assumption is that miscarriages of justice can best be avoided by allowing the defence to test and counter the prosecution evidence at the trial itself, largely in the manner in which it chooses to do so. The trial is the exclusive forum for determining whether there is a reasonable doubt as to guilt. In an inquisitorial system, the pre-trial process is indispensable, forms the basis for the trial itself, and is trusted to distinguish between reliable and unreliable evidence, detect flaws in the prosecution case and identify evidence that is favourable to the defence.[505]

(c) The nature of the trial process.[506] In an adversarial system, all parties determine the witnesses they call and the nature of the evidence they give. The opposing party has the right to cross-examine. The court oversees the process by which evidence is given, determines the admissibility of evidence and ultimately weighs up that evidence to determine whether there is a reasonable doubt. In an inquisitorial model, the conduct of the trial is largely in the hands of the court. With the dossier of evidence prepared by the independent prosecutor as the starting point, the trial judge determines who to call as a witness and assumes the dominant role in questioning them. Cross-examination as it exists in adversarial systems does not exist,[507] although the parties and their counsel are generally permitted to ask questions of witnesses.

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504 At 54. See also Merryman and Pérez-Perdomo, above n 501, at 130. What other civil law systems call the first two stages, investigation and examination, the PRC calls investigation and prosecution: see above at [145]–[146].

505 Merryman and Pérez-Perdomo, above n 501, at 132, suggest that any misapprehension that there is no presumption of innocence in civil law systems is demonstrably false. First, a legal presumption does exist in most civil law systems. Second, even where it does not exist as a formal rule, something "very much like it" emerges from the examination (in the PRC, prosecution) phase, where the character of the examining judge and the judicialisation of the function of the prosecution tend to prevent the trial of persons "who are not probably guilty".

506 Te Aka Matua o te Ture | Law Commission, above n 502, at 55.

507 See Merryman and Pérez-Perdomo, above n 501, at 131.

[415] In inquisitorial systems, therefore, the judge plays a much greater role than in adversarial systems. Further, cross-examination, fundamental to the adversarial trial, does not bear the same importance in other systems.[508] Indeed, and likely on this basis, the ICCPR provides no explicit right to cross-examination.

[416] Article 14(3)(e) of the ICCPR concentrates on equality of arms and the right to examine or have witnesses examined. As the Human Rights Committee's *General Comment No 32* notes, art 14(3)(e) is "an application of the principle of equality of arms" and thus "guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution".[509] Article 14(3)(e), the Human Rights Committee says, is not an unlimited right, but rather a "right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings".[510]

[417] It has, however, been suggested that the right to examine may not preserve the fairness of the proceedings, and additional procedural safeguards may be required to guarantee the substantive fairness contemplated by art 14(3)(e). The absence of a textual reference to cross-examination cannot on its own be read to deny the extension of such a right if, in the circumstances, this is necessary to secure a fair trial.[511]

Our assessment

[418] The Court of Appeal ordered the Minister to explore further whether the procedure for examining witnesses in the PRC outlined above means that there is not

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508 We note, however, that even in the adversarial system, there are movements away from using traditional cross-examination, particularly in relation to vulnerable witnesses such as children, people with intellectual disabilities, or victims of sexual offending: see Te Aka Matua o te Ture | Law Commission, above n 502, at 34–35 and 38–39; and the Sexual Violence Legislation Bill 2019 (185-1) which has been proposed. See also Phoebe Bowden, Terese Henning and David Plater "Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?" (2014) 37 MULR 539.

509 *General Comment No 32*, above n 452, at [39].

510 At [39]. Jackson and Summers, above n 473, at 88–89 emphasise that, as per the words of *General Comment No 32*, it is not necessary that this right is exercised at trial but merely "at some stage of the proceedings". The authors say this is illustrative of accommodation of the civil law approach, which is more receptive towards the idea of reviewing, or even contesting, evidence before the trial.

511 Kweku Vanderpuye "Traditions in Conflict: The Internationalization of Confrontation" (2010) 43 Cornell Intl LJ 513 at 541–542.

a fair opportunity for examination of witnesses, contrary to art 14(3)(e).[512] The Court of Appeal's concerns were related to the fact that witnesses are seldom required to appear in person in PRC criminal trials and on the lack of cross-examination.[513] We note that it is also necessary to consider equality of arms issues in this regard.

[419] We comment first that the PRC's criminal justice system is still largely inquisitorial. In this context, Professor Fu's comment quoted above on the process being judge-led is unsurprising. Further, at least in law, it does not seem that the procuratorate in the PRC has additional rights to examine and challenge witnesses beyond those accorded to defendants and their counsel.

[420] For the reasons set out above relating to the place of cross-examination in inquisitorial systems, we do not consider that an inability to cross-examine witnesses in itself means a trial risks being unfair. There must of course be the ability to mount a defence, including making submissions on witness testimony and an ability to submit defence evidence. We also accept that there may be a need to go beyond examination in some cases.

[421] It does seem to us that the procedure set out above allows sufficient evidence to be obtained from witnesses to enable a defence. While most witnesses do not appear in court to give evidence orally, PRC law allows an application to ensure that material witnesses whose evidence is contested do appear in court and that they are available for cross-examination if required, with a right of review or appeal if that application is not granted.[514] Any issues in this regard would be picked up through monitoring of the trial.

Conclusion on fair trial

[422] What is now required is an assessment of whether in all the circumstances there is a real risk of Mr Kim not receiving a trial that overall meets minimum international standards. As is the case for torture, this requires not only an evaluation of the criminal

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512 CA judgment, above n 11, at [242]–[243] and [278(e)(ii)].

513 At [241]–[242]. We consider that the Court of Appeal may in this area have been applying domestic New Zealand standards rather than minimum international ones.

514 In this regard, we do not consider that a refusal of an application to cross-examine witnesses who are not material to the case could ever mean a trial might be unfair.

justice system in the PRC and any issues relating to Mr Kim personally, but also an evaluation of the assurances and the likelihood they will be kept.[515]

[423] As we have outlined, the PRC has provided an assurance that all applicable domestic and international requirements relating to fair trial will be complied with and has also provided certain other relevant assurances, such as access to counsel and the recording of interrogations. We have also found that, subject to certain additional assurances being obtained and certain inquiries satisfactorily resolved, PRC domestic law, if followed, would accord Mr Kim a fair trial. In our view, the monitoring mechanism would uncover departures from domestic law occurring in the preparation for and at trial. The likelihood of uncovering any issues if they did arise and the potential to resolve them through the twelfth assurance, combined with the strength of the bilateral relationship and the broader motivations of the PRC to demonstrate the reliability of its assurances and the integrity of its systems on the international stage, means the Minister was entitled to take the view that the assurances would be honoured.

Should the Minister have received an assurance with regard to remand time?

[424] The next issue is whether an assurance should have been sought that Mr Kim's time spent in detention in New Zealand would be taken into account in setting a finite sentence, should a finite sentence be imposed.

[425] According to a memorandum dated 27 April 2017 filed by the appellants in the High Court (with a PRC Embassy note of discussions between PRC and New Zealand officials attached), there are only two available punishments if Mr Kim is convicted of intentional homicide: life imprisonment or a fixed term of imprisonment.[516] Parole is not available for prisoners who are sentenced to fixed-term imprisonment of more than 10 years or to life imprisonment for intentional homicide. However, such prisoners are eligible for commutation of sentences if they meet the legal requirements in that regard.

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515 The latter point will require similar considerations as for torture.

516 As set out above at [1], the extradition request included an assurance that, if convicted, Mr Kim would not be subject to the death penalty.

[426] When imposing a sentence of imprisonment, a PRC court can take into account time served in custody in another country as a factor that might lead to a lighter punishment. PRC officials also advised that there are provisions in extradition treaties the PRC has concluded with other countries expressly requiring the length of time served in custody by the person extradited to be deducted from the time of imprisonment in the PRC.

Court of Appeal judgment

[427] The Court accepted the submission that this issue is best addressed under s 30(3)(e) rather than s 8(1)(c) of the Extradition Act, but determined that the question is the same whichever section is considered because the Minister was required to exercise her discretion in a manner consistent with New Zealand's international obligations. This means that the issue is whether it is cruel, degrading, or disproportionately severe punishment as in s 9 of the Bill of Rights or cruel, inhuman or degrading punishment in terms of art 7 of the ICCPR if there is no absolute requirement that time spent in custody prior to conviction be treated as time served in relation to any finite term of imprisonment imposed on Mr Kim.[517]

[428] The Court of Appeal considered that it would be a disproportionately severe punishment if time already spent in custody by Mr Kim was not taken into account when fixing a finite sentence. The Court therefore considered the Minister should have sought an assurance on this point.[518]

Appellants' submissions

[429] The appellants argue that the Court of Appeal erred both in formulating the legal test and applying it. First, the correct question is whether, if time spent in custody is not taken into account, there is a real risk Mr Kim would be subject to "cruel, inhuman or degrading treatment or punishment" as per art 7 of the ICCPR. The domestic standard of "disproportionately severe treatment" under s 9 of the Bill of Rights does not apply: the issue is whether international standards would be breached. Moreover, because of the extradition context, the threshold for "inhuman" punishment

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517 CA judgment, above n 11, at [265]–[266].
518 At [267].

must be something worse than punishment that would amount to a breach of s 9 if occurring in New Zealand, for example, by being "grossly disproportionate".

[430] As for applying this test, it is submitted that a sentence of life imprisonment for murder would not meet this very high standard. This means a shorter sentence (which any finite sentence would inevitably be) also could not do so. If Mr Kim is convicted, the PRC court should be left to determine whether it should exercise its discretion to take into account time spent in custody in New Zealand in setting the finite sentence.

Mr Kim's submissions

[431] Mr Kim argues that the issue is not only whether the sentence would breach s 9 of the Bill of Rights but whether the sentence would be manifestly unjust. In either case, the Minister cannot extradite Mr Kim. The extradition context does not alter these standards. Here, Mr Kim has already suffered a long period of detention in New Zealand with adverse effects on his mental health. There is provision for remand time to reduce sentences in extradition treaties of other countries with the PRC and there is no reason not to seek an assurance in this case to that effect.[519]

Our assessment

[432] We accept the appellants' submission that, if a sentence of life imprisonment would not breach art 7 of the ICCPR or s 9 of the Bill of Rights, then a finite sentence could not do so even if time served on remand in New Zealand is not taken into account in setting that sentence.[520]

[433] It would of course not have been unreasonable for the Minister to seek an assurance as to remand time, particularly given that extradition treaties entered into by

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519 The Commission did not make any submissions on remand time.

520 It was argued before the Court of Appeal, for the first time, that an imposition of a whole-of-life sentence without parole would be in breach of art 7 of the ICCPR, above n 21. In the absence of evidence that such a sentence as a matter of fact and law is irreducible, the Court refused to address the argument: CA judgment, above n 11, at [268]. This argument was not renewed by Mr Kim before this Court, although it was addressed by the appellants briefly in written and oral submissions. We therefore do not deal with that argument.

the PRC contain such provisions.[521] Contrary to the view of the Court of Appeal, however, we do not consider that the lack of such an assurance would prevent surrender.

Summary of our decision on appeal

[434] We here set out a summary of our decision with regard to torture, fair trial and remand time.

Torture

Surrender where risk of torture

[435] There is no blanket prohibition on extraditing persons where:

(a) absent assurances, there would be substantial grounds for believing that a person to be extradited is in danger of being subjected to torture;[522] or

(b) torture is systemic in the receiving country.[523]

[436] Where there are no substantial grounds for believing a person would be in danger of being subjected to an act of torture if surrendered, the person's surrender will not breach the sending state's obligations under UNCAT, even if others are routinely tortured in the receiving state.[524]

The test

[437] Where assurances in respect of the treatment of an individual are obtained, there is a three-stage process for assessing whether there are substantial grounds for

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521 To respect judicial independence and the separation of powers, any such assurance, if sought, could not be a direction as to a judicial decision the PRC courts will make. Rather, it should, if sought, confirm that the prosecution will support a submission that remand time be taken into account.

522 See above at [112]–[121] and [127]–[128].

523 See above at [122]–[128].

524 See above at [109]–[111].

believing that the individual would be in danger of being subjected to an act of torture in the receiving state.[525] It is necessary to assess:

(a) the risk to the individual, based on their personal characteristics and situation, and in light of the general human rights situation in the receiving country;

(b) the quality of assurances offered; and

(c) whether the assurances will be honoured.

[438] These three questions are intertwined.[526] For example, high quality assurances as seen through a robust monitoring regime will not only increase the likelihood that any torture will be uncovered, but will also increase the likelihood that the assurances are honoured because of the concern that acts of torture would be discovered.

Risk to Mr Kim

[439] Torture is still widespread in the PRC, despite recent improvements both in the law and practice. It is accepted by the parties that there is thus a real risk, absent assurances, that Mr Kim would be subjected to torture if surrendered to the PRC. Given this background, the Minister was engaged in an assessment of Mr Kim's risk relative to other persons.[527] In this context the Minister was entitled to give weight to:

(a) the fact Mr Kim is to be tried and detained in Shanghai, an urban area;[528]

(b) the stage the investigation has reached;[529]

(c) the fact that Mr Kim is not a member of a high-risk ethnic or political group;[530] and

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525 See above at [131]–[132].
526 See above at [133].
527 See above at [199]–[201].
528 See above at [203] (if an assurance to that effect is given).
529 See above at [204].
530 See above at [201].

(d) the prima facie strength of the case against him.[531]

[440] In assessing risk, the Minister was entitled to disregard the possibility of a senior local party official having an interest in securing Mr Kim's conviction (unless further evidence emerges). The District Court Judge held that this theory was a "long stretch" on the evidence available.[532]

[441] We consider, however, that the Minister should have treated the Human Rights Watch report that murder suspects are more at risk of torture than other ordinary criminal suspects as a relevant consideration.[533] This would mean that the level of risk may be somewhat higher than that assessed by the Minister, but this risk is tempered by the factors set out above at [439].

[442] To the extent there is a higher level of risk than that assessed by the Minister, this only means more emphasis is required on the second and third stages of the inquiry to determine whether the assurances are sufficient in this case to address that level of risk faced by Mr Kim.[534]

Quality of assurances

[443] The following assurances and confirmations should have been obtained:[535]

(a) an assurance that Mr Kim will be tried in Shanghai, and that he will be detained in Shanghai both before and after trial (if he is convicted);[536] and

(b) confirmation from the PRC that visits during the investigation phase will be permitted at least every 48 hours, as well as within a short time period after any request by Mr Kim, in line with the instructions the Minister has provided to MFAT.[537]

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531 See above at [204].
532 See above at [206].
533 See above at [207]–[210].
534 See above at [211].
535 Subject to what is said below at [473].
536 See above at [223], or perhaps an equivalent urban area.
537 See above at [232]–[235].

[444] It would have been preferable for Mr Kim to have the right to have his lawyer present during any interrogations. The presence of a lawyer during interrogations would not, however, add significantly to the protection from torture already provided by a combination of the monitoring arrangements and the requirement to provide recordings of all interrogations.[538] Thus the absence of this right would not be a barrier to Mr Kim's surrender.

Whether the assurances will be honoured

[445] The Minister was entitled to consider the assurances would be kept based on the following:[539]

(a) the fact that Mr Kim is not a member of a high-risk ethnic or political group;[540]

(b) the assurances were provided by senior PRC officials with requisite authority to bind the State;[541]

(c) central authorities who gave the assurances have power over local authorities in the PRC;[542]

(d) the PRC's motivation to honour the assurances is significant, based on MFAT's assessment of the bilateral relationship between the PRC and New Zealand and, more importantly, the PRC's incentive in keeping the assurances in order to have other alleged criminals returned to the PRC from other countries;[543] and

(e) a robust monitoring regime, which increases the risk of exposure of any torture and thus provides a greater incentive to keep the assurances.[544]

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538 See above at [249]–[250].
539 These considerations also apply to the fair trial assurances.
540 See above at [201] and n 307.
541 See above at [258].
542 See above at [258].
543 See above at [259]–[260].
544 See above at [262].

Conclusion on torture

[446] If the assurances and monitoring requirements had been strengthened in the ways set out above, the Minister would have been entitled to consider that there were no substantial grounds to believe that Mr Kim would be in danger of being subjected to an act of torture were he to be surrendered.

Fair trial

The test

[447] The relevant inquiry is whether there is a real risk of a trial that would constitute a flagrant denial of justice, meaning a trial that falls below the minimum standards in art 14 of the ICCPR.[545] This is judged overall rather than in relation to each individual requirement of art 14, but it is still necessary to have regard to these individual requirements as each have been deemed necessary to ensure a fair trial. In some cases, falling below minimum standards may be compensated for by higher standards in another area, but in others the absence of one of the requirements may mean there cannot be a fair trial.[546] Systemic issues are to be considered but only to the extent that they risk affecting the particular individual.[547] Assurances can be taken into account in this assessment.[548]

Main fair trial assurances

[448] The main assurance is that the PRC will comply with applicable international legal obligations and domestic requirements regarding fair trial.[549] This has to be understood as an assurance that the PRC will comply with the minimum international standards set out in art 14 of the ICCPR, even though it has not ratified the ICCPR.[550] In any event, the current legal framework in the PRC largely meets the international minimum fair trial standards.[551]

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545 See above at [277]–[278].
546 See above at [279].
547 See above at [280].
548 See above at [285].
549 See above at [294].
550 See above at [295].
551 See above at [295].

[449] The Minister was also entitled to put weight on the assurance as to monitoring of the trial as providing a safeguard for Mr Kim's fair trial rights.[552]

Judicial independence

[450] There are three issues raised with regard to judicial independence. First, there is the concern that courts in the PRC are largely concerned with social and crime control, meaning a fair trial is allegedly impossible. With regard to this concern, the real issue is not any systemic issues in the PRC criminal justice system but whether or not there is a real risk of an unfair trial for Mr Kim, in his particular circumstances, should he be surrendered.[553]

[451] The second concern is about direct political influence on the courts and judges. We consider the Minister was justified in considering that because Mr Kim's alleged offending is ordinary criminal offending, the likelihood of political interference in his case is low.[554]

[452] The third concern relates to the operation of judicial committees. It was not possible for the Minister on the basis of the material before her at the time of the second surrender decision to have come to the conclusion that Mr Kim would be tried by an independent and impartial tribunal.[555]

[453] There is now, however, further material before this Court that had not been considered by the Minister or the Courts below. On the basis of that material, we consider there remains a real risk that Mr Kim's case would be referred to a judicial committee. This would occur, for example, if a question of law arose or the collegial panel proposed to acquit Mr Kim. His case may also be referred because the panel may wish to share responsibility for the decision because of the international dimension.[556]

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552 See above at [297].
553 See above at [335]–[338].
554 See above at [339]–[340].
555 See above at [341]–[345].
556 See above at [347].

[454] If the process before the judicial committee is as described in the 2019 Opinions and these are the applicable Opinions, we consider that the Minister could have reasonably concluded that, even if Mr Kim's case were referred to a judicial committee, the trial would still meet minimum international standards for judicial independence and impartiality, subject to the issue of equality of arms and outside influence. We see the process as described in the 2019 Opinions as being akin to a preliminary general appeal on the papers.[557]

[455] Whether the procedure followed in practice accords with the 2019 Opinions and in particular whether the judicial committee will have access to the whole of the trial materials in Mr Kim's case would have to be checked by the Minister.[558] We do not consider that Mr Kim's inability to make further submissions to the judicial committee would breach minimum standards as long as he has had full opportunity to make submissions on the relevant points to the collegial panel and these are set out in its report to the judicial committee.[559]

[456] However, the important principle of equality of arms would be breached if the prosecutor or any other party has any additional right to make submissions to the judicial committee without Mr Kim being given the opportunity to respond. Whether or not this is the case should have been investigated and, if necessary, assurances obtained on this point.[560]

[457] In a similar vein, it appears from the 2019 Opinions that further persons other than the collegial panel and the members of the judicial committee are either required to or entitled to attend the judicial committee meetings, including political representatives. Although they have no voting role and are not necessarily connected to the prosecution, their presence would mean that the members of the judicial committee could be subject to outside influence. The Minister must be satisfied that these other persons would not attend a judicial committee hearing in Mr Kim's case.[561]

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557 See above at [349]–[350].
558 See above at [349]–[350]. See also n 415.
559 See above at [351].
560 See above at [351]–[352].
561 See above at [353], subject to the qualification discussed above at [354].

Right to silence

[458] The Minister was entitled to conclude that Mr Kim will effectively have the right to silence because there will be no consequences if he fails to answer any questions put to him.[562]

[459] It would have been preferable if Mr Kim's lawyer could attend all interrogations but we do not consider that his trial would fall below minimum international standards if this was not the case, as long as he is not compelled to testify or confess guilt and as long as his rights to counsel are otherwise respected.[563]

Position of defence counsel

[460] The right to be legally represented when charged with a criminal offence and be represented by a lawyer at trial is an important requirement for a fair trial and is protected under art 14(3)(b) and (d) of the ICCPR.[564]

[461] We accept that the Minister was entitled to consider on the material before her that Mr Kim will be accorded the right to consult a lawyer and have a lawyer represent him at trial.[565]

[462] We consider the PRC would understand that charging Mr Kim's counsel under art 306 without cause would compromise its aim of persuading other countries to extradite accused persons to the PRC. Equally, Mr Kim's counsel will understand this. We thus do not consider art 306 provides an impediment to surrender.[566]

Disclosure

[463] We do not consider that there are any issues with disclosure that would breach Mr Kim's minimum fair trial rights or that would require further assurances. This is subject to the Minister checking that we have set out the law and practice correctly. It is also subject to the Minister being satisfied that any meetings for disclosure do not

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562 See above at [362]–[364].
563 See above at [365]–[367].
564 See above at [379].
565 See above at [380]–[381].
566 See above at [382]–[383].

take place without the defence being provided with all material disclosed to the court.[567]

Examining witnesses

[464] Evidence in criminal trials in the PRC tends to be given by written statement. An application can be made to have witnesses give oral evidence at trial if their evidence is contested.[568] We do not consider that an inability to cross-examine witnesses in itself means that a trial risks being unfair. Assuming the PRC system operates in practice in accordance with how we read the Criminal Procedure Law, we do not consider the minimum standards in art 14(3)(e) of the ICCPR would be breached solely because of an inability to cross-examine all witnesses.[569]

Conclusion on fair trial

[465] The Minister was required to make an assessment of whether there is a real risk of a trial that is not fair should Mr Kim be surrendered. This would take into account the assurances and the likelihood they will be kept. Assuming all the issues outlined above had been satisfactorily dealt with, the Minister would have been entitled to take the view that the assurances would be honoured and that Mr Kim will receive a fair trial.[570]

Remand time

[466] It would not have been unreasonable to seek an assurance that Mr Kim's time spent in custody in New Zealand prior to conviction be treated as time served in relation to any finite term of imprisonment imposed on Mr Kim if he is convicted. The absence of such an assurance would not, however, prevent his surrender.[571]

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567 See above at [402]–[407].
568 See above at [408]–[410].
569 See above at [420]–[421].
570 Again we recognise that the issues might be dealt with in some other manner than we have set out above: see below at [473].
571 See above at [433].

Cross-appeal

Mr Kim's submissions

[467] In effect, Mr Kim argues that in light of the general human rights situation in the PRC, no reasonable Minister could ever decide to extradite Mr Kim. Thus the decision should be quashed and not remitted for reconsideration. It is submitted that there remains a real risk of torture and a real risk of an unfair trial, and that these risks are intractable. The long delay and Mr Kim's mental health also require this remedy.

Our assessment

[468] It will be obvious from what we say above that we do not accept the submission that no reasonable Minister could ever make the decision to surrender Mr Kim.[572] This means that the cross-appeal must be dismissed.

Disposition of appeal

[469] The premise behind extradition is that those accused or convicted of crimes committed in another jurisdiction should not be able to avoid justice by leaving that country.[573] Extradition has become even more important in recent years in light of the growth in international crime.[574] States now regard it as part of their role as good global citizens to ensure international cooperation in the detection and punishment of crime.[575] It is important to remember that extradition proceedings are to assist criminal proceedings in another state. They are not proceedings to determine criminal charges.[576] This means that extradition proceedings should proceed with as little delay

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572 The Court of Appeal, although it considered that there were more issues with the Minister's decision than we have found, remitted the decision to the Minister: CA judgment, above n 11, at [278].

573 Te Aka Matua o te Ture | Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) at [2.2].

574 At [2.7]–[2.8].

575 At [2.2].

576 At [2.3].

as is possible while ensuring rights are protected. As the Law Commission has put it:[577]

> Extradition is a process that must operate efficiently from the perspective of the requesting country, reflect New Zealand's own concerns about law enforcement, and protect the rights of the accused through that process.

[470] We reiterate that there are also other rights involved: the rights of individual victims of crime and their families and the rights of society generally to ensure that those accused of serious crimes do not escape being tried and, if found guilty, being subjected to suitable sanctions.[578]

[471] This appeal has been largely concerned with the issues of torture and fair trial. We have held that, assuming the matters summarised above at [443], [455]–[457] and [463] are satisfactorily resolved, there would be no substantial grounds (no real risk) that Mr Kim will be in danger of being subjected to an act of torture if surrendered to the PRC. Nor would there be a real risk of an unfair trial.

[472] The issues we have held require further inquiry or further assurances are, contrary to the position taken by the Court of Appeal, relatively limited and should not be difficult or time consuming to resolve. Given the purposes behind extradition, the time that has already elapsed since the extradition request was made and the detailed consideration that has already been given to the matter to date, both by the Minister and the Courts, we consider that we should adjourn the appeal to give the appellants the opportunity to make the further inquiries and seek the further assurances we have identified.[579] The appellants must also, of course, consider any submissions made by Mr Kim.

[473] We accept that it may be open to the current Minister of Justice, the Hon Kris Faafoi, based on an analysis of the whole context and any updated information, to conclude that some or all of the additional assurances we have set out

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577 At [1.20].

578 See above at [135].

579 This was the approach taken in *R (on the application of Aswat) v Secretary of State for Home Department* [2014] EWHC 1216 (Admin).

may not be necessary or that the issues can be addressed in a different manner.[580] The current Minister would, of course, be entitled to depart from the previous Minister's decision in any event. We recognise that there may also be relevant changes in the circumstances considered by the previous Minister.

[474] A report is to be filed by the parties on or before 30 July 2021. The report should outline the result of the further inquiries and any further assurances received. It should cover the proposed disposition of the appeal in light of the further inquiries and assurances and any other relevant circumstances.[581] The report should be a joint report. Differences in view between the parties and the reasons for those differences should be summarised in the report. More detailed reasons for any differences may be added as an appendix. When filing the joint report, the parties should indicate whether a further hearing is sought.

Result

[475] The appeal is adjourned until 30 July 2021.

[476] A report is to be filed by the parties on or before 30 July 2021 outlining the matters set out at [443], [455]–[457] and [463].[582]

[477] The cross-appeal is dismissed.

O'REGAN AND FRENCH JJ
(Given by O'Regan J)

[478] We agree with the reasons given by Glazebrook J, except in relation to the disposition of the appeal.

[479] In our view, rather than adjourn the appeal, the appropriate disposition is to uphold the order of the Court of Appeal quashing the Minister's decision to surrender

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580 By way of example only, if there are New Zealand Consulate officials available to conduct adequate monitoring in cities in the PRC other than Shanghai, then detention in such a city after any conviction may not be a cause for concern.

581 For the avoidance of doubt, possible disposition options include remission of the decision to the Minister.

582 We note our comments above at [473].

Mr Kim and to make an order directing the Minister to reconsider whether Mr Kim should be surrendered, taking into account the matters set out in the reasons given by Glazebrook J and summarised at [443], [455]–[457] and [463].

[480] We accept that adjourning the appeal to give the appellants an opportunity to address the outstanding matters is consistent with the approach taken by the High Court of England and Wales in *R (on the application of Aswat) v Secretary of State for Home Department* (*Aswat (No 1)*).[583] However, an adjournment can be seen as effectively giving the appellants an opportunity to address the shortcomings in the surrender decision and in the arguments they made to this Court in support of the appeal. In any event, we see this case as distinguishable from *Aswat (No 1)*. In particular:

(a) In *Aswat (No 1)*, the adjournment was granted following a specific request from the Secretary of State to "allow some time for the United States [the requesting country] to consider whether it wished to give the kind of assurances envisaged in the judgment of the Strasbourg Court".[584] There was no such request in this case.

(b) The time between the date of the Secretary of State's decision and the High Court decision in *Aswat (No 1)* was less than a year,[585] whereas in the present case, the time between the Minister's decision and this Court's decision is nearly five years.

(c) The outstanding issue in *Aswat (No 1)* was whether or not Mr Aswat would be held, after surrender to the United States, in an appropriate psychiatric facility. An assurance from the United States that he would be resolved that issue. In effect, there was little the Secretary of State had to do in *Aswat (No 1)*: the issue was whether the United States

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583 *R (on the application of Aswat) v Secretary of State for Home Department* [2014] EWHC 1216 (Admin) [*Aswat (No 1)*]. The final disposition of the judicial review occurred in *Aswat v Secretary of State for the Home Department* [2014] EWHC 3274 (Admin) [*Aswat (No 2)*].

584 *Aswat (No 1)*, above n 583, at [47].

585 The Secretary of State for the Home Department made the relevant extradition decision on 12 September 2013. Following the decision's announcement, Mr Aswat sought judicial review in the High Court. That Court released its judgment temporarily adjourning the proceedings on 16 April 2014, less than a year after the challenged decision was made.

would provide an assurance as described by the Court. Once the assurance was given, the Court's concern was met.[586] In contrast, the outstanding issues in this case are less clear-cut.

[481] In the time between the Minister's decision and this Court's decision in the present case, there have been changes of Government and, consequently, of Ministers. That in itself does not rule out the adjournment approach, but it is another point of distinction from *Aswat (No 1)* which, in our view, makes the adjournment approach less attractive. If the Minister takes the opportunity afforded by the adjournment to address the outstanding matters, he will effectively have adopted the reasoning of his predecessor on all issues other than those outstanding matters. We see it as preferable that, given the need for the outstanding matters to be addressed, the Minister should now address the whole surrender issue afresh.

[482] We accept the point made at [469] of the reasons given by Glazebrook J that extradition should be an expeditious process, but the reality is that the process in the present case is already protracted. We acknowledge the efficiency objective of the adjournment approach in that it may obviate the need for a further Ministerial decision on surrender and the consequent possibility of a third judicial review challenge. But we do not see that as outweighing the desirability of the issues raised by this Court being considered by the Minister as part of an overall re-evaluation of the case for surrender.

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J E Anderson-Bidois, Human Rights Commission, Auckland for Intervener

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586 For example, Mitting J commented that the new assurances given by the United States "fulfil the spirit if not the letter of the means by which I anticipated that the [relevant] requirements of the Strasbourg Court would be fulfilled": *Aswat (No 2)*, above n 583, at [11].