

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 54/2018  
[2021] NZSC 9**

BETWEEN

MATHIAS ORTMANN  
First Appellant

BRAM VAN DER KOLK  
Second Appellant

FINN HABIB BATATO  
Third Appellant

AND

UNITED STATES OF AMERICA  
First Respondent

DISTRICT COURT AT NORTH SHORE  
Second Respondent

**SC 55/2018**

BETWEEN

FINN HABIB BATATO  
Appellant

AND

UNITED STATES OF AMERICA  
Respondent

**SC 56/2018**

BETWEEN

MATHIAS ORTMANN  
First Appellant

BRAM VAN DER KOLK  
Second Appellant

AND

UNITED STATES OF AMERICA  
Respondent

SC 57/2018

BETWEEN KIM DOTCOM  
Appellant  
AND UNITED STATES OF AMERICA  
Respondent

SC 58/2018

BETWEEN KIM DOTCOM  
Appellant  
AND UNITED STATES OF AMERICA  
First Respondent

DISTRICT COURT AT NORTH SHORE  
Second Respondent

Court: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and  
Williams JJ

Counsel: G M Illingworth QC, P J K Spring and A K Hyde for  
Messrs Ortmann and van der Kolk  
A G V Rogers for Mr Batato  
R M Mansfield and S L Cogan for Mr Dotcom  
D J Boldt, F R J Sinclair and Z A Fuhr for United States  
of America

Judgment: 22 February 2021

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**JUDGMENT OF THE COURT**

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- A** We remit the proceedings to the Court of Appeal for the identification of the outstanding issues in relation to the judicial review appeals (SC 54/2018 and SC 58/2018) and the resolution of those issues.
- B** We direct the Registrar to provide to the Court of Appeal copies of the submissions made by the parties in response to this Court's request for submissions in its substantive judgment (*Ortmann v United States of America* [2020] NZSC 120).
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## REASONS

[1] In our judgment of 4 November 2020, we allowed the appellants' appeals in SC 54/2018 and SC 58/2018 relating to the applications for judicial review.<sup>1</sup> However, the judicial review aspect of the appeals was limited to determining whether the Court of Appeal had erred in holding that the judicial review proceedings were an abuse of process.<sup>2</sup> We sought submissions from the parties as to whether this Court should address the issues that remain to be resolved in another hearing or remit the proceedings to the Court of Appeal for that Court to do so.<sup>3</sup> In relation to those submissions we said:<sup>4</sup>

Those submissions must identify which issues remain outstanding in the judicial review proceedings and set out the relevant party's view as to which court should resolve these issues. Outstanding issues are those which have not been addressed as part of the case stated appeals. The submissions should not seek to relitigate issues that have already been resolved by the outcome of the case stated appeals.

[2] We have now received those submissions. The parties are divided on which issues remain to be resolved (if any) and on which Court should address any unresolved issues. Both Mr Dotcom and the United States argue that the case should be remitted to the Court of Appeal. In Mr Dotcom's case, the reason given for this stance is as follows:

This will ensure that, when the matter ultimately comes before this Court, this Court will have the benefit of a reasoned appellate decision in the usual way. Otherwise, the Appellant is denied a right of appeal and the Court is denied the benefit of the issues on appeal having been appropriately considered and refined. This will also be a better utilisation of this Court's resources.

[3] The United States supports that decision, largely for the same reasons.

[4] On the other hand, the remaining appellants argue that this Court should resolve any outstanding issues in relation to judicial review. They argue that this would be more appropriate because this Court has the most recent experience of the case and is therefore best placed to efficiently hear the remaining issues. They also

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<sup>1</sup> *Ortmann v United States of America* [2020] NZSC 120.

<sup>2</sup> At [562] and [596].

<sup>3</sup> At [597].

<sup>4</sup> At [597].

say that because this Court has made some obiter remarks that bear upon the outstanding issues identified by the appellants in their submissions, this Court is the appropriate Court to address those remarks. They also point out that, if the matter were determined by the Court of Appeal, it is highly likely the unsuccessful party would seek leave to appeal to this Court.

[5] We are reluctant to override the preference of Mr Dotcom and the United States, given that both attach importance to the potential for an appeal against the decision resolving outstanding issues. While we acknowledge the position of the other appellants, particularly their argument that remission to the Court of Appeal, with the possibility of a further appeal to this Court, could cause further delay, we consider it would not be appropriate for this Court to deal with the issues directly in the face of opposition from both Mr Dotcom as the other appellant and the United States as the respondent.

[6] We therefore determine that the matter should be remitted to the Court of Appeal.

[7] It is apparent from the submissions that were filed by the parties that there is a substantial division of view about which issues remain unresolved (if any). As we are remitting the matter to the Court of Appeal, we do not consider that we should attempt to resolve that dispute, but rather should leave it to the Court of Appeal to do so whether as a preliminary issue or as part of a single hearing on the outstanding issues.

[8] For the above reasons, we remit the matter to the Court of Appeal for the identification and resolution of any outstanding issues in relation to the judicial review appeals (in this Court, SC 54/2018 and SC 58/2018). We direct the Registrar to provide to the Court of Appeal copies of the submissions made by all parties in response to the request for submissions made in our substantive judgment.

Solicitors:  
Keegan Alexander, Auckland, for Messrs Ortmann and van der Kolk  
Anderson Creagh Lai Ltd, Auckland, for Mr Dotcom  
Crown Law Office, Wellington, for United States of America