



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

MATHIAS ORTMANN & ANOTHER v UNITED STATES OF AMERICA &
ANOTHER (SC 88/2021)

KIM DOTCOM v UNITED STATES OF AMERICA & ANOTHER (SC 90/2021)

[2021] NZSC 187

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

The applicants, Messrs Ortmann, van der Kolk and Dotcom, have been found eligible to be extradited to the United States of America to face trial for criminal copyright infringement and other related charges. The applicants had appealed against the eligibility determination by way of the case stated procedure, but these appeals were dismissed by the Supreme Court in November 2020. The Court also dealt with one aspect of applicants' appeals relating to parallel judicial review proceedings. The Court determined that the Court of Appeal, in its earlier judgment delivered in 2018, had erred in holding the judicial review proceedings were an abuse of process. The judicial review proceedings were remitted back to the Court of Appeal for the identification and resolution of any outstanding issues in relation to the judicial review appeals.

On remittal back, the Court of Appeal dismissed the judicial review appeals. It held that none of the issues relied upon by the applicants remained outstanding. That was essentially because each issue either had been considered on its merits in the Court of Appeal's 2018 judgment or was a new matter outside the scope of the remittal back.

The applicants sought leave to appeal against the Court of Appeal's remittal decision, essentially on the basis that the Court of Appeal had not done what the Supreme Court directed it to do, therefore depriving them of the consideration of their judicial review appeals, to which they were entitled as of right. In particular, the applicants submitted that the judicial review

claims were wrongly disposed of on the basis the issues were considered in the case stated context as part of determining applications for special leave, rather than a merits assessment. Various other challenges to the Court of Appeal's remittal decision were also made.

Leave to appeal was sought on the basis that these errors gave rise to questions of general or public importance. The applicants also submitted that the intervention of the Supreme Court was necessary to prevent a miscarriage of justice.

Decision

The Supreme Court has dismissed the applications for leave to appeal.

The Court said that although decisions to decline special leave are not usually treated as decisions on the merits, the present case could be seen as out of the usual run because the 2018 Court of Appeal's decision on the leave applications did, in fact, engage in a merits assessment.

But in any event, the Court did not see the case as giving rise to questions of general or public importance about the Court of Appeal's approach. Rather, the applications turned on an assessment of whether, on these particular facts, the issues the applicants wish to revisit remain outstanding. The Court was satisfied there was no appearance of a miscarriage of justice in the Court of Appeal's factual assessment that the issues were not outstanding. What was important was that the issues had in fact been dealt with in an expansive and detailed way. Further, the essence of the complaints – the applicants' inability to adduce expert evidence to challenge the inferences drawn by the United States of America's evidence – was a matter for trial.

The arguments the applicants wished to raise about various other aspects of the Court of Appeal's decision had insufficient prospects of success to justify an appeal to this Court.

For these reasons, the applications for leave to appeal were dismissed. The applicants were ordered to pay the first respondent one set of costs of \$2,500.

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