



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

4 JUNE 2021

MEDIA RELEASE

MINISTER OF JUSTICE v KYUNG YUP KIM

(SC 57/2019)[2021] NZSC 57

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.

Suppression

The High Court order prohibiting publication of the identity of the countries that have provided details about their dealings with the People's Republic of China in news media or on the internet or other publicly available database remains in force.

Background

Mr Kyung Yup Kim is a permanent resident of New Zealand. The authorities in the People's Republic of China (PRC) allege that he killed a young woman while in Shanghai in December 2009. In May 2011, New Zealand received a request from the PRC seeking Mr Kim's extradition on one count of intentional homicide.

In 2013 the District Court determined that Mr Kim was eligible for surrender. On 30 November 2015, the Minister of Justice, after seeking diplomatic assurances from the PRC as to Mr Kim's treatment, determined that Mr Kim should be surrendered to the PRC.

Mr Kim successfully challenged that decision on judicial review. After reconsideration and after receiving further diplomatic assurances, the Minister again decided that Mr Kim should be surrendered. Mr Kim again applied for judicial review of that decision, but this time was unsuccessful in the High Court.

On 11 June 2019, the Court of Appeal quashed the Minister's decision and held that it must be reconsidered in light of the matters identified in its judgment. These included addressing the effectiveness of assurances to address the risk of torture and making further inquiries on certain other issues related to whether there is a risk of Mr Kim not receiving a fair trial.

The Supreme Court granted the Minister and the Attorney-General (the appellants) leave to appeal against the Court of Appeal's decision in September 2019. Mr Kim's application to cross-appeal was also granted. 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 1999. The Human Rights Commission was granted leave to intervene.

Issues in dispute

The overarching issue before the Court on the appeal was whether it was reasonably open to the Minister to decide to surrender Mr Kim to the PRC. In order to resolve this, the Court had to, among other issues, address the circumstances in which diplomatic assurances can be sought and relied upon, determine whether the Minister could reasonably conclude that there were not substantial grounds for believing that Mr Kim would be in danger of being subjected to torture if extradited to the PRC and determine whether the Minister could reasonably conclude that Mr Kim would receive a fair trial in the PRC. The Court also had to determine whether the Minister ought to have received an assurance from the PRC that the time Mr Kim has spent on remand in New Zealand would be taken into account if he is convicted and sentenced in the PRC.

In relation to the cross-appeal, the issue was whether no reasonable Minister could ever decide to extradite Mr Kim. The Court had to consider the human rights situation in the PRC, the delays involved in the case, and Mr Kim's mental health.

Findings

The circumstances in which diplomatic assurances can be sought and relied upon

The Supreme Court has unanimously held that it is not necessary to ask a preliminary question as to whether the general human rights situation in the receiving state excludes accepting diplomatic assurances whatsoever. 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 can 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 Court articulated a three-stage process for considering whether diplomatic assurances sufficiently remove the risk in a case. First, it is necessary to assess the danger 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 they would be sent. 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. 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. These three steps are intertwined.

The Court said that 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. It also held that it is

possible to accept assurances from a state with systemic issues in relation to the right to a fair trial, provided it is satisfied that the individual at issue will receive a fair trial.

Whether the Minister could conclude that there were not substantial grounds for believing that Mr Kim would be in danger of being subjected to torture if extradited to the PRC

The Supreme Court has unanimously held that, if limited further diplomatic assurances had been obtained, the Minister could have reasonably concluded that there were not substantial grounds for believing that Mr Kim would be in danger of being subjected to torture if extradited to the PRC.

The Court considered that Mr Kim's relative level of risk may have been underestimated by the Minister. This made stages two and three of the process particularly important. The Court considered that, while detailed, there are some gaps in the assurances presently obtained. An assurance should have been obtained that Mr Kim will be tried in Shanghai and will be detained there, both before trial and after trial (if he is convicted). New Zealand should also have obtained confirmation from the PRC that visits during the investigation phase, before Mr Kim's trial, will be permitted at least every 48 hours, as well as within a short time period after any request by Mr Kim.

Whether the Minister could conclude that there was not a real risk that Mr Kim would not receive a fair trial in the PRC

The Supreme Court has unanimously held that the test to be applied is whether there is a real risk of a flagrant denial of justice in Mr Kim's case. The issue is whether the trial would fall below the minimum fair trial requirements contained in art 14 of the International Covenant on Civil and Political Rights. The Court reiterated that a trial is either fair or it is not, and a somewhat fair trial would not suffice. It also noted that it did 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.

Applying this test, the Court has unanimously held that, if limited further assurances had been obtained and certain further inquiries made, the Minister could have – depending on the results of the inquiries – reasonably concluded that Mr Kim would not face a real risk of a flagrant denial of justice on extradition. In particular, and as above, the Minister should have received an assurance that the trial would take place in Shanghai. Other matters required further investigation and, depending on what the Minister had found, could have required further assurances.

Whether the Minister ought to have received an assurance from the PRC that the time Mr Kim has spent on remand in New Zealand would be taken into account if he is convicted and sentenced in the PRC

The Supreme Court has unanimously held that the Minister did not need to receive an assurance from the PRC that the time Mr Kim has spent on remand in New Zealand would be taken into account if he is convicted and sentenced in the PRC. While it would not have been unreasonable to seek that assurance, the absence of such an assurance would not prevent his surrender.

Cross-appeal

As is apparent from the above, the Supreme Court did not consider that no reasonable Minister could ever make the decision to surrender Mr Kim. It therefore unanimously dismissed the cross-appeal.

Disposition

The Supreme Court has, by a 3-2 majority, adjourned the appeal.

Glazebrook, Ellen France and Arnold JJ considered that, contrary to the decision reached by the Court of Appeal, the issues the Court has held required further inquiry or further assurances are 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, they held that the Court should adjourn the appeal to give the appellants the opportunity to make the further inquiries and seek the further assurances identified. They also said that the appellants must consider any further submissions made by Mr Kim.

The majority accepted 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 set out may not be necessary or that the issues can be addressed in a different manner. He would, in any event, also be entitled to depart from the previous Minister's decision. The majority recognised that there may also be relevant changes in the circumstances considered by the previous Minister.

O'Regan and French JJ considered that, rather than adjourn the appeal, the appropriate disposition would be to uphold the order of the Court of Appeal quashing the Minister's decision to surrender 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 judgment. The time that has elapsed since the decision, including the fact that there is a different Minister than the one who made the original surrender decision, as well as the nature of the outstanding matters to be addressed, makes fresh consideration the appropriate course.

The majority has directed that a report be filed by the parties on or before 30 July 2021. The parties should indicate in that report whether a further hearing is sought.

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