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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 57/2019
[2022] NZSC 44

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

Hearing:	4 February 2022
Court:	Glazebrook, O'Regan, Ellen France, Arnold and French JJ
Counsel:	U R Jagose QC and A F Todd for Appellants A J Ellis, B J R Keith and G K Edgeler for Respondent
Judgment:	13 April 2022

JUDGMENT OF THE COURT

A **The application for leave to adduce the expert reports annexed to the parties' joint report dated 3 December 2021 is granted.**

B **The appeal is allowed. The decision of the Court of Appeal is set aside.**

C **The Minister of Justice's decision of 19 September 2016 to surrender the respondent under s 30 of the Extradition Act 1999 is reinstated.**

D **Costs are reserved.**

REASONS

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

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Introduction

[1] In a judgment delivered on 4 June 2021[1] the Court, by majority, adjourned the appeal by the appellants, the Minister of Justice and the Attorney-General, against a decision of the Court of Appeal.[2] The Court of Appeal had allowed an appeal by the respondent, Mr Kim, in his judicial review of the 19 September 2016 decision of the then Minister of Justice (Hon Amy Adams) under s 30 of the Extradition Act 1999 that

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1 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 [SC judgment].

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

he should be surrendered to the People's Republic of China (PRC) to face trial on one count of intentional homicide. The Court of Appeal quashed the Minister's decision on the basis of the risks to Mr Kim in terms of torture and fair trial, among other things.

[2] In adjourning the appeal the Court held that, assuming some specific issues relating to aspects of the analysis of the risks to Mr Kim were satisfactorily resolved, there would be no substantial grounds (no real risk) of Mr Kim being subjected to torture or of an unfair trial if surrendered to the PRC.[3] The appeal was adjourned to give the appellants the opportunity to make further inquiries, seek further assurances from the PRC Government on the specific issues identified and consider any submissions made by Mr Kim.[4] These steps have been taken.

[3] The issue for us now is whether the responses provided by the PRC satisfactorily resolve the outstanding issues identified by the Court in the earlier judgment. We address that issue after saying a little more about the principal steps undertaken since delivery of the earlier judgment.

Steps undertaken following delivery of the 4 June 2021 judgment

[4] In the earlier judgment the Court directed the parties to submit a joint report setting out the result of the further inquiries made and any further assurances received, as well as the proposed disposition of the appeal and any other relevant circumstances.[5] The parties were also directed to describe any differences between them and whether a further hearing was sought. The joint report dated 3 December 2021 filed by the parties helpfully summarises the steps taken since the delivery of the earlier judgment and we adopt that summary in the description which follows.

[5] On 9 July 2021, the Ministry of Foreign Affairs and Trade (MFAT) on behalf of the appellants put a number of questions and requests for further assurances to the Government of the PRC. The PRC Government replied on 1 September 2021. In addition, the Minister of Justice made a request to the Minister of Foreign Affairs on

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3 SC judgment, above n 1, at [471].
4 At [472].
5 At [474].

24 June 2021 seeking information about the strength of the current bilateral relationship between New Zealand and the PRC, the reliability of assurances, and any other relevant diplomatic matters. The response from the Minister of Foreign Affairs was dated 6 October 2021 although provided on 14 October 2021.

[6] Counsel for Mr Kim made submissions to the appellants about the content of the necessary inquiries; the need, in their submission, for ancillary inquiries and objective evidence gathering; and empirical and expert material. After receiving the response dated 1 September 2021 from the PRC Government and the letter of 6 October 2021 from the Minister of Foreign Affairs, counsel for Mr Kim provided further submissions and material to the Minister of Justice on 27 October 2021. That material included the expert reports which are the subject of an application for leave to adduce new evidence in this Court. Finally, Mr Kim provided the Minister of Justice with information and reports in relation to his medical condition. In relation to this material, the appellants dispute the relevance of the parts of it that became available subsequent to consideration by the Minister.

[7] Further submissions were also made to the Minister of Justice by Amnesty International Aotearoa New Zealand, Human Rights Watch, and the Inter-Parliamentary Alliance on China. The Minister of Justice sought advice on this further material from the Minister of Foreign Affairs on 13 November 2021 and the Minister of Foreign Affairs responded in a letter dated 15 November 2021 but received on 16 November 2021.

[8] By letter dated 16 November 2021, the Minister of Justice gave Mr Kim his view of the inquiries, responses and various circumstances. The Minister concluded that the responses provided by the PRC Government satisfactorily addressed the Court's outstanding issues. Those responses, along with the matters already addressed by the Court meant there were "no substantial grounds to believe that [Mr Kim] would be at risk of torture or an unfair trial". Nor did the Minister consider Mr Kim's health or "the age of the case generally" were "sufficiently extraordinary or compelling to prevent extradition".

[9] Mr Kim sought a further hearing in this Court on the effect of the further assurances. A hearing was held on 4 February 2022.

Summary of the parties' positions on the responses

[10] The appellants' position is that the responses received resolve the issues outstanding and there are now no substantial grounds for believing that Mr Kim is at risk of torture or of an unfair trial. The appeal can accordingly be allowed and the decision to surrender Mr Kim reinstated.

[11] Mr Kim's case is that key questions were not answered by the PRC, either at all or in full, where answers were given they served only to confirm the risks to Mr Kim and, in any event, circumstances have changed in a way that means Mr Kim is at a real risk of both torture and an unfair trial should he be surrendered. The result is that the appeal must be dismissed and the matter remitted back to the Minister to reconsider the decision.

[12] Underlying these competing positions is a difference between the parties as to the extent to which the Minister had to make his own assessment of the outstanding matters.

[13] The appellants' submission is that the effect of the Court's earlier judgment was that there were some discrete points identified on which the Court sought further information. If the Minister of Justice was satisfied with the responses, it was open for him to refer the matter back to the Court. Alternatively, as the Court said in its earlier judgment, the Minister was entitled to depart from the previous Minister's decision. The Minister did not consider it necessary to take the latter course and he was entitled to reach that view.

[14] Mr Kim says it was necessary for the Minister himself to reach a concluded view on the outstanding matters, to address matters raised by way of changed circumstances, and to provide a reasoned response. The Minister has not done so and, as we explained in the summary of his position above, Mr Kim submits there was no basis given the material before him on which the Minister could be satisfied the outstanding matters were resolved.

[15] We address the specific points made by the parties in the discussion which follows. We preface our consideration by noting that, as will be apparent from the discussion which follows, we accept the correct approach is that advanced by the appellants. This Court left the case on the basis the Minister could be satisfied there was no real risk to Mr Kim if the stated assurances were given and confirmation of other matters obtained.[6] While the Court was divided on the question of whether the outstanding issues could be resolved in this way, the majority view was that they could. Accordingly, if the Minister was so satisfied as a result of the responses received from the PRC and the advice taken (here, from the Minister of Foreign Affairs), he could say so without elaborating on the reasons. The matter would then come back to the Court for the Court to make its assessment. We see this approach as consistent with that taken in *R (on the application of Aswat) v Secretary of State for Home Department*.[7] That case provided a precedent for the decision to adjourn the appeal pending the outcome of further inquiries.[8]

[16] We turn now to consider the responses provided in relation to torture and then fair trial. In this respect the discussion follows the table helpfully provided by the parties in their joint report.

Torture

[17] To put the discussion which follows in context, we need to say a little about the approach adopted in the earlier judgment on the risk of torture.

Background

[18] The Court said there was a three-stage process for assessing whether there were substantial grounds for believing Mr Kim on surrender would be in danger of being

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6 SC judgment, above n 1, at [471].

7 *R (on the application of Aswat) v Secretary of State for Home Department* [2014] EWHC 1216 (Admin). The approach taken is also consistent with the willingness of the Court on appeal to receive and consider assurances whenever offered by a requesting state discussed in *The Government of the United States v Assange* [2021] EWHC 3313 (Admin) at [42] and [45]. The Supreme Court of the United Kingdom on 14 March 2022 refused to give Mr Assange permission to appeal this decision.

8 SC judgment, above n 1, at [472], n 579.

subjected to an act of torture in the PRC. In particular, the Court said it was necessary to assess the following, inter-related, questions:[9]

(a) the risk to the individual, considered in light of their particular characteristics and situation, and the general human rights situation in the receiving country;

(b) the quality of assurances offered and whether, if honoured, they would adequately mitigate the risk to the individual; and

(c) whether the assurances will be honoured.

[19] At the first stage, that is the risk to Mr Kim, the Court said this had to be assessed in light of the general human rights situation in the PRC and, particularly, the evidence as to the prevalence of torture.[10] Given the position in the PRC, it was accepted by the appellants that Mr Kim would be at risk of torture without assurances. Accordingly, the Minister at this stage was undertaking an assessment of the relative risk of torture assuming no assurances.[11] As the Court said, the exercise the Minister undertook involved determining Mr Kim's position on a spectrum ranging from a point where the risk of torture is very high (for high-risk groups) to where it is still very possible but less likely.[12]

[20] In concluding that the relative risk was not high (before any assurances were considered) one of the factors Hon Amy Adams had taken into account was the view of the Special Rapporteur on Torture that the incidence of torture was on the decline particularly in urban areas.[13] That view was based on governmental and non-governmental information and the Special Rapporteur's own fact-finding during

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9 At [131]–[133] and [437]–[438].
10 At [198].
11 At [200].
12 At [200].
13 At [202]–[203], citing 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). A follow-up report was prepared in 2010 although without any input from the People's Republic of China (PRC): 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).

his 2005 mission to the PRC. As the Court noted, the Minister did not decide that the risk of torture was not present in urban areas like Shanghai but rather that it was less prevalent there than in other areas.[14] The Court took the view that in the context of assessing relative risk, the Minister could take into account the Special Rapporteur's view but only if it had been confirmed through an assurance that Mr Kim would be tried and detained in Shanghai.[15]

[21] On the second stage of the inquiry, that is as to the quality of the assurances, the Court considered that because of the persistence of torture in the PRC, specific assurances as well as a robust monitoring regime were required to supplement the general assurance which had been given by the PRC Government that Mr Kim would not be tortured.[16]

[22] The Court then addressed whether the other, specific, assurances that had been given by the PRC were sufficiently comprehensive.[17] In that context, the Court noted that the effectiveness of the monitoring regime was predicated on Mr Kim being detained in Shanghai as the monitoring would be undertaken by the New Zealand Consulate staff based there.[18] In considering the importance of a robust monitoring regime the Court also referred to arrangements made between the Minister of Justice and the Minister of Foreign Affairs for Shanghai-based New Zealand consular officials to visit Mr Kim at least once every 48 hours during the investigation phase and no less than once every 15 days from then until the completion of Mr Kim's trial.[19] The Court considered the Minister was correct to require visits at least once every 48 hours during the investigation phase given the information before her that the risk of torture was at its greatest at that time.[20] Further, the Minister was right to require those visits to be in addition to any Mr Kim may request to be arranged by New Zealand officials.[21]

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14 At [203].
15 At [203]. The offending took place in Shanghai. The investigation was being conducted by the Shanghai Public Security Authority.
16 At [215].
17 The assurances on torture are set out in full at [129].
18 At [223].
19 At [232].
20 At [233].
21 At [233].

However, 48 hourly visits were not expressly provided for under the terms of the assurances.[22] Such an assurance should have been obtained.[23]

[23] In terms of the third stage of the inquiry, that is, whether the assurances will be honoured, the Court reviewed the evidence and stated that the Minister was entitled to conclude they would be honoured on the basis, amongst other things, of the strength of the PRC's motivation to honour the assurances.[24] The Minister's view of the latter was based on MFAT's assessment of the strength of the bilateral relationship between the two countries, 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".[25] The robust monitoring regime was also relevant to this stage of the inquiry.[26] The more robust the regime is, the higher the risk of exposure and therefore the greater the incentive to keep the assurances.

The need for two further inquiries and the PRC response

[24] Against this background, the Court took the view that, assuming two further assurances were obtained, the Minister would be entitled to conclude that there are no substantial grounds (no real risk) that Mr Kim would be in danger of being subjected to an act of torture if surrendered to the PRC.[27] The two further assurances that should have been obtained were as follows:[28]

> (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); 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.

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22 At [234].
23 At [235].
24 At [445].
25 At [445(d)].
26 At [262] and [445(e)].
27 At [264] and [446].
28 At [443] (footnotes omitted). See also [223] and [232]–[235].

[25] The New Zealand Government sought assurances on both points. The response from the PRC Government in its Note Verbale was as follows:

> After extradition to the PRC from New Zealand, Mr Kim will be detained pending trial and tried in Shanghai, and serving any sentence of imprisonment in Shanghai if convicted.
>
> … the PRC further assures:
>
> During the investigation phase, New Zealand diplomatic or consular representatives are permitted to visit Mr Kim at his detention site once every 48 hours, and more than once in a 48 hour period if he requests an additional visit or visits.
>
> The PRC will arrange any additional visits requested by Mr Kim as quickly as possible.

The sufficiency of the two further assurances on torture

[26] These two assurances on their face deal with the Court's outstanding concerns in relation to the risk of torture. In considering the case for Mr Kim that the Minister should not have taken these assurances at face value, we address various matters raised by Mr Kim as they relate to each part of the three-stage test.

The risk to Mr Kim

[27] Mr Kim first emphasises that the report of the Special Rapporteur relied on for the proposition that being held in Shanghai would assist in mitigating the risk of torture is now dated and does not stand up against current scholarship. Current scholarship, such as that reflected in the evidence advanced by Mr Kim of Professor Eva Pils, Dr Matthieu Burnay and Ms Alexandra Kaiser, is that torture is endemic and routine throughout the PRC without any suggested differentiation between Shanghai and other areas. Therefore, the submission is that any assurance as to the location of Mr Kim before and after trial (if convicted) does not mitigate the risk of torture.

[28] Second, in this context and in relation to the risk of an unfair trial, Mr Kim relies on statements suggesting that the profile of Mr Kim's case has changed so that he can no longer be treated as an "ordinary" suspect.[29] To illustrate the point, Professor Pils and her colleagues state that "Mr Kim's case is a significant and

[29] See also below at [51].

sensitive case for the PRC government". The submission is that it is accordingly no longer possible to take any comfort from the fact Mr Kim is an "ordinary" criminal suspect, and not a person in a high-risk group.

[29] The first point is not a new one. The Minister had before her evidence from Mr Clive Ansley, a lawyer with experience of the criminal justice system in the PRC, who provided evidence for Mr Kim.[30] Mr Ansley said he was very familiar with Shanghai and saw no evidence of the alleged decline in torture there. The submission in effect challenges the earlier findings of the Court. But, more importantly, in terms of both of Mr Kim's points, the Minister was assessing relative risk. The Minister was not saying Mr Kim could not be tortured if held in Shanghai but rather that the risk of that occurring was lower. The risk was lower for a range of reasons, relevantly, including the fact New Zealand consular staff were based in Shanghai, the strength of the prima facie case against him and the advanced stage of the investigation.[31]

[30] We do not accept the submission it is no longer correct to assess the risk to Mr Kim on the basis he is an "ordinary" criminal suspect. Mr Kim is an ordinary criminal suspect at least in the sense that he does not belong to a minority group and is not a political prisoner.[32] Further, it remains the case that the PRC Government has an interest in furthering extradition arrangements.[33] The Minister of Foreign Affairs in her letter of 6 October 2021 made the point Mr Kim's case was a "test" case for the PRC and noted the PRC's interest in extradition. On that analysis, the publicity to date may, in fact, be protective of Mr Kim's interests.

[31] Even if there had been a change to Mr Kim's "status" in this respect, this would not necessarily have meant a greater risk of torture. The issue would have been whether the assurances and monitoring regime sufficed to protect against torture,

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30 SC judgment, above n 1, at [167]–[168].

31 At [210]. The Court also referred subsequently to an article based on much earlier research which noted that judges in Shanghai suffer the least political interference due largely to better economic development: at [339], n 409. Mr Kim relies on the evidence to the effect that these sorts of distinctions do not assist: see, for example, the observation of Professor Pils, Dr Matthieu Burnay and Ms Alexandra Kaiser that "the legal and practical position of the PRC judiciary is that of dependent functionaries within the PRC Party-state".

32 At [210]. The Court in its earlier judgment accepted that the Minister was wrong to ignore evidence that murder suspects are at high risk but the Court saw this added relative risk as necessitating a closer look at the assurances given and whether they could be relied on: at [211].

33 At [259].

given the added level of risk.[34] However, for the reasons we have outlined, we do not need to consider that prospect here.

The quality of the assurances

[32] The point made under this head by Mr Kim is that the emergence of "white" torture, for example the use of undetectable drugs, raises real questions about the ability of consular staff to monitor Mr Kim while he is in custody. This change in circumstances accordingly undermines the efficacy of any assurances as to monitoring. Reference is made, for example, to the October 2021 report by Professor Pils and her colleagues which notes the increasing resort by the PRC to torture "in ways that are often hard to detect" and to the use of "forced drugging" in the context of taking steps to avoid detection.

[33] We accept the submission for the appellants that the fact there are real difficulties in detecting torture is not a new point. In discussing concerns underlying the view assurances could not be relied on in a country where torture was endemic, the Court noted in the earlier judgment that torture was difficult to detect, referring to the fact that "[p]erpetrators may be trained in torture methods designed to avoid its detection".[35] The Court also discussed various other factors which made torture hard to detect.[36] Professor Pils and her colleagues in their July 2021 report similarly noted that the use of coercive drugging has "long been known" with victims only being released after it had become medically impossible to trace the drugs administered. We do not see the material before the Minister as indicating a higher level of risk than that identified at the time the Court considered the matter in the earlier judgment.

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34 We accordingly accept the appellants' submissions as to the approach to changed circumstances.

35 At [82] (footnote omitted).

36 At [82]. There was also discussion about the extent to which the assurances providing for medical examination of Mr Kim were sufficient. There was no assurance of a private physical examination and New Zealand was limited to choosing a PRC-qualified doctor. However, the Court considered that although Mr Kim may be inhibited from raising issues during the medical examination there were other opportunities for him to do so, such as in the private interviews Mr Kim is able to have with consular staff. The opportunity for a medical examination was still seen as providing some additional protection: at [243]–[246].

Whether the assurances will be honoured

[34] Mr Kim submits that examples of breaches by the PRC of international law obligations, particularly binding consular access treaties, calls into question the view that assurances can be relied on and the plausibility of the claim that reputational concerns would engender compliance. Two associated points are made.

[35] The first of these points is that the Minister of Foreign Affairs in her response has not addressed the material provided by Professor Clarke and Professor Cohen in their report dated 24 October 2021 nor that in the reports of Professor Pils and her colleagues. These reports were before the Minister of Justice but were received by him after the 6 October 2021 letter from the Minister of Foreign Affairs. The second point is that, considered against this material, it was wrong to conclude that assurances would be reliable and, further, it was wrong to consider that in the event of a dispute about compliance with the assurances, there were timely means available for resolution, including formal diplomatic consultations.

[36] In her first letter of 6 October 2021, Hon Nanaia Mahuta, the Minister of Foreign Affairs set out her "clear" view that the PRC would uphold the assurances made. The Minister considered the PRC had "compelling incentives to do so" as she explained. This conclusion was preceded by a discussion of a number of "concerning" events relied on by the experts for Mr Kim. Those matters included the marked deterioration of the human rights situation in Xinjiang and the National Security Law enacted by the PRC in Hong Kong in 2020. The Minister also discussed the detention by the PRC of two Australian citizens of Chinese descent, the detention of two Canadian nationals and the restriction of Canada's consular access as guaranteed by the Vienna Convention on Consular Relations.

[37] The Minister went on to say however that Aotearoa New Zealand and the PRC had "a strong common interest" in "effective law enforcement cooperation" and that this was an area on which the two countries had "worked together constructively for many years".

[38] Against this background, the Minister set out the factors which led her to conclude assurances from the PRC in relation to Mr Kim were reliable. First, this

would be a "test case" for the PRC which the international community was watching closely. The PRC has a "significant interest in being able to extradite individuals to face criminal charges". Publicity by New Zealand about any non-compliance with the assurances would "seriously jeopardise" the PRC's law enforcement cooperation with other countries. Second, she explained why she saw Mr Kim's case as in a different category from that of the two Canadians and from the situations in Hong Kong and that in Xinjiang The two Canadians were targeted because they were Canadian citizens "as part of broader bilateral issues" between Canada and the PRC. Mr Kim is not a New Zealand citizen and has a "serious and legitimate allegation of criminality to face". Finally, Mr Kim's case had no link to Hong Kong or Xinjiang. The violations in those places were "strongly tied" to the PRC's political aspirations in relation to those two regions. While the Minister did not refer to the expert reports Mr Kim provided to the Minister of Justice, in her later letter of 15 November 2021, she addressed the representations made by Amnesty International Aotearoa New Zealand, Human Rights Watch and the Inter-Parliamentary Alliance on China. All three of those organisations submitted that diplomatic assurances were not a reliable protection against the risk of torture in detention, noting the PRC's adverse record in these matters. The Minister reiterated that the "criminal and non-political character of Mr Kim's case" underpinned her advice that the assurances would be kept. She also placed some weight on the content of the assurances.

[39] It was possible that the position had changed to such an extent that the assurances could no longer be seen as providing the protection that was the case at the time of the Minister's decision to extradite Mr Kim and our review of that in the earlier judgment. Whether that was so has been carefully considered by the Minister of Foreign Affairs in the areas of her expertise.[37] By expertise in this context we mean the Minister's expertise in relation to matters of international and bilateral diplomatic relations as well as incentives for cooperation internationally. That understanding extends to general transnational criminal matters. The Minister has carefully

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[37] In the earlier judgment the Court noted that the Minister of Justice was entitled to rely on the expertise of the Minister of Foreign Affairs and that the latter Minister's "assessment of the state of the bilateral relationship is 'evidence' like any other evidence. Nor [did] we consider that it [was] improper for the courts to take that expertise into account.": at [49], n 53. The Court also made the point that contrary evidence about the state of bilateral relations would be evaluated in the usual way: at [49], n 53. Assessment of the contrary evidence was also within the expertise of the Minister.

explained her assessment and there is no evidential basis on which the Court should not accept it. The Minister was plainly aware of the factors that militated against accepting the assurances here, such as the case of the two Canadians, and must have been aware of the resultant delay in resolving that case.

Conclusion on risk of torture

[40] For these reasons, we are satisfied the further assurances provided a reasonable basis on which the Minister of Justice could be satisfied that there was no real risk that Mr Kim would be subject to an act of torture on surrender to the PRC. We reiterate the point made in the earlier judgment that, while the prohibition on torture is absolute, if no substantial grounds exist for believing an individual accused is at risk of torture because of the assurances provided, the individual should not avoid prosecution for a serious crime.[38] As we noted in that context, there are 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, suitable sanctions are imposed.[39] The ability to extradite an accused "serves those ends in the sense that it ensures that a person against whom there is a prima facie case is returned for trial".[40]

Fair trial

[41] The outstanding concerns about Mr Kim not receiving a fair trial broadly fall into two groups. The first group of concerns relates to the likelihood that Mr Kim's case would be referred to a judicial committee.[41] As the Court noted in the earlier judgment, each People's Court establishes its own judicial committee.[42] While a collegial panel tries the case, certain categories of cases may be referred to the judicial committee for determination. The collegial panel then executes the decision of the judicial committee. The second group of concerns relates to uncertainty as to the approach to disclosure to the defence.

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38 At [135].
39 At [135].
40 At [135].
41 The possibility of referral to a judicial committee was a matter on which the Court sought and received further submissions following the hearing leading to the Court's earlier judgment.
42 At [303].

[42] We deal first with the questions relating to judicial committees and then with disclosure. We then briefly address Mr Kim's submissions on delay and its effect on a fair trial. In addressing these issues we note the Court in the earlier judgment said that in considering whether there was a real risk Mr Kim would face an unfair trial, assurances could be taken into account.[43] The issue would be whether the assurances removed the real risk of an unfair trial.[44] In assessing that, a similar three-stage process to that described above in relation to torture was to be applied.[45] There is significant overlap in considering the three questions identified in that process, that is, the risk to Mr Kim, the quality of assurances, and whether the assurances will be honoured, in the fair trial context. For that reason, we address the questions in a more generic way.

Judicial committees

[43] In its earlier judgment, this Court found that on the evidence before her at the time of the second surrender decision, the Minister of Justice could not have concluded Mr Kim would be tried by an independent and impartial tribunal.[46] But the Court had further information that the Minister did not have and considered whether that new information altered the assessment.[47]

[44] In this context, the Court referred to the Opinions of the Supreme People's Court on Improving and Perfecting the Working Mechanism for Judicial Committees dated 2 August 2019 (the 2019 Opinions).[48] The Court noted that, if the process governing the operation of the judicial committees was as set out in the 2019 Opinions then, even if Mr Kim's case was referred to a judicial committee, the Minister "may be entitled to conclude that judicial committee proceedings conducted in this way in Mr Kim's case would meet minimum international trial standards".[49]

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43 At [285]. The Court noted that assurances "are more readily considered acceptable in relation to fair trial matters".

44 The Court made the point that the relevant standard by which to judge whether a trial would be fair is according to minimum international standards rather than domestic standards or domestic or international best practice: at [278].

45 At [285].

46 At [345].

47 At [346].

48 At [347].

49 At [350].

[45] This statement was, however, subject to confirmation of a number of matters. These are set out in more detail in the earlier judgment but essentially the questions were whether:[50]

(a) the 2019 Opinions were the relevant benchmark and reflect what happens in practice;

(b) if the matter was referred to a judicial committee, the committee would have access to all of the trial materials with a full report from the collegial panel which the judicial committee members would read; and

(c) Mr Kim would have a full opportunity to make submissions on the relevant points to the collegial panel and these would be set out in its report to the judicial committee.

[46] If these matters were confirmed, the Court said that the judicial committee proceedings "could therefore be seen as akin to a preliminary general appeal decided on the papers".[51] The Court's statement that judicial committee proceedings conducted in this way met international trial standards was also subject to confirmation there would be equality of arms before the judicial committee and there would be no outside influence on the judicial committee hearing.[52]

[47] We deal first with the place of the 2019 Opinions and the responses to the initial questions about the operations of judicial committees before addressing issues relating to equality of arms and outside influence.

The operational aspects and the 2019 Opinions

[48] The PRC Government confirmed that the "currently effective rules on the working mechanism for the judicial committees" were set out in the 2019 Opinions. Further, the PRC referred to the relevant provisions governing the scope of cases to be referred to judicial committees and the procedure for referral. It noted that "[n]ot all

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50 At [349], [350], [351] and [455]; and see [347], n 415.
51 At [350].
52 At [350].

cases will be referred to the judicial committees". The PRC also stated that Article 12 of the 2019 Opinions provides that if a case is referred to a judicial committee, the collegial panel will submit a written report to the committee. Furthermore:

> The report shall fully and objectively present the facts and evidence of the case and the opinions of the procuratorate and the defence, lay out the issues concerning the application of law, and include the collegial panel's proposed decisions and reasons.
>
> Members of the judicial committee shall thoroughly review the above-mentioned report and have access to all case files and other relevant materials at any time before and during their meetings.

[49] Finally, under this head, the PRC noted that:

> The judicial committee may require the collegial panel to provide supplementary facts, evidence and legal opinions on an issue it considers important, but not directly asking for submissions from the procuratorate and the defendant. The defendant has ample opportunities to make submissions to the collegial panel.

[50] Mr Kim challenges the adequacy of the responses on judicial committees more generally as well as making some specific submissions on these responses.

[51] Taking first the general points, it is a theme of Mr Kim's submissions on the risks to a fair trial arising out of referral of his case to a judicial committee that, given judicial committees operate in secrecy, what they do cannot be monitored and there can be no confidence that assurances have been (or will be) met. It was therefore necessary to find some way of monitoring assurances about those closed deliberations. None has been sought or provided. Further, the point is made that Party political influence may still be exerted through informal contact and, indeed, the evidence suggests that such influences are stronger with correlative constitutional and other changes since 2015 which have only served to emphasise what Professor Pils and her colleagues describe as "the principle that the court system is dependent upon and integral to the Party-State".[53] The effect of these influences is exacerbated given Mr Kim's case is no longer an "ordinary" case.[54]

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53 Professor Pils and her colleagues refer, among other matters, to the centralisation of control by the Party and to the sanctions for judges who step out of line.

54 See above, at [28] and [30], for discussion on this point in relation to the risk of torture.

[52] In terms of the specific points made about the responses to the operational aspects of the committees, Mr Kim says, first, that there has been no confirmation that the 2019 Opinions are followed in practice. Reference is made in this context to the evidence from Professor Pils and her colleagues that such responses will have been "carefully prepared and approved at a high level within the PRC government". The omissions will be deliberate. Further, it is noted that Professors Clarke and Cohen state that the PRC law relied on is frequently not followed or is read down in practice and so does not reflect reality.

[53] Second, Mr Kim is critical of the inability for the defence to make submissions to the judicial committee particularly where the response confirms that the judicial committee may raise and decide additional issues not raised at trial without scope for submissions from Mr Kim.

[54] In relation to the general points made, these issues were addressed in the Court's earlier judgment and we have confirmed, above, that we do not accept the submission this case is now not an "ordinary" case.[55] The Court took the view that, provided the specific discrete matters identified in relation to the operation of the 2019 Opinions were satisfactorily resolved, there was no real risk of an unfair trial. It is also necessary to consider these matters in light of the earlier assurances provided, including the assurance that the PRC Government will abide by the fair trial requirements of its domestic law.[56]

[55] On the first specific point, we accept the submission for the appellants that the response confirms the Court's understanding that the 2019 Opinions govern the way in which the judicial committees operate. This part of the response has to be read in the context of the specific assurances given which, as we discuss, directly address the concerns raised by the Court. Those assurances make no sense if the 2019 Opinions are not operative in practice. Further, the reference is to the "effective" rules and the steps in the 2019 Opinions are then relied on to illustrate what will happen in a practical sense in Mr Kim's case.

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55 See above at [30].
56 SC judgment, above n 1, at [288].

[56] In terms of the second point, it was the Court's understanding that a defendant would not usually have the right to make submissions directly to the judicial committee. But because a full report of the evidence and submissions of the parties would form part of the collegial panel's report and be read by the judicial committee, that would suffice.[57] In other words, the absence of an ability to make direct submissions to the judicial committee was not fatal, so long as it was clear the submissions to the collegial panel and in the report covered the matters in issue before the judicial committee. The responses confirm the Court's understanding.

[57] Finally, we do not consider that the provision by the collegial panel to the judicial committee of supplementary facts and so on is problematic in terms of a fair trial. We read that part of the response as equating with an unexceptional aspect of the deliberative process. Further, Mr Kim will have had the opportunity to make submissions on all of the material before the collegial panel. We add that the judicial committee decision is, as was confirmed by the PRC response, subject to a right of appeal.

Equality of arms

[58] The Court said that the equality of arms principle would be breached if Mr Kim and the prosecutor (or any other party) did not have the same right to provide information or submissions to, or attend meetings of the judicial committee.[58]

[59] The PRC answer to the questions about this aspect was in two parts. First, there was an acknowledgment that under Article 19 of the 2019 Opinions:

> … the chief procurator … handling the case or a deputy chief procurator … may sit in on a judicial committee meeting (this arrangement is not mandatory and they do not act as prosecutors … in the meeting).

[60] Second, the Supreme People's Court made an assurance that, despite the provision in Article 19, after Mr Kim's extradition if the collegial panel hearing the

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57 At [351] and [455].
58 At [351]–[352] and [456].

case refers it to the judicial committee of the same court:

> … no one other than members of the collegial panel and the judicial committee will be invited to attend judicial committee meetings in relation to Mr Kim's case. If the procuratorate is given additional opportunities to make submissions to the judicial committee, Mr Kim will have equal opportunities and make responses.

[61] Mr Kim says these responses only serve to confirm the procurator may attend the judicial committee meetings. The reference to others not being "invited" to attend simply avoids answering the question about whether the procurator and defendant have the same rights to attend.

[62] The appellants submit that the reference to the fact the Chief Procurator or the Deputy Chief Procurator do not act as prosecutors is presumably because they are not responsible for prosecuting all of the cases within their jurisdiction. But the assurance which follows meets the Court's concerns. We agree. We see the focus on the use of the word "invited" as a matter of semantics. And it is clear that if the procuratorate has further opportunities to make submissions, Mr Kim will have the same opportunities. A key plank underlying the Court's concern in the earlier judgment was about making sure Mr Kim has the same rights as the procuratorate.

Outside influence

[63] The Court in the earlier judgment also said the Minister would need to be satisfied that outside persons would not attend the meetings of the judicial committee or otherwise be consulted if Mr Kim's case is referred to a judicial committee.[59] This point arose because the 2019 Opinions allow people's congress delegates, political consultative conference members and expert scholars to attend judicial committee meetings in a non-voting capacity.[60]

[64] The PRC was asked whether persons other than collegial panel members and judicial committee members could attend meetings. If so, an assurance was sought

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59 At [353] and [457].
60 At [328].

that no one other than panel or committee members would attend or be consulted. The response was as follows:

> According to Article 18 of the *Opinions*, a judicial committee may invite, when it deems necessary, deputies of people's congresses, members of the Chinese People's Political Consultative Conference, experts and scholars, among others, to sit in on its meetings (this arrangement is not mandatory), and provide professional opinions with the consent of the chair of the meeting. These participants are not "government officials or political representatives" referred to by New Zealand.
>
> The Supreme People's Court of the PRC has agreed to assure that after Mr Kim's extradition to the PRC, if the collegial panel hearing the case refers it to the judicial committee of the same court, no one other than members of the collegial panel and the judicial committee will be invited to attend judicial committee meetings in relation to Mr Kim's case. If the procuratorate is given additional opportunities to make submissions to the judicial committee, Mr Kim will have equal opportunities and make responses.

[65] We do not accept the submission for Mr Kim that the response leaves open the option of persons other than judicial committee members being consulted. Mr Kim relies in this respect on the fact members of judicial committees typically include party officials and scope for their influence extends beyond attendance in person.

[66] We agree with the appellants that the response did not need to expressly state that members of the judicial committee will not consult outsiders in a setting other than judicial committee meetings. That is implicit in the statement outsiders will not be invited to attend. In outlining the concern in relation to outside influence, it is also relevant that the Court saw attendance at committee deliberations by outsiders who might offer views as providing "another possibility [at the committee meetings] of direct influence on members of the judicial committee from outside the court system and in a private forum".[61]

[67] As the appellants accept, the responses in relation to fair trial do not neatly correspond with the questions asked on a point-by-point basis. The Court referred in the next part of the passage cited in the previous paragraph to attendance at meetings or to persons "otherwise be[ing] consulted" and the reference to others not being invited does not address that possibility directly.[62] But when the responses are

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61 At [353]. In summarising what was required, at [457], the Court said the Minister must be satisfied outsiders would not attend a judicial committee meeting in Mr Kim's case.

62 At [353].

considered as a whole, the overall package provides a reasonable basis on which the Minister could conclude the issues were satisfactorily resolved. As the appellants also say, these more recent assurances also need to be assessed in light of the earlier assurance from the PRC Government that it will abide by the fair trial requirements of its domestic law.

[68] In that earlier assurance, the PRC also said it would, in dealings with Mr Kim, "comply with applicable international legal obligations … regarding fair trial".[63] There was some debate in the earlier hearing about the utility of this part of the assurance.[64] The Court found that the assurance "could only sensibly be understood as indicating that the PRC will comply with the fair trial standards" set out in the International Covenant on Civil and Political Rights (ICCPR).[65] The PRC Government was asked about whether this was what was meant. The response was to note that while the PRC was not a party to the ICCPR, the pertinent fair trial standards in the ICCPR:

> … have been stipulated by the Criminal Procedure Law and other criminal legislation of China. China can guarantee Mr Kim's lawful rights to a fair trial under Chinese laws and regulations.

[69] Mr Kim says this only goes to confirm his concern that the PRC will, essentially, act in accordance with its interpretation of the right to a fair trial in art 14 of the ICCPR rather than meeting international standards as to fair trial. Reference was made in this respect to the Human Rights Action Plan of China (2021–2025).[66] We do not see this point as critical in the assessment of the real risk to Mr Kim given the relevant domestic law contains the protections with which we are concerned.

Disclosure

[70] In terms of disclosure, the Court in its earlier judgment said the Minister needed to check that the law and practice in relation to disclosure had been set out

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63 See [288] for the assurance.

64 At [295]–[296].

65 At [295], referring to the 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.

66 The State Council Information Office of the People's Republic of China *Human Rights Action Plan of China (2021-2025)* (10 September 2021).

correctly.[67] The Minister should also check that any meetings for disclosure do not take place without the defence being provided with all material disclosed to the Court.

[71] A series of questions were asked about the law and practice relating to disclosure. In response, the PRC set out what was provided by the Criminal Procedure Law of the PRC and other laws. It was explained that the public security authorities will transfer exculpatory evidence from the investigation to the procuratorate once the investigation is concluded. The response also noted that "from the day when the people's procuratorate begins to examine a case for prosecution" a defence lawyer may "access, extract and duplicate materials of the case, including evidence". Further, the response was that systems established by the relevant Article of the Criminal Procedure Law were "functioning well in practice" and that "[p]eople's procuratorates at all levels have designated departments and venues for defence lawyers to access case files". Finally, it was noted that "[a]ccess to case files shall ordinarily be arranged immediately upon the request of a defence lawyer" and, where "access is unable to be arranged within the same day", explanations would be provided "and an arrangement shall be made within three days". The PRC also explained the requirement was for evidence to "be verified before being used as the basis for deciding a case".

[72] In relation to these responses, Mr Kim raises similar concerns to those addressed already about, for example, departures between law and practice and as to the fact exculpatory evidence is not sought by the PRC police.

[73] Again, the Court's concern was as to the need to clarify the approach to discrete points. We agree with the appellants that, particularly when read with the earlier assurance that the PRC will comply with its domestic law in Mr Kim's case, our concerns about incomplete or inadequate disclosure to the defence (by trial judges receiving evidence the defence has no opportunity to see) have been addressed.

Delay

[74] As foreshadowed, we now briefly address the submission that the prospect of a fair trial is further harmed by the passage of time that has occurred in the extradition

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[67] SC judgment, above n 1, at [403], [405], [407] and [463].

process. Mr Kim relies in this respect on a decision of the United Nations Human Rights Committee under the ICCPR in *Cagas v Philippines*.[68]

[75] There are a number of difficulties with this submission. First, delay was a matter relied on by Mr Kim in support of his argument on his cross-appeal that no reasonable Minister could ever decide to extradite Mr Kim.[69] The Court did not accept that argument and the cross-appeal was dismissed.[70] The issue is no longer live and Mr Kim cannot seek to re-litigate it now. Second, in this context it is hard to see this as anything other than effectively an argument there should be something equating to a statute of limitations for murder. Finally, in any event, we do not consider *Cagas v Philippines* supports the proposition Mr Kim advances. That case was not an extradition case but rather related to lengthy pre-trial detention after bail had been declined.[71]

Conclusion on fair trial

[76] For these reasons, we are satisfied the further assurances provided a reasonable basis on which the Minister could be satisfied that there was no real risk Mr Kim would face an unfair trial on surrender to the PRC.

Mr Kim's health

[77] The final issue to which we briefly refer relates to the effect of further material provided about Mr Kim's health. Again, the question of Mr Kim's health was raised in support of the cross-appeal.[72] The issue is not before us, as Mr Kim accepted.

Result

[78] In accordance with the view of the majority, the appeal is allowed. The decision of the Court of Appeal is set aside. The Minister of Justice's decision of

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68 Human Rights Committee *Views: Communication No 788/1997* UN Doc CCPR/C/73/D/788/1997 (31 January 2002) [*Cagas v Philippines*].
69 SC judgment, above n 1, at [467].
70 At [468].
71 *Cagas v Philippines*, above n 68, at [3.1]–[3.3].
72 SC judgment, above n 1, at [467].

19 September 2016 to surrender the respondent under s 30 of the Extradition Act is reinstated.

New evidence

[79] The application for leave to adduce the expert reports annexed to the parties' joint report dated 3 December 2021 is granted. This material comprises the July and October 2021 reports from Professor Pils and her colleagues; the report dated 24 October 2021 from Professors Clarke and Cohen; and the 1 December 2021 report from Clive Ansley. Some of these reports were before the Minister of Justice and aspects of them have been referred to in this judgment. While some of the material in those reports is not sufficiently fresh or cogent to meet the test for admission of new evidence on appeal, we have determined it is not necessary to sift through the reports to weed out material in that category.[73]

Costs

[80] We reserve costs.

[81] Unless the parties are able to agree costs, we seek submissions on that issue. Submissions for the appellants are to be filed and served by 18 May 2022. Submissions for Mr Kim are to be filed and served by 10 June 2022 and any submissions from the appellants in reply by 17 June 2022.

O'REGAN AND FRENCH JJ
(Given by O'Regan J)

[82] We dissented from the judgment of the majority in the Court's judgment of 4 June 2021 in relation to the disposition of the appeal.[74] Contrary to the majority's decision to adjourn the appeal, we considered the appropriate disposition was 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

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73 *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) at 649–650; and see *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124.

74 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 [SC judgment] at [478].

should be surrendered, taking into account the matters set out in the reasons given by Glazebrook J in the 4 June 2021 judgment.[75]

[83] Our view has not been altered by the steps that have been taken since the adjournment of the appeal, as described in the majority judgment. We consider that the reasons that led us to conclude that the matter should be reconsidered by the Minister in light of the 4 June 2021 judgment continue to apply.[76]

[84] We therefore dissent from the decision to set aside the decision of the Court of Appeal and reinstate the decision of the Minister of Justice to surrender Mr Kim under s 30 of the Extradition Act 1999.

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75 At [479]. We considered the present case could be distinguished from *R (on the application of Aswat) v Secretary of State for Home Department* [2014] EWHC 1216 (Admin): see SC judgment, above n 74, at [480].

76 At [481] and [482].