IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA643/2025
[2026] NZCA 284

BETWEEN	KIM DOTCOM Appellant
AND	MINISTER OF JUSTICE First Respondent
AND	COMMISSIONER OF POLICE Second Respondent

Hearing:	21 April 2026
Court:	French P, Campbell and Edwards JJ
Counsel:	R M Mansfield KC for Appellant J E Hodder KC, S J Leslie and S L W Fowler for First Respondent F R J Sinclair and G M Taylor for Second Respondent
Judgment:	1 July 2026 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay each of the respondents costs for a standard appeal on a band A basis, together with usual disbursements. We certify for two counsel.

C The appellant must pay one set of costs to the respondents in relation to the adjournment application on the basis of a standard application, band A with a 50 per cent increase.

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REASONS OF THE COURT

(Given by French P)

Introduction

[1] The United States of America (US) wishes to extradite Mr Dotcom from New Zealand where he is a resident to stand trial in the US on charges of criminal copyright infringement, racketeering and wire fraud. The request was made pursuant to the provisions of the Extradition Act 1999 and an extradition treaty (the Treaty) that exists between the US and New Zealand.[1] The extradition request was made in 2012.

[2] Following the 2012 request, there was extensive litigation in the New Zealand courts as to whether Mr Dotcom was eligible for surrender.[2] Finally, in 2020, the Supreme Court determined he was eligible for surrender to face trial in the US on

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1 Extradition (United States of America) Order 1970 [the Treaty].

2 See, for example, *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 23 December 2015; *Ortmann v United States of America* [2017] NZHC 189; and *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 [Court of Appeal eligibility judgment].

12 charges.[3] That finding meant it was then over to the Minister of Justice (the Minister) to decide under s 30 of the Extradition Act whether or not Mr Dotcom should be surrendered.[4]

[3] After hearing from Mr Dotcom and receiving advice from officials, the Minister determined that Mr Dotcom should be surrendered. The surrender decision was made on 12 August 2024. In the course of reaching his decision, the Minister considered, but rejected, Mr Dotcom's contention that in breach of the right under s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA) he would receive a disproportionately severe sentence in the US were he to be extradited for trial there and convicted. The protected right under s 9 is the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

[4] Execution of the surrender order was deferred for four weeks to enable Mr Dotcom to take legal advice and issue proceedings if he wished to challenge the Minister's decision.

[5] Mr Dotcom subsequently filed an application in the High Court seeking judicial review of the Minister's decision. The proceeding also sought judicial review of a decision made by the New Zealand Commissioner of Police (the Commissioner) to decline to charge Mr Dotcom with New Zealand offences equivalent to the charges laid against him by the US authorities.[5]

[6] In a judgment issued on 10 September 2025, Grice J dismissed the application for judicial review in its entirety,[6] prompting Mr Dotcom to appeal to this Court.

[7] The notice of appeal contained several grounds of appeal. At the hearing before us, Mr Mansfield KC however confirmed on behalf of Mr Dotcom that the

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3 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 [Supreme Court eligibility judgment] at [434] and [496]. Mr Dotcom was initially charged by the US with 13 charges but the Supreme Court held he was not eligible in respect of one of them, being a count of conspiracy to commit money laundering: see [594] and [599(b)].

4 At [11]–[12].

5 The making of the decision was delegated by the Commissioner to an Assistant Commissioner Investigations of the New Zealand Police but for the purpose of this proceeding is treated as the Commissioner's decision.

6 *Dotcom v Minister of Justice* [2025] NZHC 2634, [2025] 3 NZLR 486 [High Court judgment under appeal] at [184]–[186].

appeal grounds were limited to matters raised in submissions. For their part, counsel for the Minister contended that Mr Dotcom's submissions significantly reframe the arguments advanced in the High Court and also depart from the review grounds pleaded in the statement of claim. To the extent that they do, that is certainly irregular, but we are satisfied the respondents have not been prejudiced as a result. We have therefore considered all the arguments raised by Mr Mansfield in his written and oral submissions.

[8] Those submissions focused on the sentence Mr Dotcom would likely receive in the US if found guilty and the disparity of treatment as between him and two of his alleged co-conspirators, Mr Ortmann and Mr van der Kolk. According to Mr Mansfield, both decision makers (the Commissioner and the Minister) led themselves into error by prioritising the interests of an extradition treaty partner over the proper application of New Zealand law.

Factual background

[9] The details of the 12 charges against Mr Dotcom which have been filed in a US federal court are as follows:[7]

(a) one count of conspiracy to commit racketeering (maximum penalty of 20 years' imprisonment), racketeering being a term used in the US Code to denote seeking to make a profit from organised crime;[8]

(b) one count of conspiracy to commit copyright infringement (maximum penalty of five years' imprisonment);[9]

(c) one count of criminal copyright infringement by distributing a copyright work being prepared for commercial distribution on a

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7 As noted above at n 3, Mr Dotcom was also initially charged with a 13th count of conspiracy to commit money laundering, but surrender is not available for that charge following the Supreme Court eligibility judgment.

8 Crimes and Criminal Procedure 18 USC §§ 1962(d)–1963(a).

9 Section 371.

computer network and aiding and abetting of criminal copyright infringement (maximum penalty of five years' imprisonment);[10]

(d) four counts of criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement (each charge carrying a maximum penalty of five years' imprisonment);[11] and

(e) five counts of fraud by wire and aiding and abetting fraud by wire (fraud by wire being fraud that involves some form of telecommunications or the internet, each charge carrying a maximum penalty of twenty years' imprisonment).[12]

[10] The charges arise from the activities of a business providing cloud storage and file sharing facilities for internet users.[13] This business, described by the US in the superseding indictment as the "Mega Conspiracy",[14] had a number of companies and websites. Megaupload Ltd was the registered owner of Megaupload.com,[15] which was the business' primary storage site.[16] Megaupload.com is alleged to have been deliberately designed and operated to facilitate the large-scale sharing of commercial files such as films and music in breach of copyright.[17] It was a highly lucrative business.

[11] Mr Dotcom was one of the founders of Megaupload Ltd, its Chief Executive Officer from 2005 until 2011, and then its Chief Innovation Officer.[18] According to

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10 Sections 2 and 2319(d)(2); and Copyrights 17 USC § 506(a)(1)(C).
11 Crimes and Criminal Procedure 18 USC § 2319(b)(1); and Copyrights 17 USC § 506(a)(1)(A).
12 Crimes and Criminal Procedure 18 USC §§ 2 and 1343.
13 Supreme Court eligibility judgment, above n 3, at [13] and [200].
14 In January 2012, a Grand Jury in a US federal court returned a federal indictment — a formal written accusation charging a person with a particular crime — containing five charges against Mr Dotcom (and other related co-defendants). In February 2012, the Grand Jury returned a superseding indictment which replaced the original January 2012 indictment. The superseding indictment contained the 12 counts against Mr Dotcom (and other related co-defendants) as outlined above at [9], as well as a 13th count of conspiracy to commit money laundering which cannot be pursued following the Supreme Court eligibility judgment, above n 3. The superseding indictment has been discussed and relied on throughout Mr Dotcom's extradition proceedings in New Zealand. Accordingly, we rely on the superseding indictment here as well.
15 This is according to the superseding indictment.
16 See Supreme Court eligibility judgment, above n 3, at [13].
17 At [320].
18 At [14]. See also the superseding indictment.

the superseding indictment, Mr Dotcom, through a related company,[19] owned 68 per cent of Megaupload Ltd, Megaupload.com, Megaclick.com and Megapix.com, and 100 per cent of the registered companies behind Megavideo.com, Megaporn.com and Megapay.com.[20]

[12] As noted in a previous decision of this Court,[21] Megaupload experienced enormous growth from 2008. The business is claimed at one point to have accounted for four per cent of global internet traffic,[22] and is said to have earned revenue of more than USD 175,000,000.[23] The US attributes this to the systematic infringement of copyright. It claims the resulting losses to copyright owners exceeded USD 500,000,000.[24]

[13] Originally, the US sought extradition of three other individuals as well as Mr Dotcom.[25] All three were alleged to have been actively involved in the business with Mr Dotcom. Along with Mr Dotcom, they too were held eligible for surrender by the New Zealand Supreme Court.[26]

[14] One of the three, a Mr Batato, fell ill with a terminal illness.[27] In 2021, the US was granted leave to withdraw its application for his extradition.[28] Mr Batato died in 2022. The other two alleged co-conspirators were a Mr Ortmann and a Mr van der Kolk. Mr Ortmann had oversight of the software programmers who developed the business' websites and was also the Chief Technical Officer of Megaupload Ltd.[29] Through a company of which Mr Ortmann was the sole director

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19 The related company is Vestor Ltd. According to the superseding indictment, Mr Dotcom is the sole shareholder and director of Vestor Ltd.

20 See also Supreme Court eligibility judgment, above n 3, at [14], n 27.

21 Court of Appeal eligibility judgment, above n 2, at [13].

22 See *R v Ortmann* [2023] NZHC 1504 [High Court sentencing notes] at [23].

23 At [40].

24 At [12].

25 The US also sought the provisional arrest of another three alleged co-conspirators pending a formal extradition request, but they were not in New Zealand at the relevant time. One of those three offshore alleged co-conspirators, a Mr Andrus Nomm, was arrested in the Netherlands in January 2012. Mr Nomm agreed to be surrendered to the US where he pleaded guilty and was sentenced to a year and a day in federal prison.

26 Supreme Court eligibility judgment, above n 3.

27 Mr Batato had been the Chief Marketing and Sales Officer for Megaupload.com and the business' other websites.

28 *United States of America v Dotcom* DC Auckland CRI-2012-092-1647, 10 June 2021.

29 High Court sentencing notes, above n 22, at [16].

and shareholder, he owned 25 per cent of Megaupload Ltd.[30] Mr van der Kolk was the Programmer-in-Charge for Megaupload Ltd and Megamedia Ltd.[31] Through a company controlled by him, he owned 2.5 per cent of Megaupload Ltd.[32]

[15] In 2022, Mr Ortmann and Mr van der Kolk approached the New Zealand authorities offering to plead guilty to equivalent New Zealand offences (that is, equivalent to the US charges) in a New Zealand court.[33] They also offered to provide assistance to the US in its prosecution against Mr Dotcom whom the US regards as the ringleader.[34]

[16] After the US authorities had signalled their willingness to forgo their right to seek extradition of Mr Ortmann and Mr van der Kolk, the New Zealand police commenced a domestic prosecution in the Auckland High Court against the two men. Both duly pleaded guilty on agreed facts to the equivalent New Zealand offences.[35] The application for their extradition was withdrawn and they were each sentenced on 15 June 2023 to terms of imprisonment in New Zealand.[36]

[17] In the case of Mr Ortmann, the prison term imposed was two years and seven months and in the case of Mr van der Kolk two years and six months.[37] Reparation orders were also made, both men having consented to surrender all funds that remained in their names in overseas accounts.[38] Counsel advised the sentencing Judge that this would exceed a total of NZD 10,000,000.[39]

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30 This is based on the superseding indictment but see also High Court sentencing notes at [16].

31 High Court sentencing notes, above n 22, at [17]. According to the superseding indictment, Megamedia Ltd is the parent company and sole shareholder of Megavideo Ltd (which is the registered owner of Megavideo.com), Megarotic Ltd (which is the registered owner of Megaporn.com), and Megapay Ltd.

32 This is based on the superseding indictment. See also High Court sentencing notes, above n 22, at [17].

33 High Court sentencing notes, above n 22, at [3].

34 At [100]. Although Mr Mansfield KC contended it was never a feature of the extradition proceeding up until now who was the primary offender, he accepted that the US case is advanced on the basis that the ringleader was Mr Dotcom.

35 Two charges of participating in an organised criminal group, one charge of conspiring to cause loss by deception and one charge of conspiring to dishonestly obtain documents: see Crimes Act 1961, ss 98A, 310, 240 and 228.

36 High Court sentencing notes, above n 22.

37 At [125].

38 At [126].

39 At [110].

[18] In arriving at end sentences of under three years' imprisonment, the Judge first adopted a starting point of ten years' imprisonment for Mr van der Kolk, and ten and a half years in the case of Mr Ortmann.[40] The starting points were then each reduced by 75 per cent on account of mitigating personal factors which included the guilty pleas, the assistance to the US authorities, the reparation, and prospects for rehabilitation.[41]

[19] The assistance provided to the US authorities appears to have been significant and is considered by those authorities to have strengthened the prosecution against Mr Dotcom.[42]

[20] The assistance provided included consenting to the transfer of computers and other electronic items seized from the two men in 2012. Up until that point, US efforts to obtain and analyse those items had been frustrated by litigation and encryption. Mr van der Kolk and Mr Ortmann further promised to assist in the investigation and prosecution of Mr Dotcom. To that end, they agreed to swear on oath to the truth of the summary of facts. That meant sworn verification of allegations that:

> Megaupload had been designed, and operated, as a sophisticated mechanism for defrauding copyright owners for commercial gain, and that their cover story — that Megaupload was a neutral cyberlocker, which acted responsibly when notified of infringements — was part of the deception.

[21] It is common ground that the sentence likely to be imposed on Mr Dotcom in the US were he to be found guilty would be substantially greater than the sentences imposed on Mr Ortmann and Mr van der Kolk in New Zealand. That would be so, even putting to one side the personal discounts given the two men by the sentencing Judge.

[22] The month following the sentencing of his co-conspirators, Mr Dotcom invited the Commissioner of Police on 5 July 2023 to confer with Crown Law and consider whether the Crown and the US would agree to charge him in New Zealand too.

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40 At [91].
41 At [97]–[124].
42 At [100] and [106].

Mr Dotcom said he would submit to the New Zealand jurisdiction and any charges laid could be determined domestically under New Zealand law.

[23] The Commissioner tasked the Assistant Commissioner Investigations with considering the request which was subsequently declined in a letter dated 18 July 2023.

[24] Then, as already mentioned, on 12 August 2024 the Minister issued his decision that Mr Dotcom was to be surrendered to the US.

[25] Before making his surrender decision, the Minister sought advice from a US legal expert regarding the sentence Mr Dotcom was likely to receive in the US in the event of his being found guilty and convicted. The report from the expert, a Mr Debold, was that the range of possible sentences was from 30 to 150 years' imprisonment. Mr Debold also advised that early release on parole is not a feature of the US federal system although a reduction of up to approximately one seventh of the sentence for good behaviour is possible. In his opinion, although Mr Dotcom might avoid a sentence as long as 150 years, there was a significant chance he would receive a sentence of at least 30 years.

[26] We pause here to interpolate that at the hearing before us, Mr Sinclair (counsel for the Commissioner) drew our attention to recent sentencing decisions in the US that postdate the Debold report and which appear to suggest a more lenient approach to sentencing on copyright-related charges.[43] In a judicial review context however, the consideration should generally be limited to the information that was before the decision-maker. Further, without any expert assistance as to the significance of these

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[43] US Attorney's Office, Eastern District of Pennsylvania "Leader of Illegal Copyright Infringement Scheme Sentenced to 5 ½ Years' Imprisonment" (press release, 8 March 2023) in respect of a Mr Carrasquillo; and Office of Public Affairs "Five Defendants Sentenced in Connection with Operating One of the Largest Illegal Television Show Streaming Services in the United States" (press release, 22 July 2025) in respect of a Mr Dallmann and a Mr Polo. In all of these cases, it appears that the US Sentencing Guidelines suggested each defendant should receive a sentence range of 24–30 years. Mr Carrasquillo was ultimately sentenced to five years and six months' imprisonment. He was also ordered to pay restitution of more than USD 15,000,000 and to forfeit over USD 30,000,000 in proceeds that he reaped from the scheme. Mr Dallmann was sentenced to seven years' imprisonment. Mr Polo was sentenced to four years and nine months' imprisonment.

decisions in US sentencing jurisprudence, it is difficult for us to know with any certainty what significance to ascribe to them.

[27] In the surrender decision, the Minister noted that the uncertainty of the US sentence — anywhere from 30 to 150 years — was a complicating factor in assessing disproportionality as between the sentence Mr Dotcom was likely to receive in the US and the sentence likely to be imposed in New Zealand for equivalent New Zealand offences. The latter was considered by the Minister to be in the range of 12 to 15 years' imprisonment.

[28] In the Minister's view, notwithstanding the uncertainty of the US sentences, the practical reality was that whether the US sentence was a 30 or 150 year prison term, it was likely to be for the rest of Mr Dotcom's natural life. He was aged 50 at the time of the surrender decision made in 2024 . Rather than focus on the number of years, the Minister therefore proceeded on the basis of a likely sentence of at least 30 years, and which likely would result in a 50 year old spending the rest of their natural life in prison.

[29] The Minister accepted that the difference between the likely US outcome and the notional equivalent New Zealand outcome was "clearly substantial". He went on to say:

> … However, that does not necessarily make the US sentence disproportionately severe. Significant differences in sentences between jurisdictions are permissible, and need not necessarily prevent extradition.
>
> The alleged offending, if proven, would amount to fraud on a massive scale. A conviction in the US will likely lead to a sentence that effectively means Mr Dotcom would probably spend the rest of his natural life in prison.
>
> I have weighed these various factors carefully. On balance, in my view, in the context of the circumstances of this case (including the scale of the alleged offending), surrendering a 50 year old person to a country where, if convicted, they are likely to spend the rest of their natural life in prison would not "shock the conscience" of properly informed New Zealanders. Accordingly, I do not consider that the likely US sentence would be disproportionately severe.

[30] The Minister then considered whether the likely US sentence involved an irreducible life sentence, that is to say a life sentence without any possibility of an

early release. He found it did not because of the possibility of compassionate release and executive clemency.

[31] Following receipt of the Minister's surrender decision, Mr Dotcom filed a 55 page statement of claim in the High Court raising several grounds of review against both the Commissioner and the Minister. Then followed the unsuccessful High Court judicial review and now this appeal.

[32] We begin our analysis by considering the appeal relating to the Commissioner.

The decision not to prosecute Mr Dotcom

The claim

[33] The statement of claim alleged that the Commissioner's decision to refuse to charge Mr Dotcom in New Zealand despite having charged Mr Ortmann and Mr van der Kolk in respect of substantially the same facts was:

(a) biased and for an improper purpose in that it was for the purpose of appeasing the US and making an example of Mr Dotcom rather than in accordance with the test for prosecution under the Solicitor-General's Prosecution Guidelines 2013 (the Prosecution Guidelines);[44]

(b) unreasonable because of the different treatment afforded Mr Ortmann and Mr van der Kolk and the fact that if Mr Dotcom is found guilty, he will be subjected to grossly disproportionate punishment relative to his co-conspirators;

(c) contrary to ss 9, 25, and 27 of NZBORA;[45] and

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44 Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013).

45 Section 9 is the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment, s 25 establishes the minimum rights of everyone who is charged with an offence, and s 27 provides for the right to justice.

(d) contrary to arts 9 and 14 of the International Covenant on Civil and Political Rights.[46]

[34] The relief sought was a declaration that the Commissioner's decision not to charge Mr Dotcom in New Zealand was invalid as well as orders quashing the decision and directing the Commissioner to charge Mr Dotcom in New Zealand.

The High Court

[35] The Judge rejected all the grounds of review and held there was no basis to interfere with the decision not to prosecute. In particular, she was not persuaded that the decision was unreasonable.[47] Nor in her view was there any evidential basis for the allegations of improper conduct.[48] In her view, the Commissioner had properly exercised his discretion whether to prosecute and had not taken into account any irrelevant considerations.[49]

Arguments on appeal

[36] The central focus of the submissions made on behalf of Mr Dotcom was the Prosecution Guidelines. Mr Mansfield argued that the Commissioner's decision was erroneous in law for failing to comply with the Prosecution Guidelines and that the High Court had erred in finding to the contrary. Mr Mansfield also challenged the correctness of the High Court finding that the Commissioner's decision was reasonable.

[37] As regards the Prosecution Guidelines, Mr Mansfield contended they required the Commissioner to consider first whether the evidential threshold for a prosecution had been met and secondly whether a prosecution was in the public interest. In making his decision to prosecute Mr Ortmann and Mr van der Kolk, the Commissioner must, Mr Mansfield argued, have been satisfied that both elements were present and if so,

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46 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]. Article 9 recognises and protects both liberty of person and security of person, and art 14 is the right to equality before courts and tribunals and to a fair trial.

47 High Court judgment under appeal, above n 6, at [74] and [184(d)].

48 At [70] and [74].

49 At [184(d)].

given their cases were indistinguishable from Mr Dotcom's case, the Commissioner should have decided to initiate a prosecution against him as well. If the Commissioner was not so satisfied in the cases of the other two, then he should have declined the deal they had made with the US.

[38] In short, according to Mr Mansfield, either all three should have been prosecuted in New Zealand or none of them.

[39] Developing these submissions, Mr Mansfield further argued that parity of treatment was required under the Prosecution Guidelines. Defendants involved in the same alleged offending should be prosecuted together, tried together and sentenced accordingly. In being prepared to entertain whether the other two should be prosecuted in New Zealand, it was therefore incumbent on the Commissioner to have considered whether the same opportunity should be afforded to Mr Dotcom. The failure to do so led to the irresistible inference that the Commissioner had not acted independently but was doing the bidding of the US. At worst for Mr Dotcom, he could expect in New Zealand to receive a 12 to 15 year prison sentence which stood in stark contrast to the likely sentences in the US.

[40] Responding to arguments raised on behalf of the Commissioner, Mr Mansfield conceded that Mr Dotcom had been identified as the primary offender. However, he argued the role each man had played in the business was only relevant to sentencing, not prosecution. As for the extradition context, Mr Mansfield said while that was a relevant factor for the Commissioner to take into account, it was a factor common to all three and not a basis for distinguishing between them. All three had been found liable to surrender. The only difference, in Mr Mansfield's submission, was that the other two did a deal behind the scenes.

Our view

[41] We begin our analysis with the preliminary observation that although prosecution decisions are amenable to judicial review, it is well established that the

scope for review is limited.[50] That is because of constitutional constraints and the high content of judgment and discretion involved in such decisions.[51] Even if that were not so, on the facts of this case, we consider it clearcut that there was a rational and proper basis for distinguishing between Mr Dotcom and the other two men.

[42] As noted in the Commissioner's decision letter dated 18 July 2023, Mr Dotcom's position differed from that of Mr Ortmann and Mr van der Kolk in fundamental respects. Not only was Mr Dotcom the primary offender in terms of role and financial gain, but he was also not offering to plead guilty on agreed facts, and most critically of all, the US was not prepared to withdraw its request for extradition of him.[52]

[43] The fact Mr Dotcom was not offering to plead guilty meant his proposal involved having a trial in New Zealand. And that was something the New Zealand police did not consider feasible. The Commissioner's decision letter stated that the New Zealand police were not in a position to prosecute the case through to trial, pointing out that it was a US investigation not a New Zealand one and that it involved a vast volume of complex evidence, with investigating agents and witnesses located in the US.

[44] Mr Mansfield suggested these concerns were overstated, citing the use of remote technology for giving evidence and noting that at least two key witnesses (Mr Ortmann and Mr van der Kolk) were in New Zealand. However, in our view, it is not for the courts to minutely scrutinise police decisions about the allocation of their finite resources, not least of all in circumstances where the likely scale of the investigation, the disclosure process and the trial itself is self-evident. We note too that the only evidence before us as to the feasibility of a prosecution was an affidavit from the Assistant Commissioner Investigations.

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50 *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [35], citing *Polynesia Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [69]. See also *Attorney-General of New Zealand v Fitzgerald* [2024] NZCA 419, [2024] 3 NZLR 817 at [94], referring to *Osborne v Worksafe New Zealand*.

51 *Osborne v Worksafe New Zealand*, above n 50, at [34]. See also *Attorney-General v Fitzgerald*, above n 50, at [92], citing *Osborne v Worksafe New Zealand* at [34].

52 We also note that, unlike Mr Ortmann and Mr van der Kolk, Mr Dotcom has previous convictions.

[45] The Commissioner's decision letter also answers a further criticism made by Mr Mansfield, namely that it is not a proper policy to prosecute only those who are prepared to plead guilty and that in any event, for all the Commissioner knew, Mr Ortmann and Mr van der Kolk could have changed their minds about pleading guilty once the New Zealand charges were laid and the High Court seized of the matter. However, what the decision letter states is that because of the logistical issues, had Mr van der Kolk and Mr Ortmann sought to withdraw their guilty pleas, it is likely the New Zealand charges would have been immediately withdrawn and the request for their extradition renewed.

[46] As indicated in [42], we consider the most telling argument against Mr Mansfield's submissions is the fact that the US maintains its request for Mr Dotcom's extradition to face trial in the US and is not prepared to withdraw it as it was in the case of Mr Ortmann and Mr van der Kolk.

[47] Neither the Treaty nor the Extradition Act contemplate a domestic prosecution as an alternative to an extant extradition proceeding. Unlike some jurisdictions, New Zealand does not have what is known as a "forum bar", namely an express statutory restriction preventing extradition to another nation where the alleged offending could be prosecuted domestically.[53] That means, as Ms Taylor for the Commissioner submitted, were the New Zealand police unilaterally to acquiesce to Mr Dotcom's request, that would be inconsistent with both the scheme of the Extradition Act and the Treaty.[54]

[48] In contrast, the decision to prosecute Mr Ortmann and Mr van der Kolk *was* consistent with New Zealand's obligations under the Treaty, because the requesting

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53 For example, in 2013, the United Kingdom introduced a forum bar: see Extradition Act 2003 (UK), ss 19B, 79(1)(e), 79(1A), and 83A–83E. The forum bar can only operate if a substantial measure of the requested person's relevant activity was performed in the United Kingdom and a judge decides the specified matters relating to the interests of justice mean that the extradition should not take place. See also Extradition Act 1988 (Cth), s 45. Section 45 allows for domestic prosecution as an alternative to extradition for offences arising extra-territorially if the Attorney-General consents and has determined under ss 15B or 22 that the person is not to be surrendered to the requesting country.

54 See, for example, *Regina (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727 at [65]; and *R (Ahsan) v Director of Public Prosecutions* [2008] EWHC 666 (Admin) at [38], citing *Regina (Bermingham) v Director of the Serious Fraud Office*. We note these cases were decided in the United Kingdom prior to the enactment of the statutory forum bar under the Extradition Act (UK).

country consented to that course of action and was substantially assisted by it. The decision thus accorded with the objectives of international cooperation and comity,[55] which are central to extradition.

[49] It follows given the existence of an ongoing extradition proceeding that it was unnecessary for the Commissioner to consider the Prosecution Guidelines. Mr Mansfield's argument would require the Commissioner to assess the evidential sufficiency of a case that the New Zealand police had not even started investigating and which it could not prosecute without acting contrary to the Extradition Act and putting New Zealand in breach of its Treaty obligations. The decision to prosecute the other two was only legally possible because they were removed from the extradition track.

[50] Mr Mansfield sought to overcome these formidable difficulties by calling in aid NZBORA, and in particular, the protected right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.[56] However, the Commissioner's decision was simply a decision not to prosecute Mr Dotcom in New Zealand. It was not a decision imposing a punishment or treatment. And although the decision in one sense placed him "at risk" of punishment in the US, we consider that any sentence the US courts might impose were Mr Dotcom to be extradited and found guilty is too remote from the Commissioner's decision to amount to "treatment" or "punishment" for the purposes of s 9 of NZBORA.

[51] For the reasons discussed above, we are satisfied that the decision to prosecute the other two men and the decision declining to prosecute Mr Dotcom were both lawful and rational decisions. The High Court was correct to reject the claims against the Commissioner.

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55 Comity in the extradition context is generally understood as denoting respect for the laws of other countries despite the fact they may differ from the laws of New Zealand. The term reciprocity is also often used in the authorities as a synonym for cooperation, referencing the reciprocal obligations on states to facilitate extradition to each other. See also the Treaty, above n 1: The Treaty expressly records that it is the product of a desire on the part of both countries to make more effective the cooperation of the two countries for the reciprocal extradition of offenders.

56 New Zealand Bill of Rights Act 1990, s 9.

The Minister's decision to surrender Mr Dotcom (the surrender decision)

The legal framework

[52] The issue of whether Mr Dotcom is likely to receive a disproportionately severe punishment in the US was identified as a key issue in the surrender decision, in the High Court,[57] and now in this appeal.

[53] In order to understand the arguments advanced by counsel, it is necessary at this juncture to provide a brief explanation of the relevant legal framework.

[54] Liability to disproportionately severe punishment is not *expressly* listed among the restrictions on surrender set out in s 30 of the Extradition Act. However, as noted in the briefing paper provided to the Minister, it was still possible for him to consider the issue under s 30. That was because, in addition to the express restrictions, s 30(3)(e) empowers the Minister to determine a person is not to be surrendered for "any other reason".

[55] As the briefing paper further explained, while s 30(3)(e) would only render "liability to severely disproportionate punishment" a discretionary restriction as opposed to a mandatory restriction under the Extradition Act, the issue of disproportionately severe sentences also engages the protected right under s 9 of NZBORA. It will be recalled that s 9 provides that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. Given that the issue engaged a fundamental protected right, the Minister was advised it would be effectively mandatory to refuse surrender if the likely sentence Mr Dotcom would receive in the US would amount to disproportionately severe punishment.

[56] The Minister clearly accepted that advice because the surrender decision states, "Mr Dotcom should not be surrendered if he is likely to be subjected to a disproportionately severe punishment". It is common ground on appeal as it was in

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[57] High Court judgment under appeal, above n 6, at [94]–[132].

the High Court that the Minister was correct to take that position and that it required him to examine the foreseeable consequences of sending Mr Dotcom to the US.

[57] The Minister also accepted the advice in the briefing paper regarding what test should be applied in determining whether Mr Dotcom would be subjected in the US to a disproportionately severe sentence. The relevant test was identified as being whether the likely sentence was so excessive it would shock the conscience of properly informed New Zealanders. The "shocked conscience test" is derived from Canadian human rights jurisprudence.[58] It is now part of New Zealand law following the decisions of our Supreme Court in *Taunoa v R* and *Fitzgerald v R* where the test was held to apply to s 9 of NZBORA.[59]

[58] Although *Taunoa and Fitzgerald* involved the application of s 9 of NZBORA in a domestic setting and not an extradition setting,[60] the same shocked conscience test has been consistently adopted in extradition cases by Canadian courts,[61] the European

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58 See, for example, *Miller v The Queen* [1977] 2 SCR 680 at 688 per Laskin CJ, where the question was whether the criminal punishment prescribed was "so excessive as to outrage standards of decency". See also *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 at 1072 per Lamer J, at 1089 per McIntyre J, and at 1109 per Wilson J.

59 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [92] per Elias CJ, at [172] per Blanchard J, and at [289] per Tipping J; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [79] per Winkelmann CJ, at [163]–[165] and [167] per O'Regan and Arnold JJ, and at [239] per Glazebrook J.

60 In *Taunoa v Attorney-General*, the Supreme Court, by majority, held that the treatment of prison inmates who had been subjected to a behaviour modification regime did not amount to a breach of s 9 of the New Zealand Bill of Rights Act. In *Fitzgerald v R*, the Supreme Court held the shocked conscience test was satisfied in the case of a man experiencing mental health problems who received a prison sentence of seven years for kissing a woman who was a stranger to him on the cheek. We also note that this Court has considered whether humanitarian considerations were relevant to a decision made under s 30 of the Extradition Act in *Bujak v Minister of Justice* [2009] NZCA 570.

61 See, for example, *Canada v Schmidt* [1987] 1 SCR 500 at 522; *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779; *Gwynne v Canada (Minister of Justice)* (1998) 103 BCAC 1, 37 WCB (2d) 355; *United States v Burns* 2001 SCC 7, [2001] 1 SCR 283; *Lake v Canada (Minister of Justice)* 2008 SCC 23, [2008] 1 SCR 761; *United States of America v UAS* 2013 BCCA 483; *United States of America v Wilcox* 2015 BCCA 39; *Canada (Attorney General) (United States of America) v Hillis* 2021 ONCA 447, 156 OR (3d) 525; and *United States of America v Ferguson* 2023 BCCA 186. We note that the relevant human rights provisions in Canada are ss 7 and 12 of the Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

Court of Human Rights (ECHR),[62] and United Kingdom courts.[63] A significant number of these cases involve extradition to the US.

[59] In the present case, the parties all agree the Minister was correct to adopt the shocked conscience test. And although the application of the test both by the Minister and the Judge is challenged, it is also agreed that their respective formulations of it were correct.

[60] To summarise, the application of s 9 of NZBORA in this case required the Minister to first identify the sentence likely to be imposed in the US. As pointed out in *Sanchez-Sanchez v United Kingdom*, unlike the domestic setting where human rights are being considered in relation to a sentence that has actually been imposed, in the extradition context where the person has not yet been convicted, a complex risk assessment as to the likely sentence is required.[64] The ECHR in *Sanchez* described the assessment as "a tentative prognosis that will inevitably be characterised by a very different level of uncertainty when compared to the domestic context".[65] It went on to say that this called "as a matter of principle, but also out of practical concerns" for caution in applying domestic-setting cases to their fullest extent in the extradition context.[66] Some of the overseas cases also use the language of requiring satisfaction that there is a "real risk" or likelihood of a particular sentence in the requesting country.[67]

[61] Having identified the likely sentence, the Minister was then required to determine whether it was "grossly disproportionate" for the purposes of s 9 of NZBORA by applying the shocked conscience test.

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62 See, for example, *Ahmad v United Kingdom* (2013) 56 EHRR 1 (ECHR).

63 See, for example, *R (on the application of Wellington) v Secretary of State for the Home Department* [2007] EWHC 1109 (Admin); and *Inzunza v Government of the United States of America* [2011] EWHC 920 (Admin). We note that the relevant human rights provision in the United Kingdom is art 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221(opened for signature 4 November 1950, entered into force 3 September 1953) [the Convention] as incorporated in the Human Rights Act 1998 (UK).

64 *Sanchez-Sanchez v United Kingdom* (2022) 54 BHRC 347 (Grand Chamber) at 369.

65 At 369.

66 At 369.

67 At 371. See also *Balahan v Sweden* ECHR 9839/22, 29 June 2023; and *Singler v Government of the United States of America* [2025] EWHC 3555 (Admin).

[62] Finally, as mentioned, the Minister also considered that another alternative way a sentence might be disproportionately severe for the purposes of s 9 of NZBORA was if it amounted to an irreducible life sentence, that is to say a life sentence without any prospect of release at all.

[63] The existence of this alternative pathway to a finding of disproportionately severe punishment in the extradition context has been adopted in comparable jurisdictions including countries subject to the European Convention on Human Rights (the Convention).[68] It has been consistently held that if a sentence is an irreducible life sentence it may breach art 3 of the Convention which provides a right to freedom from inhuman or degrading treatment or punishment.[69] A similar position has been adopted in Canada.[70]

[64] As noted by Mr Hodder KC for the Minister, New Zealand courts have yet to address the question of an irreducible life sentence either in the domestic setting or the extradition context.[71] However, for the purposes of this case, there is no dispute about the existence of this alternative pathway as a matter of law. What is very much in dispute is whether the pathway is available to Mr Dotcom on the facts.

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68 The Convention, above n 63.

69 As per our discussion below at [99], the courts have indicated that it is not enough to show there is a real risk of a sentence of life imprisonment without parole. It must also be ascertained whether, from the moment of sentencing, there is a review mechanism in place allowing the requesting country to consider whether any changes in the prisoner's life or steps towards rehabilitation are so significant as to mean that continued detention can no longer be justified on legitimate grounds: see *Sanchez-Sanchez v United Kingdom*, above n 64, at 371; and *Balahan v Sweden*, above n 67, at [54]. See also *Regina (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] AC 335.

70 See, for example, *R v Bissonnette* 2022 SCC 23, [2022] 1 SCR 597 at [81], [97], and [111]: the Supreme Court held, albeit in the domestic context, that a sentence of imprisonment without a realistic possibility of parole was intrinsically incompatible with human dignity and s 12 of the Canadian Charter of Rights and Freedoms.

71 We note the question of whether the imposition of a whole of life sentence of imprisonment without parole would be in breach of art 7 of the ICCPR was raised in *Kim v Minister of Justice* [2019] NZCA 209, [2019] 3 NZLR 173 at [268]. However, the argument was only raised in passing in the appellant's written submissions. The Court did not address the argument because it was not referred to any evidence as to whether or not a sentence of life imprisonment without parole in the People's Republic of China was, as a matter of law and fact, irreducible. Mr Kim did not pursue the point on appeal: see *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338, at [432], n 520. We also note that, as observed in the briefing paper, *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 is still the only case in New Zealand where a life sentence without parole has been imposed.

The grounds of review in relation to the surrender decision

[65] The grounds of review were summarised in the submissions filed by Mr Mansfield in this Court as being that the surrender decision was:

(a) in breach of s 9 of NZBORA and/or s 30(3)(e) of the Extradition Act,[72] as it resulted in disproportionately severe treatment of Mr Dotcom relative to Mr Ortmann and Mr van der Kolk that would shock the conscience of properly informed ordinary New Zealanders;

(b) unreasonable, if not perverse, in that it resulted in two members of the same alleged conspiracy with no stronger ties to New Zealand than Mr Dotcom being charged in New Zealand after a decade of being sought for extradition jointly;

(c) erroneous in law because the Minister misdirected himself by characterising the argument put to him about disparity in treatment as requesting him to review or interfere with the Commissioner's exercise of prosecutorial discretion;

(d) erroneous in fact because the Minister's analysis of likely sentencing outcomes in the US was inconsistent with the Debold report he had commissioned;

(e) erroneous in law by failing to have regard to a relevant consideration, namely the terms of the plea agreements between the US and Mr Ortmann and Mr van der Kolk and the negotiations leading up to it; and

(f) erroneous in law by having regard to an irrelevant factor, namely the self-serving evidence of Mr Ortmann and Mr van der Kolk that Mr Dotcom was the leader of the alleged conspiracy and thereby

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[72] As noted above at [54], s 30(3)(e) allows the Minister to determine that the person is not to be surrendered "for any other reason".

purporting to reduce the degree of disparity between the respective sentences.

[66] The relief sought in the statement of claim was a declaration that the surrender decision was invalid together with orders quashing the surrender decision and discharging Mr Dotcom.

[67] The High Court did not uphold any of the grounds of review. After traversing a number of authorities, the Judge found that the Minister's decision was based on relevant considerations and was in no sense unreasonable or unfair.[73]

[68] We now address each of the grounds of appeal advanced by Mr Mansfield in his written and oral submissions. These were to the general effect that the Judge erred by failing to identify that the surrender decision was based on errors of law as to the applicable test, as well as errors of fact regarding the sentencing position in the US. Further, that the Judge erred in finding that the disproportionality was not so severe as to shock the conscience and erred in finding the surrender decision was not unreasonable.

The correct comparator for the purpose of the first pathway

[69] At one point of his submissions, Mr Mansfield appeared to suggest that the comparison that should have been undertaken was a comparison between the sentence Mr Dotcom was likely to receive in the US and the actual sentences imposed on Mr Ortmann and Mr van der Kolk.

[70] That however is not consistent with *Fitzgerald* and its focus on the individual offender and the circumstances of the offending.[74] Nor is it consistent with any of the extradition authorities where the comparison undertaken is always between the sentence the person is likely to receive in the requested country and the likely sentence in the requesting country. Of course, the sentences imposed on Mr Ortmann and Mr van der Kolk may be used — as it was by the Minister — to inform an assessment

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73 High Court judgment under appeal, above n 6, at [132], and [184(a)–(c)].
74 *Fitzgerald v R*, above n 59.

of the likely New Zealand sentence but, in our view, that is the extent to which they are relevant.

[71] It follows from the above, that we also reject a related submission made by Mr Mansfield that it was a reviewable error for the Minister not to take the effect of the Commissioner's decision declining to prosecute Mr Dotcom into account.

The assessment of the likely US sentence

[72] Mr Mansfield submitted that the Minister proceeded on a factually incorrect assumption in his risk assessment of the likely sentencing outcomes in the US, an error which the High Court Judge failed to identify. The sentence of at least 30 years without parole adopted by the Minister was, Mr Mansfield argued, a best case scenario. In his submission, the more likely sentence was at the end of the range, that is to say nearer 150 years.

[73] In order to understand what appears to New Zealand eyes to be an extraordinarily wide sentencing range of 30 to 150 years, it is necessary to consider the Debold report in more detail.

[74] The first point to note is that none of the offences charged against Mr Dotcom carry mandatory minimum sentences. Nor do any of them carry a life sentence. The 150 year figure represents the combined total of the maximum penalties on the 12 counts.[75]

[75] As the Debold report explains, within the maximum prison-term boundaries, sentencing judges must consider various factors specified by statute and further refined in the US Federal Sentencing Guidelines. The Guidelines (described by Mr Debold as a score-keeping exercise) have been promulgated by a federal agency called the Sentencing Commission. They are designed to yield a single sentencing range for the totality of the convictions in any given case. They do so by setting out a base offence level for each federal offence which may be adjusted upwards or downwards by the sentencing judge on account of factors relating to the offence and

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[75] See the charges and the sentences they carry in our discussion above at [9].

the offender. Once the court arrives at a total offence level, a sentencing table dictates the offender's sentencing range.

[76] As Mr Debold also explains, the sentencing judge has a residual discretion to depart from the sentencing range. The Guidelines have been held to be advisory only. If however the judge does not identify any basis to depart or vary below the sentencing range, the judge is then required to impose consecutive sentences.

[77] In endeavouring to predict the sentence Mr Dotcom might receive in the US, it is evident from the Debold report that any prediction is necessarily subject to a number of contingencies and assumptions.[76] Unknown factors causing uncertainty arise, for example, from whether Mr Dotcom pleads guilty to all or any of the counts, whether the judge is prepared to depart from the range and whether Mr Dotcom is convicted on all 12 counts.

[78] A further unknown identified by Mr Debold was the application of new amendments to the US Sentencing Guidelines. Mr Debold explained that the amendments allowed prisoners to apply to the sentencing judge for a reduced sentence based on extraordinary and compelling reasons, such as serious deterioration in health. Mr Debold did not factor the amendments into his advice because he considered it was "highly uncertain whether, or to what extent, an extraordinary and compelling reason will materialize after sentence is imposed" and he could not predict how a judge considering the motion would assess it or exercise their broad discretion.

[79] Importantly the opinion also expressly acknowledges that it is difficult to predict how a judge would approach Mr Dotcom's case because cases of this type are said to occur "so infrequently". However, clearly doing the best he can and subject to the qualifications he identifies, Mr Debold predicts that Mr Dotcom would face a "significant challenge" in receiving a downward adjustment that would bring his sentence below 30 years. He concludes that a sentence of at least 30 years is

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[76] As an example of the uncertainty in predicting the likely US sentence, Mr Hodder KC referred to a case cited in the Minister's briefing paper involving the extradition of an alleged computer hacker accused of causing losses of USD 59,000,000 in a cyber-attack where the prosecutors had indicated a sentence of 27 to 35 years would be sought. The courts upheld the extradition on the basis of this estimate, but the offender ultimately only received an end sentence of eight years' imprisonment: see *Findikoglu v Germany* ECHR 20672/15, 30 June 2016.

"very likely". In another passage of the report, he says that he believes that "although Mr Dotcom may avoid a sentence as long as 150 years, there is a significant chance he will receive a sentence of at least 30 years".

[80] In the circumstances, we are not persuaded there was any error factual or legal in the Minister's approach which while adopting a 30 year prison term did so on the basis that it was an effective life sentence. It was an approach that took into account the expert opinion. And it was in our view a reasonable approach to take.

Did the Judge misapply the s 9 gross disproportionality test under NZBORA?

[81] Mr Mansfield acknowledged that the Judge identified the correct standard — whether the sentence would shock the conscience of properly informed New Zealanders. However, in his submission, she then displaced it with an assessment tied to the US context by holding that it is not an assessment of whether New Zealanders would be shocked if the sentence were imposed in New Zealand but their reaction if imposed in the US context.

[82] In adopting that approach, the Judge is said to have substituted foreign sentencing norms, improperly read down domestic human rights protections, ignored art IX of the Treaty which requires the application of New Zealand law and overlooked s 11(1) of the Extradition Act. Section 11(1) states the provisions of the Extradition Act must be construed to give effect to any extradition treaty in force between New Zealand and the extradition country.

[83] A further submission made by Mr Mansfield was that in applying the shocked conscience test the Minister was also required to have regard to what he described as the gross disparity of outcomes as between Mr Dotcom and the other two co-conspirators.

[84] In our view, these criticisms of the High Court judgment are misplaced. They are also inconsistent with well-established extradition caselaw from jurisdictions with similar human rights instruments to s 9 of NZBORA.

[85] Significantly, these authorities from comparable jurisdictions make it clear that the test of "disproportionately severe" or "grossly severe" involves a high threshold. For example, in a 2023 decision of the ECHR, it was said the test of "grossly disproportionate" would only be met "in very exceptional cases", on "rare and unique occasions".[77] The reason it has consistently been held to be a high threshold in the extradition context is because variations in sentencing practices — even "great" variations — between different nations are common.[78] As the briefing paper in this case put it: "Another country should not be expected to hold the same views and standards about criminal punishment as [New Zealand], otherwise extradition would be impossible."

[86] These sentiments echo a constant theme in the overseas authorities that an effective extradition process is founded upon respect for sovereignty and differences in the judicial systems among various nations.[79] By entering into an extradition treaty with another country, a nation displays confidence in the fairness of that treaty partner's system.[80] If countries are to be assured of cooperation when they seek extradition from states whose laws may not conform exactly to their own, they must be prepared to reciprocate.[81] Further, a failure to adhere to these international norms means countries run the risk of becoming safe havens for fugitive offenders.[82]

[87] It follows as these authorities demonstrate, that contrary to Mr Mansfield's submission, the shocked conscience test is inextricably tied to the US context. It is not enough for Mr Dotcom to assert that simply because he will likely receive a much longer prison term than he would if sentenced in New Zealand, that means neither the Minister nor the High Court applied New Zealand law. The question is *not* whether the likely sentence would shock the national conscience if imposed at home but rather whether it would shock the national conscience for a person to face such a sentence in another country after an extradition request and surrender. The difference in potential

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77 *Balahan v Sweden,* above n 67, at [53].

78 At [53]. See also *Ahmad v United Kingdom*, above n 62, at 70.

79 See, for example, *Lobban v Minister for Justice* [2015] FCA 1361 at [71] and [76].

80 See, for example, *Canada (Attorney General) (United States of America) v Hillis*, above n 61, at [101].

81 See, for example, *United States v Burns*, above n 61, at 328.

82 See, for example, *Bujak v Minister of Justice*, above n 60, at [56]; *Gomes v Government of the Republic of Trinidad and Tobago* [2009] UKHL 21, [2009] 1 WLR 1038 at [36]; and *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551 at [9].

jeopardy is required to be balanced with a myriad of factors including comity and reciprocity which underpin the extradition regime and regarding which the properly informed national conscience is taken to be aware.

[88] As a result, it has been said to be "well settled" and "clear" that:[83]

> [41] … absent sentences that would invoke behaviours of a nature like torture, the death penalty, the excising of limbs, for example, the sentencing regimes of other nations, no matter how much more severe than our own, will not generally "shock the conscience" of the community. …

[89] The mere fact of a disparity in the length of imprisonment as between respective countries, even a very significant disparity rendering what the local court would consider a harsh sentence,[84] is thus not in itself enough.[85] In Canada for example, the courts have upheld surrender decisions involving significant differences between the likely sentence in Canada as opposed to likely US sentence.

[90] In one case, *United States of America v Wilcox*, the Canadian sentence range was 45 days to 10 years per count, compared with the US total sentence range of 26 years to 108 years.[86] In another, *Canada (Attorney General) (United States of America) v Hillis*, the applicant faced a likely sentence of 90 days to three years' imprisonment in Canada if convicted, whereas the likely range in the US was 30 years' to life imprisonment.[87] Similarly in *United States of America v Ferguson*, the applicant faced a likely sentence in the range of three to four years' imprisonment if

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83 *United States of America v Wilcox*, above n 61. See also *United States of America v Ferguson*, above n 61, at [103]; and *Canada (Attorney General) (United States of America) v Hillis*, above n 61, at [104].

84 See, for example, *United States of America v UAS*, above n 61, at [70]: the Canadian sentence range of one to 10 years contrasted with US range of 25 years to 99 years. See also in *Gwynne v Canada (Minister of Justice)*, above n 61, at [27]–[28], where the majority noted that although the likely US sentence was harsh, severity alone was not enough and it was difficult to establish that the severity of a sentence in a foreign jurisdiction was a breach of the relevant human right.

85 *United States of America v Ferguson*, above n 61, at [102].

86 *United States of America v Wilcox*, above n 61, at [23]–[24]. Mr Wilcox was charged with four counts of sexual conduct with a minor. He was convicted by a jury of two charges, but the jury could not reach a verdict in respect of the other two. For his two convictions, Mr Wilcox faced a likely minimum sentence of 26 years. However, if his two convictions were overturned on appeal, the US reserved the right to conduct a new trial on all four counts. If he was convicted of all four counts in the new trial, he would face a minimum sentence of 52 years and a maximum sentence of 108 years.

87 *Canada (Attorney General) (United States of America) v Hillis*, above n 61, at [28] and [40].

convicted at trial in Canada, but 15 to 19.5 years' imprisonment if convicted at trial in the US.[88]

[91] If Mr Mansfield's criticism of the High Court judgment was intended to suggest the Judge had held that the test involved consideration of the conscience of a US national rather than the conscience of a New Zealander, we consider that also to be an incorrect interpretation of the judgment. The judgment is clear that it is the conscience of a New Zealander that is the operative conscience. But we repeat, it is a New Zealander who is aware there are differences between foreign criminal justice systems and our own systems and who understands the imperatives of comity and reciprocity.

[92] As will be apparent, the High Court decision in this case regarding the application of the shocked conscience test was entirely consistent with the overseas authorities. We see no reason why those authorities should not be applied in New Zealand and none was advanced on behalf of Mr Dotcom, other than a bare assertion at one point of the submissions that s 9 of NZBORA does not require the Minister to have regard to the extradition context. Given that the Minister is exercising powers under the Extradition Act, we consider that proposition to be untenable. We thus agree with the submission made on behalf of the Minister that there is no basis for saying that the relevant law of New Zealand is materially different from overseas jurisdictions, including of course the Canadian jurisdiction, which was the source of the shocked conscience test that New Zealand has adopted.

Is Mr Dotcom at risk of an irreducible prison sentence?

[93] As mentioned, it was common ground that as a matter of law it would be a breach of s 9 of NZBORA if there is a real risk of Mr Dotcom receiving an irreducible life sentence, meaning no prospect at all of release.

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[88] *United States of America v Ferguson*, above n 61, at [97]–[98]. We also note that, in another Canadian case, *Gwynne v Canada (Minister of Justice)*, above n 61, a decision surrendering a fugitive to the US to resume the remaining 110 years of his sentence of 120 years for extortion was upheld.

[94] As also mentioned, none of the offences with which Mr Dotcom has been charged carry a life sentence. The Minister accepted however that the practical effect of the long finite prison sentence that was likely to be imposed meant Mr Dotcom was at risk of spending the rest of his natural life in prison.

[95] Mr Mansfield contends that having accepted that and in the knowledge that parole is not a feature of US federal law, the Minister erred by nevertheless going on to find a sentence of 30 years would not be an irreducible life sentence for the purposes of s 9 of NZBORA due to the availability of executive clemency and compassionate release.

[96] As explained in the 2020 decision of *Hafeez v Government of the United States of America*, compassionate release in the US requires a prisoner to persuade the court that extraordinary and compelling reasons exist which would warrant a reduction of the sentence.[89] The US Sentencing Commission has identified four scenarios which would fulfil the definition of extraordinary and compelling: terminal illness, prisoner is aged over 65 and experiencing a serious deterioration in health due to ageing, a change in family circumstances resulting in the prisoner being the only caregiver and a fourth undefined scenario.[90] Executive clemency for a federal offence is a constitutional power vested solely in the President allowing them to pardon the offender or commute the sentence. There is no legal limit on the number of applications that a prisoner may make for executive clemency.[91]

[97] As also explained in *Hafeez*:

> [45] … The basis for commutation of sentence pursuant to executive clemency is set out in guidance published by the US Department of Justice. It is as follows:
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> > "Commutation of sentence is an extraordinary remedy. Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner eg, co-operation with investigative or prosecutive efforts that has not been adequately rewarded by other official action. A combination of these

89 *Hafeez v Government of the United States of America* [2020] EWHC 155 (Admin), [2020] 1 WLR 1296 at [44].
90 At [44].
91 At [45] and [58].

> and/or other equitable factors (such as demonstrated rehabilitation whilst in custody or exigent circumstances unforeseen by the court at the time of sentencing) may also provide a basis for recommending commutation in the context of a particular case."

[98] In Mr Mansfield's submission, neither compassionate release nor executive clemency is anything more than a theoretical possibility for Mr Dotcom and "the grim reality" is that he will serve the rest of his natural life in prison with the only real hope being a terminal illness which might see him released for weeks, perhaps even months, before he actually dies.

[99] However, that is not the settled approach taken in the authorities. What has been consistently held to make a life sentence (even a life sentence without parole) reducible and hence rights consistent is the existence of a genuine review mechanism, not the likelihood of it being applied for the benefit of the particular individual whose extradition is sought.[92] The only requirement is that the review mechanism be in existence at the time of sentencing.[93] Thus, for example, whole of life sentences imposed in the domestic English context have been held not to amount to irreducible life sentences because the Secretary of State has discretion to release on compassionate grounds.[94] Whether the Secretary of State is unlikely to exercise the discretion in the circumstances of the particular case at hand is considered irrelevant.[95]

[100] In a 2025 English decision, this approach was confirmed in the context of a request to extradite a person indicted in Colorado for the murder of two children and

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92 *Singler v Government of the United States of America*, above n 67, at [56]–[63].

93 See, for example, *Sanchez-Sanchez v United Kingdom*, above n 64, at 371; *Balahan v Sweden*, above n 67, at [54]; and *Hayes v United Kingdom* ECHR 56532/22, 1 July 2025 at [94].

94 See, for example, *R v Bieber* [2008] EWCA Crim 1601, [2009] 1 WLR 223 at [48]–[50], where the Court held that the Secretary of State's power of release under s 30(1) of the Crime (Sentences) Act 1997 meant that a whole life order was not irreducible and therefore not in violation of art 3 of the Convention. We note that in *Vinter v United Kingdom* (2013) BHRC 605 (Grand Chamber) at [125]–[130] a whole life order was deemed irreducible because the Grand Chamber considered there was a lack of clarity as to whether the Secretary of State's power under s 30 provided prisoners an appropriate and adequate avenue of redress. The English Court of Appeal addressed the Grand Chamber's uncertainty in *Regina v McLoughlin* [2014] EWCA Crim 188, [2014] 1 WLR 3964 at [28]–[36] and held that the s 30 power did provide a sufficient avenue of redress. The Grand Chamber has since confirmed that *Regina v McLoughlin* has clarified the domestic law and that a whole life sentence is consistent with art 3 of the Convention and reducible due to the Secretary of State's s 30 power: see *Hutchinson v United Kingdom* (2017) 43 BHRC 667 (Grand Chamber) at [70]–[72].

95 In New Zealand, the equivalent mechanism would be the royal prerogative of mercy: see Letters Patent Constituting the Office of the Governor-General of New Zealand 1983, cl 11. Under s 41 of the Parole Act 2002, the Parole Board also has power to grant compassionate release.

one of attempted murder of another child.[96] Under Colorado state law, if convicted the person would face a mandatory sentence of life imprisonment without parole.[97] That was held not to be an irreducible life sentence because Colorado has a mechanism for executive clemency. It was the availability of the system that was held to be relevant, not whether given the seriousness of the alleged offending the State Governor was unlikely to grant it.[98] The Court also held it was not necessary for the requesting state to be able to point to cases where offenders in a similar position had secured releases,[99] and concurred with the District Judge's reliance on the following passage from *Amnott v Lord Advocate*:[100]

> The existence of compassionate release and executive clemency within the US criminal justice system is sufficient to meet the requirements of Article 3 in the extradition context, even if it may not be likely that the appellants will be afforded either remedy over time.

[101] To similar effect is the following statement in *Kafkaris v Cyprus*:[101]

> 98 In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. An analysis of the Court's case-law on the subject discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy art 3 … It follows that a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full. It is enough for the purposes of art 3 that a life sentence is de jure and de facto reducible.

[102] This statement from *Kafkaris v Cyprus* was endorsed in the English extradition decisions of *Singler*,[102] and *Hafeez* where in the latter case it was also said that no subsequent authority in the ECHR has cast doubt on the fundamental principles articulated in *Kafkaris.*[103]

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96 *Singler v Government of the United States of America*, above n 67.
97 At [9].
98 At [56]–[63].
99 At [49] and [59].
100 *Amnott v Lord Advocate* [2022] HCJAC 6 at [38], cited with approval in *Singler v Government of the United States of America*, above n 67, at [54].
101 *Kafkaris v Cyprus* (2008) 49 EHRR 35 (Grand Chamber).
102 *Singler v Government of the United States of America*, above n 67, at [11] referring to the District Judge's summary. See also at [19] for Foster J's approval of the District Judge's summary.
103 *Hafeez v Government of the United States of America*, above n 89, at [48].

[103] In light of these authorities, we agree with the High Court that it was open to the Minister to find that Mr Dotcom was not facing an irreducible life sentence.[104] The Minister did not err either in law or fact and the decision was reasonable.

[104] None of the grounds of appeal having succeeded, it follows the appeal should be dismissed.

Costs

Costs on the appeal

[105] The appeal having failed, we make an award of costs in favour of each respondent against Mr Dotcom. The costs are to be calculated for a standard appeal on a band A basis together with usual disbursements. In each case, we certify for two counsel.

Costs on the application for an adjournment

[106] At the commencement of the hearing, we declined an application made on behalf of Mr Dotcom for an adjournment and awarded one set of costs to the respondents with a 50 per cent increase.

[107] The background is as follows.

[108] In November 2025, this appeal was allocated the fixture date of 21 April 2026.

[109] At 7.30 pm on 20 April 2026, counsel for Mr Dotcom filed and served a memorandum seeking an adjournment of the hearing. The memorandum was accompanied by an affidavit and a large volume of papers totalling some 130 pages. The material included medical reports relating to Mr Dotcom (the most recent of the reports being dated 29 January 2026) and a legal opinion from Mr Dotcom's US-based lawyer. The legal opinion was to the effect that a US Supreme Court decision issued on 25 March 2026, *Cox Communications Inc v Sony Music Entertainment*,[105] meant the US charges against Mr Dotcom could no longer be sustained.

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104 High Court judgment under appeal, above n 6, at [132].

105 *Cox Communications Inc v Sony Music Entertainment* 607 US ____ (2026), 146 S Ct 959 (2026).

[110] The memorandum also advised that Mr Dotcom was awaiting the Minister's decision on the further medical evidence which had been presented to him on 30 January 2026. It acknowledged that the medical evidence had been the subject of a previous application for an adjournment of the High Court hearing before Grice J.[106] An argument raised in support of that application was the risk of multiple additional review proceedings.[107] Grice J declined to grant an adjournment.[108] The memorandum submitted however that the recent US *Cox* decision now increased that risk of multiple additional judicial review proceedings and hence the desirability of an adjournment.

[111] In a joint memorandum, the respondents strongly opposed any adjournment and suggested it was an obvious attempt by Mr Dotcom to delay surrender to the US. Their counsel told us that although they had recently been in contact on a daily basis multiple times with Mr Dotcom's counsel regarding hearing length and the list of issues, there had been no indication of any possible request for an adjournment. A letter attaching the legal opinion from the US based lawyer and the *Cox* decision was only provided to the respondents at 3 pm on 20 April 2026. Even then Mr Dotcom's counsel did not indicate an adjournment would be sought. That did not eventuate until 7.30 pm.

[112] The respondents submitted that the health information had been the basis of four unsuccessful attempts in the High Court to adjourn the proceeding. On each occasion, in declining an adjournment, that Court had emphasised the need for prompt and expeditious resolution of extradition matters. The respondents further pointed out that when discussing timetabling in November 2025 for the hearing of this appeal, Cooke J was aware of the possibility of an application to the Minister regarding health information but clearly contemplated that even if that happened it would not prevent this appeal from proceeding.

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106 See High Court judgment under appeal, above n 6, at [161].
107 At [167].
108 At [5] and [161].

[113] As regards the US legal opinion, the respondents noted that the *Cox* decision appears to approve an earlier US decision,[109] which was discussed by our Supreme Court when finding Mr Dotcom was eligible for surrender in 2020.[110] The respondents also observed that neither the affidavit nor the memorandum filed in support of the adjournment specify when Mr Dotcom or his counsel first learnt of the *Cox* decision. All that was said in the memorandum filed on behalf of Mr Dotcom was that "the timing of this application for adjournment is unfortunate but regrettably this is simply a function of when the *Cox* decision was issued". The respondents however provided the Court with screenshots of five tweets made by Mr Dotcom between 27 and 31 March 2026 about the *Cox* decision and its effect on his case, including comments that it meant a dismissal or rehearing of the proceedings against him was now "unavoidable".

[114] The respondents submitted that the application for an adjournment should be declined with increased costs given the repetitive nature of the application, the proximity to the hearing and the apparent attempt to mislead the court.

[115] At the commencement of the hearing before us, we asked Mr Mansfield if he wanted to say anything more in support of the application for an adjournment. We also stated that in particular we would like him to address the suggestion in the respondents' memorandum about the Court being misled, given it appeared that despite Mr Dotcom knowing about the *Cox* decision back in March, the adjournment application was filed at the last minute.

[116] In response, Mr Mansfield said his instructions had been to advance an application for an adjournment but that as the memorandum had indicated he considered it was unlikely to be granted. He did not accept the Court had been misled or that increased costs were justified. He said the *Cox* decision had only come out at the end of March and given it was not that far through April he did not consider delay was a concern. He also stated the intention was only to appraise the Court of the *Cox*

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109 *Cox Communications Inc v Sony Music Entertainment*, above n 105, at 7, citing *Metro Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005).

110 Supreme Court eligibility judgment, above n 3, at [318]–[320], discussing *Metro Goldwyn-Mayer Studios Inc v Grokster Ltd*.

decision so as to avoid being criticised by the US or the Crown for belatedly raising it later.

[117] After hearing from Mr Mansfield, the panel briefly conferred and as mentioned declined the application for an adjournment with increased costs.

[118] However, during reply submissions, Mr Mansfield took the opportunity to return to the subject of the adjournment application. He said at the beginning of the hearing, he had been surprised by the Court asking him to respond to the suggestion Mr Dotcom had misled the Court, not having had an opportunity to consider the respondents' memorandum. He said he had not anticipated the respondents would file a memorandum because in his own memorandum it had been made "as clear as we could do" that counsel did not expect the Court would entertain an application for an adjournment and would likely proceed with a hearing. In his submission, given the date of the *Cox* decision and the fact the legal opinion was only received on 17 April 2026, it was not misleading to describe it as a recent development.

[119] Mr Mansfield further submitted that if the Court considers this late request for an adjournment really warranted increased costs, then "so be it", but the real likelihood was that if Mr Dotcom is surrendered to the US the costs will not be paid and the respondents will have to wait until he has served his sentence of up to 150 years or until his estate reaches probate.

[120] We understood Mr Mansfield's submission to be a request that we revisit the increased costs award.

[121] In our view, whatever the intentions were in seeking an adjournment, the fact remains it was sought. The respondents could not just ignore the application which was sprung on them at the very last minute. They were put to unnecessary expense in having to review the material and then respond to it literally overnight under urgency. To suggest that the eleventh-hour timing was simply a function of when the *Cox* decision was released was a misleading explanation in so far as Mr Dotcom was suggesting he had only just become aware of the decision. The tweets indicated he

had in fact been aware of it and its claimed effect on his own case back on 27 March. In short, the respondents were unreasonably taken by surprise.

[122] We therefore confirm the decision to award increased costs on the basis of a 50 per cent increase in the amount of the costs payable under the scale rules.

Outcome

[123] The appeal is dismissed.

[124] The appellant must pay each of the respondents costs for a standard appeal on a band A basis, together with usual disbursements. We certify for two counsel.

[125] The appellant must pay one set of costs to the respondents in relation to the adjournment application on the basis of a standard application, band A with a 50 per cent increase.

Solicitors:
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