

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-000170
[2026] NZHC 2887

UNDER	the Judicial Review Procedure Act 2016, the New Zealand Bill of Rights Act 1990, and the Extradition Act 1999
BETWEEN	KYUNG YUP KIM Applicant
AND	MINISTER OF JUSTICE First Respondent
	ATTORNEY-GENERAL Second Respondent

Hearing:	11-13 May 2026; further submissions 31 August 2026
Counsel:	B J R Keith and G K Edgeler for Applicant D P Neild and O Kiel for First and Second Respondents
Judgment:	24 September 2026

JUDGMENT OF LA HOOD J

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Introduction

[1] Mr Kim seeks judicial review of the Minister of Justice's decision that his extradition to China to face a murder charge remains appropriate. The People's Republic of China (PRC) has sought Mr Kim's extradition since 2011.

[2] On 3 March 2024, the Hon Paul Goldsmith (the Minister) decided that a 2016 decision to surrender Mr Kim to the PRC remains appropriate. In 2022, the Supreme Court upheld the 2016 decision in *Minister of Justice v Kim (Kim (No 2))*.¹ Minister Goldsmith gave Mr Kim an opportunity to provide written submissions before making his decision. Following review of those submissions, officials provided advice to the Minister that there had been no material change in circumstances since the Supreme Court's decision. On 5 March 2024, the Minister wrote to Mr Kim explaining why the decision to surrender him remained appropriate and attached a signed surrender order.

[3] Mr Kim says that substantial changes occurred in the two years between the Supreme Court's decision and the Minister's decision. Those changes include a deterioration in the bilateral relationship between the PRC and New Zealand, and amendments to the PRC's domestic law. Mr Kim submits the Minister's decision not to inquire into the matters raised by Mr Kim was unlawful for four main reasons. First, the decision was inconsistent with the duty not to extradite where there is a real risk of torture or an unfair trial. Second, the Minister made insufficient inquiries into the matters raised by Mr Kim and should have given him an opportunity to respond to any further information obtained. Third, in the absence of proper inquiry, the decision was irrational. Finally, the Minister made the decision for the impermissible purpose of avoiding further litigation.

[4] In terms of remedy, Mr Kim seeks a declaration that the respondents take no further step in respect of the PRC extradition request. He accepts that this would be an exceptional remedy only available if the Court determines that the only lawful decision that the Minister can make is to decline the request.

¹ *Minister of Justice v Kim* [2022] NZSC 44, [2022] 1 NZLR 38 [*Kim (No 2)*].

[5] The respondents (the Crown) say that there has only been one relevant change since the Supreme Court’s decision. Namely, the United Nations Human Rights Committee (UNHRC) considered the essence of Mr Kim’s complaint that extradition violated his rights under the International Covenant on Civil Political Rights (ICCPR) was “insufficiently substantiated”.² The Crown says that, in light of the Supreme Court’s decision and the UNHRC’s views, the Minister’s decision not to undertake a full reconsideration of the 2016 extradition decision was appropriate. The Crown submits nothing had changed that justified a full reconsideration, and such a reconsideration would have been contrary to the strong interest in timeliness and finality for extradition decisions.³

Summary of decision

[6] Overall, I have concluded that there was a reasonable basis for the Minister to be satisfied that there was no sufficiently material change in the circumstances since the Supreme Court’s decision to require a “wider reconsideration” of the extradition decision.⁴ In summary, I have reached this conclusion for the following reasons:

- (a) There was a reasonable basis for the Minister to be satisfied the PRC’s incentives to comply with the specific assurances provided had not changed to such an extent that a wider reconsideration of extradition was required, and that the assurances continued to protect Mr Kim from a real risk of torture or an unfair trial. The PRC’s continued motivation to comply with the assurances is confirmed by evidence from a very senior Ministry of Foreign Affairs and Trade (MFAT) official with direct experience of dealing with PRC officials responsible for Mr Kim’s case.

² International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and United Nations Human Rights Committee *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 4170/2022 CCPR/C/139/D/4170/2022* (2023) at [7.5]–[7.9], [7.11]–[7.12] and [7.14].

³ Relying on the Supreme Court’s observation that “extradition proceedings should proceed with as little delay as is possible while ensuring rights are protected”: *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [469] [*Kim* (No 1)].

⁴ *Kim* (No 2), above n 1.

- (b) The Minister had a reasonable basis to be satisfied that the bilateral relationship between the PRC and New Zealand had not changed to such an extent that wider reconsideration was required. Although there are real areas of difference between the PRC and New Zealand, there is no evidence that these differences have materially impacted on years of effective cooperation on international law enforcement.
- (c) Despite evidence of the PRC increasingly rejecting Western ideas and an increased likelihood of an unfair trial in the PRC, there was a reasonable basis for the Minister to conclude that this general risk is met by the specific and comprehensive assurances provided. As the Supreme Court considered the general risk to fair trial rights would be met by the assurances, further entrenchment of those general risks did not establish a material change that required the Minister to undertake a wider reconsideration of extradition.
- (d) There was a reasonable basis for the Minister to conclude that the PRC's obstruction of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in conducting its inquiry into the Xinjiang Uyghur Autonomous Region did not raise anything sufficiently material to require wider reconsideration. Allegations of human rights breaches in Xinjiang were addressed by the Supreme Court, and it concluded that they are met by the specific assurances provided in this case. Although the report raises general concerns about the PRC obstructing a United Nations monitoring body, that is of little relevance to whether the PRC will comply with specific assurances relating to New Zealand officials' ability to monitor Mr Kim in Shanghai.
- (e) There was a reasonable basis for the Minister to conclude that changes to PRC domestic law that might increase the risk of Chinese doctors being unlikely to report torture was not a material change that required a wider reconsideration of extradition. It was open to the Minister to

conclude that the specific assurances remain effective despite any increase in this general risk that was known to the Supreme Court.

- (f) The Supreme Court considered the assurances in this case were sufficient to protect Mr Kim despite his poor health.⁵ The evidence falls short of establishing sufficient change in Mr Kim's mental health to materially increase the likelihood of Mr Kim not reporting torture.
- (g) There was a reasonable basis for the Minister to conclude that evidence about the PRC denying consular access to Australian and Canadian nationals is not new, and that the circumstances of those cases are materially different to Mr Kim's case.
- (h) The Minister's decision did not wrongfully reframe Mr Kim's arguments, and there was a reasonable basis for the Minister to conclude that examples of the PRC's general conduct lacked a direct connection to Mr Kim's case. The Minister did not overlook the relevance of the European Court of Human Rights' case of *Liu v Poland*,⁶ and Canadian and Australian cases. It was open to the Minister to decide that not every new circumstance will justify revisiting the extradition decision. There was no error in the Minister referring to the exhaustive and careful consideration given to Mr Kim's case to date.
- (i) The Minister correctly considered he was not required to undertake a wider reconsideration of extradition in the absence of a sufficiently material change in circumstances. There was no error in the Minister's overall assessment of any changes in risk, and the adequacy and reliability of the assurances to meet that risk. No material information was withheld from the Minister, nor was there a failure to obtain relevant information. Nothing sufficiently material had changed since the Supreme Court decision to require a wider reconsideration of the

⁵ At [467]–[468].

⁶ *Liu v Poland* (37610/18) Section 1, ECHR, 6 October 2022.

extradition decision, or precluded the conclusion that extradition remained appropriate.

- (j) There was no breach of natural justice. The Minister gave Mr Kim an opportunity to provide extensive written submissions. The Minister read Mr Kim's letter and relied on the written advice of officials who had analysed the letter.
- (k) There is no impermissible purpose established by Ministry officials advising that fresh consideration of the extradition decision could result in complex judicial review proceedings. Noting that an entirely fresh decision would be more likely to expose the decision to judicial review does not on its own establish an impermissible purpose given the other factors the officials relied on to advise against a full reconsideration.

Background

[7] Mr Kim's case has an extensive procedural background. In 2015, the then Minister of Justice, the Hon Amy Adams (Minister Adams), determined that Mr Kim should be surrendered to the PRC to face a murder charge. The decision was judicially reviewed and set aside by Mallon J, with a direction that Minister Adams consider specific issues.⁷

[8] In 2016, Minister Adams reconsidered her decision, concluding that Mr Kim should be surrendered (the 2016 surrender decision). The High Court upheld that decision in 2017,⁸ but it was set aside by the Court of Appeal in 2019.⁹ In 2021, the Supreme Court in *Minister of Justice v Kim (Kim (No 1))* adjourned the appeal for the then Minister of Justice, the Hon Kris Faafoi (Minister Faafoi), to obtain additional assurances from the PRC on 27 discrete issues.¹⁰ The Court noted that Minister Faafoi must also consider any submissions made by Mr Kim.¹¹

⁷ *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [250]–[261].

⁸ *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 82 [Second Mallon J decision].

⁹ *Kim v Minister of Justice* [2019] NZCA 209, [2019] 3 NZLR 173.

¹⁰ *Kim (No 1)*, above n 3.

¹¹ At [472].

[9] Minister Faafoi considered surrender remained appropriate after obtaining further assurances from the PRC. He relied on advice from the then Minister of Foreign affairs and Trade, the Hon Nanaia Mahuta (Minister Mahuta) that the PRC's assurances could still be relied on. In April 2022, the Supreme Court upheld the surrender decision.¹²

[10] In 2022, the Government agreed not to surrender Mr Kim until the UNHRC had determined Mr Kim's complaint in respect of the extradition decision. The UNHRC dismissed Mr Kim's complaint in October 2023.¹³

[11] On 17 December 2023, Minister Goldsmith agreed to commence the next steps to implement the surrender decision and notified Mr Kim of his intention to do so.

[12] The assurances obtained from the PRC address Mr Kim's fair trial rights and his right to not be subjected to torture. There is also a monitoring regime to enable New Zealand consular staff to monitor Mr Kim and the PRC's compliance with the fair trial and torture assurances. The Supreme Court's decisions of *Kim (No 1)* and *Kim (No 2)* address in detail the adequacy of the assurances.¹⁴ The Supreme Court noted that as the need for assurances arises from the real risk of torture, it would be paradoxical to rule out reliance on assurances because of that risk.¹⁵

Mr Kim's submissions to the Minister

[13] After Minister Goldsmith notified Mr Kim of his decision to implement the surrender decision, Mr Kim's counsel wrote to the Minister on 5 February 2024. Mr Kim's detailed letter submitted that four circumstances amounted to a material change since the Supreme Court's decision, namely:

¹² *Kim (No 2)*, above n 1.

¹³ United Nations Human Rights Committee, above n 2. The complaint was only upheld in respect of a violation of Mr Kim's right not to be arbitrarily detained in respect of the short period of his detention between the expiry of the warrant on 12 September 2014 and the issuance of a new warrant on 1 December 2014 (see [8.19]).

¹⁴ *Kim (No 1)*, above n 3, at [212]–[264] and [277]–[299], [422]–[423], [448]–[465]; and *Kim (No 2)*, above n 1, at [32]–[40] and [42]–[76].

¹⁵ *Kim (No 1)*, above n 3, at [127].

- (a) The PRC had not secured extradition cooperation from other countries and had ceased efforts to obtain the lawful return of alleged offenders. Therefore, Mr Kim's case was no longer a test case for the PRC, and there was no longer an incentive to comply with the assurances.
- (b) The assurances had been given during a "relatively benign" period of New Zealand's relationship with the PRC. Since then, the bilateral relationship had significantly deteriorated.
- (c) The amendments to the PRC's domestic law increased the Communist Party of China's (Party) control of over sensitive cases. The PRC had increasingly rejected Western legal norms in favour of Chinese ideas. The PRC had also challenged the international rules-based order, including rejecting a 2022 report by the OHCHR into the Xinjiang Uyghur Autonomous Region (OHCHR report).¹⁶ As a result:
 - (i) The Supreme Court's conclusion that the PRC will interpret the torture and fair trial assurances consistently with international law is no longer tenable.
 - (ii) Mr Kim's case will be treated as a sensitive case and therefore be subjected to Party oversight. Mr Kim's fair trial rights would not be met as the decision-maker would not be independent.

[14] I will return to address these points below.

The Ministry of Justice's advice

[15] In a briefing paper dated 26 February 2024, the Ministry of Justice (the Ministry) provided its advice to Minister Goldsmith, including a summary of Mr Kim's arguments. Ministry officials advised the Minister that he should consider Mr Kim's submissions, that he retained responsibility for the surrender up until the

¹⁶ Office of the High Commissioner for Human Rights *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China* (2022).

point surrender occurs, and that he was entitled to depart from the 2016 surrender decision. The Ministry's advice included:

This is not a full-scale reconsideration of the entire original surrender decision. Instead, the focus of your consideration should be on whether the most recent information submitted by Mr Kim is so significant that you consider that it leads you to the view that, despite the previous decision and court judgments, surrender should now no longer proceed.

[16] The briefing recommended that a fresh full assessment of the extradition request was unnecessary because:

... requiring a fresh full assessment at each moment would lead to the extradition process becoming interminably stuck on repeat, and eventually entirely frustrated. The process will become never-ending if every new piece of information arising over time that might have had some relevance on the surrender decision, such as a new report on the general human rights situation in China, continually warranted revisiting and remaking a surrender decision.

[17] The Ministry of Justice said the issues raised by Mr Kim are not new:

... the sorts of general issues Mr Kim now points to are a continuation of those already well known and understood in 2021 by Ministers and in 2022 by the Supreme Court. While they note more recent events they ultimately amount to a continuation of the sorts of issues that have been raised in Mr Kim's various submissions to Ministers and courts over many years. They do not undermine or contradict what was already known. Mr Kim's arguments are not about his own position but are rather about a general worldview of China and its trustworthiness.

[18] In response to specific changes advanced by Mr Kim, the Ministry advised that:

- (a) Mr Kim overstated the effect of the European Court of Human Rights decision in *Liu v Poland* (*Liu*) by arguing that the PRC's efforts to obtain lawful extraditions had ceased after *Liu* barred extradition to the PRC from European Union member states.¹⁷ In *Liu*, the Court expressly noted formal diplomatic assurances had not been obtained, and Mr Liu was a Taiwanese citizen, which put him at special risk.¹⁸ The PRC remains incentivised to comply with the assurances it has given New Zealand, because:

¹⁷ *Liu v Poland*, above n 6.

¹⁸ At [82]–[84].

... the value it derives in respect of international law enforcement cooperation, not just in New Zealand but from other countries ... MFAT officials advise that China continues to strongly value cooperation in law enforcement with other countries and that this remains the case, despite developments in their foreign policy positions.

- (b) There were no changes in the bilateral relationship with the PRC that were relevant to Mr Kim's specific case. Mr Kim "points to highly generalised events and statements in international relations, and inferences about broad political developments in the PRC, but which have no direct relevance to Mr Kim's case".
- (c) On the changes to Chinese domestic law and the international law, the Ministry advised:

Having consulted with officials from [MFAT] we are of the view that recent developments in foreign policy and changes to Chinese law, such as Xi Jinping Thought, and the enactment of the Foreign Relations Law, do not affect Minister Mahuta's 2021 assessment in respect of the reliability of the assurances in this case.

- (d) The Ministry also addressed the OHCHR report. The Ministry explained that the report was about the human rights situation in the Xinjiang Uyghur Autonomous Region in the PRC, which had been expressly considered by Minister Mahuta in her 2021 advice. As Minister Mahuta had noted, Mr Kim's case has no connection to Xinjiang. The Ministry said information in the OHCHR report was not new (as it confirmed what was already known), had already been considered, and was not relevant to assessing the personal risk to Mr Kim.

The Minister's decision

[19] The Minister has filed an affidavit deposing that he read the February 2024 briefing paper and Mr Kim's counsel's February 2024 letter.

[20] In his letter to Mr Kim dated 5 March 2024, the Minister informed Mr Kim that his surrender remains appropriate:

I am of the view that the matters raised in your counsel's recent submission focus on general human rights issues and foreign policy issues that have no direct connection to your case. They also refer to overseas cases or situations that I do not consider have comparable factual circumstances to your position.

[21] The Minister acknowledged the concern about the real risk of torture or an unfair trial, and said that the Government obtained specific and detailed formal diplomatic assurances from the PRC for that reason. However, the Minister noted that the Supreme Court had upheld the decision to surrender Mr Kim, giving consideration to the specific risks to Mr Kim, his personal characteristics, the general situation in the PRC, the particular formal assurances provided by the PRC, and the likelihood that the assurances would be honoured.

[22] In relation to Mr Kim's challenge to the process adopted by Minister Faafoi, the Minister noted the Supreme Court's findings in *Kim (No 2)* that Minister Faafoi was entitled to rely on the advice of Minister Mahuta on questions of international relations and the reliability of the PRC's assurances.

[23] The Minister said that he kept an "open mind" to the possibility of a significantly material change in the circumstances that would halt extradition or for the decision to be reassessed in full again. However, "not every new piece of information or change in circumstances will warrant reconsideration of a prior decision". The Minister considered that Mr Kim's counsel was attempting to relitigate issues that had already been considered in "great depth" and said:

While [arguments made by Mr Kim's counsel] note more recent events they ultimately amount to a continuation of the sorts of issues that have been raised in your counsel's various submissions to Ministers and courts over many years. They do not materially alter the position considered in exhaustive detail, and determined to be appropriate, by previous Ministers, numerous courts, and the UNHRC ...

I do not see a basis for reopening this case yet again. Your case has had exhaustive and careful consideration, on many occasions, at the highest levels. It must eventually reach a conclusion.

[24] In relation to Mr Kim's health, the Minister concluded that there was no material change since the issue was considered by Minister Faafoi in 2022. Therefore, Mr Kim's health did not provide a reason to prevent surrender.

The overarching question for determination

[25] Against that background, it is helpful to start by considering the overarching question for determination having regard to the proper approach to judicial review in this context.

The question for Minister Goldsmith

[26] I will start by considering the fundamental question that Minister Goldsmith was required to address.

[27] In an interlocutory judgment declining discovery and further particulars of the statement of defence in this case, I described the Minister's decision as follows:¹⁹

[17] ... Although the Minister did not undertake a full-scale reconsideration of the 2016 surrender decision, he nevertheless made a decision that surrender remains appropriate ...

[19] ... the essential issue in the proceeding will be whether it was lawful for the Minister to decline to undertake a full-scale reconsideration of the 2016 surrender decision and instead to undertake a limited review of the original decision based on the information before him.

[28] The Court of Appeal, in upholding that interlocutory decision, described the Minister's decision in this way:²⁰

... the issue for the Court in the substantive application is not whether the various factual assertions made by Mr Kim could be proven if information not before the Minister was taken into account. Rather, it is whether the Minister acted lawfully in failing to undertake a *wider reconsideration* of the circumstances said to justify Mr Kim's extradition and, specifically, that Mr Kim's BORA-protected rights would be at risk ...

[29] Mr Keith, for Mr Kim, notes that a "full-scale" reconsideration of the surrender decision was never sought. However, I do not understand Mr Keith to take issue with the Court of Appeal's description of Mr Kim's essential complaint, namely that the Minister acted unlawfully by failing to undertake a "wider reconsideration" of the surrender decision.

¹⁹ *Kim v Minister of Justice* [2024] NZHC 2183 [Interlocutory decision].

²⁰ *Kim v Minister of Justice* [2025] NZCA 623 at [26] (emphasis added) [CA leave to appeal decision].

[30] I accept the Crown submission that mapping the decision onto the statutory framework of the Extradition Act 1999 is not straightforward. The Act does not expressly contemplate ministers revisiting a previous minister’s surrender decision. Once the District Court found Mr Kim eligible for surrender (on 29 November 2013),²¹ the Minister “must” determine whether Mr Kim should be surrendered under s 30. Once that decision was made, the Minister “must” make a surrender order under s 31 (subject to restrictions around timing). In this case, Minister Adams made the relevant s 30 decision on 19 September 2016, which was upheld by the Supreme Court in April 2022. Minister Goldsmith signed the s 31 surrender order on 3 March 2024. But he also decided that surrender remained appropriate, which is the decision that is being reviewed.

[31] I accept the Crown’s submission that the decision to surrender can be framed in two ways. In my interlocutory judgment, I considered Minister Goldsmith made a decision under s 30 on a more limited basis than Minister Adams’ 2016 decision.²² The Crown says an alternative framing is that Minister Goldsmith made a decision not to revisit the 2016 decision. In other words, Minister Goldsmith declined to exercise his powers under s 30, and his “limited review” was in support of that decision. The Crown submits that this alternative framing best fits the documentary record. For example, the Minister’s letter to Mr Kim stated that “I do not see a basis for reopening this case yet again”.

[32] An ability to revisit the decision is consistent with Mallon J’s observations in the High Court and the approach of the Supreme Court. Mallon J observed that the nature of the issues at stake are such that it might be said that the Minister is able to revoke the decision to surrender up until the decision is implemented.²³ In its first decision, the Supreme Court said that Minister Faafoi would be entitled to depart from the previous Minister’s decision following receipt of any updated information and additional assurances.²⁴

²¹ *Re Kim* DC Auckland CRI-2011-004-11056, 29 November 2013.

²² Interlocutory decision, above n 19, at [17].

²³ Second Mallon J decision, above n 8, at [36].

²⁴ *Kim (No 1)*, above n 3, at [473].

[33] It is common ground that Minister Faafoi did not undertake a full reconsideration of Minister Adams' 2016 decision. He considered the additional assurances provided by the PRC satisfactorily addressed the Supreme Court's concerns, and concluded there were no substantial grounds for believing that Mr Kim would be at risk of torture or an unfair trial. He also accepted Minister Mahuta's advice that the PRC's assurances can still be relied on. He therefore considered it appropriate to ask the Supreme Court to confirm that the further assurances resolved the outstanding issues.

[34] In its second decision, the Supreme Court did not treat Minister Faafoi's decision as replacing Minister Adams' 2016 decision. The Supreme Court said it had "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".²⁵ If the Minister was so satisfied, the case would return to the Court for it to make its assessment. The Court concluded that 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" or would face an unfair trial.²⁶ To give effect to these findings, the Court reinstated Minister Adams' 2016 decision. The Supreme Court's approach appears to confirm it was open to Minister Goldsmith to exercise the s 30 power on a limited basis to satisfy himself that surrender remained appropriate.

[35] Ultimately, little turns on this point, as the Crown accepts that, however the decision is framed, it is amenable to review and the essential issues for determination remain the same.

[36] I consider the essential issues in this case are encapsulated by passages from the Supreme Court's second decision. Following a summary of Minister Mahuta's advice that PRC's assurances were reliable, the Court said:²⁷

[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

²⁵ *Kim (No 2)*, above n 1, at [15].

²⁶ At [40] and [76].

²⁷ *Kim (No 2)*, above n 1 (footnotes omitted).

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. 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 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.

[37] The Court then reached the following conclusion on the 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. 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. 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".

[38] The Court's conclusion on fair trial was:

[76] ...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.

[39] Thus, I consider the question for Minister Goldsmith was whether there was a real risk that the position had changed to such an extent that the assurances could no longer be seen as providing the protection that the Supreme Court decided they provided at the time of its decision. In other words, was there evidence of a sufficiently material change in the circumstances since the Supreme Court's decision to require a "wider reconsideration" of the extradition decision?

The correct approach to judicial review in this context and the essential question for the Court

[40] In its written submissions, the Crown argued that because the Minister decided not to undertake a full reconsideration of Minister Adams' decision, I am not required

to make my own assessment of whether the extradition decision is consistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The Crown submitted that the Supreme Court has already found that the decision was consistent with the Bill of Rights. This means, the Crown said, the only decision for the High Court is whether anything sufficiently material has changed that would preclude Minister Goldsmith from finding that extradition remained appropriate, or that required him to undertake more extensive inquiries. However, during oral argument the Crown accepted Minister Goldsmith's decision would be unlawful if it has the effect of breaching Mr Kim's rights not to be subjected to torture or an unfair trial protected by ss 9 and 25 of the Bill of Rights.

[41] I accept that my task is not to judicially review Minister Adams' decision, and that the Supreme Court has already found that the decision was compliant with the Bill of Rights. Rather, my task is to determine whether Minister Goldsmith's decision was consistent with Mr Kim's protected rights.

[42] Although both the rights engaged here are absolute rights, the Supreme Court has made it clear that neither right will be infringed if there is no real risk of torture or an unfair trial.²⁸ As the Supreme Court said, this test appropriately recognises the other important rights and interests involved in extradition, particularly "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, subject to suitable sanctions".²⁹

[43] In my decision declining Mr Kim leave to appeal my interlocutory decision, I made the following observations about the approach to judicial review:³⁰

[9] Mr Kim says the Court's role in this case, where fundamental human rights are engaged, is to reach its own view on the appropriateness of Mr Kim's extradition with limited (if any) regard to the context of the Minister's decision. The Court will have to form its own view irrespective of the material before the Minister and therefore discovery is necessary of all material held by the Ministry of Foreign Affairs and Trade (MFAT) that contributed to its institutional knowledge when providing its advice. This is despite such material not being reviewed or directly relied on by MFAT when

²⁸ See, for example *Kim (No 1)*, above n 3, at [131] and [277].

²⁹ *Kim (No 1)*, above n 3, at [135]; *Kim (No 2)*, above n 1, at [40].

³⁰ *Kim v Minister of Justice* [2024] NZHC 3662 [Leave to appeal decision].

providing its advice to the Ministry of Justice (MOJ), not being provided to the MOJ or the Minister, and not relating specifically to Mr Kim's extradition or the assurances provided by the PRC.³¹

[10] Mr Kim submits this approach is required because the Supreme Court's decisions in *A (SC 70/2022) v Minister of Internal Affairs* and *Moncrief-Spittle v Regional Facilities Auckland Ltd* have fundamentally changed the approach to applications for judicial review in human rights cases.³² He says these cases hold that the Court must consider all matters afresh and substitute its discretion for that of the decision maker. Mr Kim submits that this means the Court can take into account any evidence available at the date of the Court hearing, whether or not it was (or should have been) before the decision maker, including material that has come into existence since. This, it is submitted, means that the MFAT material sought must be discovered in these proceedings and placed before the Court for it to exercise its own discretion about the risk of torture or unfair trial. It follows that my framing of the essential issue on this judicial review is, at least arguably, wrong.

[11] If Mr Kim's interpretation of these decisions is correct, I agree with his submission that they have "revolutionised" the law of judicial review in cases involving Bill of Rights compliance. It would turn judicial review in such cases into the equivalent of a full merits appeal (although it seems without even the requirement for the Court to be persuaded that the decision was wrong).³³

[12] I do not accept it is arguable that these decisions have revolutionised the law in the way suggested.³⁴

[13] My reading of the relevant passages in *A (SC 70/2022) v Minister of Internal Affairs* (where the Court also discusses its decision in *Moncrief-Spittle*)³⁵ is that the Court was doing no more than confirming the established principle that substantive rights compliance is a legal issue for the Court not a matter of discretion.³⁶ The Court concluded that if the statutory grounds for the decision were satisfied it is likely to be a justified limit on rights; and a failure to address rights compliance would not be fatal to the validity of a decision, but that did not mean those advising the Minister should feel free not to address it.³⁷

[14] There is no suggestion in these passages that the Court intended to fundamentally alter the approach to judicial review in human rights cases by requiring the Court to start afresh and substitute its own discretion for that of the decision maker. In fact, an earlier passage in the judgment suggests no such intention. In the statute under consideration there was an express power for the Court to substitute its own discretion for that of the Minister. The Court

³¹ Interlocutory decision, above n 19, at [31].

³² *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372; and *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 [*Moncrief-Spittle*].

³³ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

³⁴ *A (CA677/2020) v Minister of Internal Affairs* [2022] NZCA 257.

³⁵ *A (SC 70/2022) v Minister of Internal Affairs*, above n 32, at [137]–[141].

³⁶ See *New Health New Zealand Inc v Director-General of Health* [2023] NZHC 3183, [2024] 2 NZLR 1 at [11]–[15].

³⁷ *A (SC 70/2022) v Minister of Internal Affairs*, above n 32, at [140].

described such a power as “unusual” and a “major modification of the normal approach to judicial review” that “should be exercised with some caution”.³⁸ This is difficult to reconcile with Mr Kim’s submission that the Court made such a major modification to judicial review in human rights cases without expressly saying so.

[15] The Court’s role on judicial review is always context specific. It is required to ascertain the legal limits or controls on the power conferred by the statute.³⁹ This requires consideration of the statutory scheme, the nature of the decision, the nature of the decision maker, and whether fundamental rights are engaged. If fundamental rights issues are engaged, the exercise of the power must be consistent with those rights. However, rights-consistency must be assessed by reference to all the circumstances in which the decision was made.

[16] In this case, the Supreme Court has decided how the Court should approach reviewing a decision to extradite Mr Kim to the PRC under s 30 of the Act. The Court declined to make definitive general statements about the standard of judicial review in extradition cases.⁴⁰ However, it noted the need to have regard “to the executive’s assessment of certain aspects of the extradition decision where the executive possesses particular expertise or some other form of competence relative to the court” would mean “that a correctness standard would be difficult to apply in practice”.⁴¹ It then said that if the Court “taking into account the Minister’s expertise where appropriate, considers that there are substantial grounds for believing Mr Kim will be at risk of torture or that he will not receive a fair trial, then it would be unlikely to conclude that it was reasonably open to the Minister to decide to surrender Mr Kim to the PRC”.⁴²

[17] In reaching its ultimate conclusions, the Court was “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.”⁴³ And “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.”⁴⁴

³⁸ At [86] and [93].

³⁹ I agree with Cooke J that the Court’s approach to judicial review is governed by the express and implied legal limits or controls on the power conferred by the statute: *Patterson v District Court, Hutt Valley* [2020] NZHC 259 at [14]–[16]; *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [83]–[85]; *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53]–[55]; and *One Foundation v Minister of Internal Affairs* [2023] NZHC 3869 at [14]–[17].

⁴⁰ *Kim (No 1)*, above n 3, at [51].

⁴¹ At [49].

⁴² At [50].

⁴³ *Kim (No 2)*, above n 1, at [40].

⁴⁴ At [76].

[18] It follows that the Supreme Court in this case did not approach its task in the way that Mr Kim now suggests is mandated, by starting afresh and substituting its discretion for that of the Minister.⁴⁵

[19] It is clear the Minister did not undertake a full-scale reconsideration of the surrender decision in this case. He concluded that surrender remained appropriate submitted to him by Mr Kim, Mr Kim's personal circumstances, and the diplomatic assurances given by the PRC.⁴⁶ The question is whether, in all the circumstances, he was reasonably entitled to reach that conclusion.

[44] The Court of Appeal decision on declining leave to appeal the interlocutory application also partly addressed this issue:⁴⁷

[21] In *A (SC 70/2022) v Minister of Internal Affairs and Attorney-General v Chisnall*, the Supreme Court confirmed that where a decision is challenged as being substantively inconsistent with the New Zealand Bill of Rights Act 1990 (BORA), it is for the Court itself to determine whether the decision is inconsistent with the rights engaged. Mr Kim wishes to argue that the effect of these decisions is that the Court is now required to make the assessment of inconsistency on the basis of such information as is reasonably available — not limited to that put before the decision maker — and further, the extent of candour is correspondingly heightened. He says that, on this approach, the necessary assessment in this case is not possible without further particulars of the Crown's position and discovery.

[22] In the leave decision, the Judge recorded Mr Kim's argument as follows:

[9] ... The Court will have to form its own view irrespective of the material before the Minister and therefore discovery is necessary of all material held by [the] Ministry of Foreign Affairs and Trade (MFAT) that contributed to its institutional knowledge when providing its advice. This is despite such material not being reviewed or directly relied on by MFAT when providing its advice to the Ministry of Justice (MOJ), not being provided to the MOJ or the Minister, and not relating specifically to Mr Kim's extradition or the assurances provided by the PRC.

⁴⁵ I have not overlooked Mr Kim's reliance on *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433. In that case, the United Kingdom Supreme Court held that it was a question of law for the Court's determination whether a policy of removal of asylum seekers to Rwanda was rights-compliant. In the context of that case, this required the Court to form its own view about whether there were substantial grounds for believing there was a risk of ill treatment in Rwanda. It does not appear that the Court went as far as suggesting that its task was to start afresh and substitute its view for that of the decision maker (for example, the Court held that the Government's assessment of the risk of ill treatment was an important element of the evidence the Court was required to take into account, at [57]). But even if I am wrong about this, it is the New Zealand Supreme Court's approach that must be determinative.

⁴⁶ Leave to appeal decision, above n 30, at [17]–[18].

⁴⁷ CA leave to appeal decision, above n 20 (footnotes omitted).

[23] The Judge did not accept this argument and, specifically, did not accept that the decisions relied on by Mr Kim had the effect he contended for.

[24] We do not consider the propositions Mr Kim wishes to advance are arguable. First, to state the obvious, both of the Supreme Court cases cited involved substantive evaluations by the Court: in *A (SC 70/2022) v Minister of Internal Affairs* of the information before the Minister, and in *Attorney-General v Chisnall* of the information before Parliament. In *A (SC 70/2022) v Minister of Internal Affairs*, there was a statutory mandate to engage in that evaluation, and even then the Supreme Court expressed caution about the scope of the inquiry, and doubted whether the Court could go beyond the material that was before the Minister. In *Attorney-General v Chisnall*, the Court was engaged in a substantive evaluation of BORA consistency. That context is far removed from the present.

[45] In *Chief of Defence Force v Four Members of the Armed Forces (Four Members)*, the Supreme Court confirmed what I described in my interlocutory decision as the well-established principle that it is for the Court to determine Bill of Rights consistency. The Court should not defer to the decision-maker's assessment.⁴⁸ This confirms the obvious proposition that it is for the Court to determine whether a statute or fundamental rule of law has been complied with.⁴⁹

[46] However, *Four Members* also provides guidance on *how* the Court should determine Bill of Rights consistency, and the appropriate approach to judicial review when fundamental human rights are engaged. The Court held that a range of factors will determine the “margin of appreciation” afforded to the decision-maker when protected rights are engaged.⁵⁰ These include the particular right engaged, the nature and extent of any limitation on it, the nature of the justification, the scope of legislative authority to make the decision, and the knowledge and expertise of the decision-maker relative to the Court.⁵¹ The Court then went on to identify the matters in favour of, and in opposition to, affording the decision-maker a margin of appreciation in that case.⁵² The Court recognised that various descriptions are used for affording a margin of appreciation to the decision-maker, including deference, leeway, and weight. The Court did not find it appropriate to insist that courts use particular language. The Court

⁴⁸ *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [99] and [102] [*Four Members*].

⁴⁹ *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70 (HCA) at 611 per Brennan J; *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 per Elias CJ and Arnold J at [1].

⁵⁰ *Four Members*, above n 48, at [105].

⁵¹ At [105].

⁵² At [106]–[107].

said that the various terms do not signify the Court is abandoning its duty to make its own assessment, but that a decision may be lawful if it “lies within a range of reasonable alternatives”.⁵³

[47] The Court in *Four Members* did not specifically address the framing of the Court’s approach to judicial review favoured by Cooke J in a line of cases referred to in my decision declining leave to appeal the interlocutory decision.⁵⁴ I prefer Cooke J’s formulation over the use of terms such as “deference” or “intensity of review”. Cooke J’s formulation better reflects that the Court’s constitutional role in every case is to determine whether a decision was made within its lawful boundaries. It is those boundaries that vary between cases rather than the intensity with which the Court goes about its task. However, I consider this is no practical difference between Cooke J’s framing and the approach of the Supreme Court in *Four Members*. Ultimately, the Court’s role is to assess whether the decision was lawful. The possible approaches to that assessment include: assessing whether the decision was within the legal limits imposed on the decision-maker (Cooke J’s formulation); or within the margin of appreciation afforded to the decision-maker (the *Four Members* formulation); or whether it was lawful having regard to the appropriate intensity of review. These are essentially different ways of describing the same approach.

[48] However, caution is required in applying *Four Members* in this case, as *Four Members* involved review of rights capable of limitation under s 5 of the Bill of Rights whereas the rights engaged here are not capable of limitation. But the approach required to determine rights consistency in this case, namely whether there is a real risk of a rights violation, involves similar elements to those involved in conducting a s 5 proportionality assessment. For example, it involves the prediction of future events, an inherently imprecise assessment about which reasonable minds can differ.⁵⁵

⁵³ At [102].

⁵⁴ Leave to appeal decision, above n 30, at [15]. Cooke J’s framing of the approach to judicial review is endorsed in at least one Court of Appeal decision and High Court decisions: *One Foundation v Minister of Internal Affairs*, above n 39; *Christian Congregation of Jehovah’s Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2024] NZCA 128; [2024] 2 NZLR 534 at [29]; *All Abroad Aotearoa Inc v Auckland Transport* [2022] NZHC 1620 at [87]; and *New Zealand Steel Ltd v Minister of Commerce and Consumer Affairs* [2021] NZHC 966 at [72].

⁵⁵ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 at [32].

It also involves an assessment where the executive has greater institutional capability and expertise, as the Supreme Court recognised.⁵⁶ Further, account should be taken of the objectives of mutual cooperation and comity between nations central to extradition.⁵⁷ As already noted, the Supreme Court emphasised that victims of serious crime and society generally have the right to expect “those accused of crimes are tried and, if convicted, suitable sanctions are imposed.”⁵⁸ Thus, there should be recognition that it is constitutionally appropriate that the statutory decision maker bears the responsibility for making the decision, and the Court should be slow to substitute its own decision.⁵⁹

[49] These factors support the Minister having a margin of appreciation when making an extradition decision. In this case, the point is further supported by the nature of the decision in question. This was a decision that surrender remained appropriate following a detailed review of the merits of Mr Kim’s extradition by the courts and executive over many years. I do not accept Mr Kim’s submission that the Crown overstates the level of consideration given to Mr Kim’s case because there has effectively only been one comprehensive lawful consideration of its merits by Minister Adams in 2016, which was ultimately upheld by the Supreme Court. The history of Mr Kim’s case self-evidently does not support that submission. Indeed, one of the main reasons the Supreme Court adjourned Mr Kim’s case rather than requiring the Minister to reconsider it was “the detailed consideration that has already been given to the matter to date, both by the Minister and the Courts”.⁶⁰

[50] On the other hand, as the Supreme Court emphasised, this case engages absolute rights.⁶¹ The Court simply cannot countenance extradition in circumstances where there is a real risk of a breach of those rights. This factor narrows the margin of appreciation, and required the Minister to carefully assess the material advanced by Mr Kim. However, I do not consider the authorities referred to above, particularly the Supreme Court’s decisions in *Kim (No 1)* and *Four Members*, require me to apply a

⁵⁶ See, for example, *Kim (No 2)*, above n 1, at [39].

⁵⁷ *Dotcom v Minister of Justice* [2026] NZCA 284 at [48].

⁵⁸ *Kim (No 2)*, above n 1, at [40] citing *Kim (No 1)*, above n 3, at [135].

⁵⁹ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*, above n 55, at [99].

⁶⁰ *Kim (No 1)*, above n 3, at [472].

⁶¹ At [135].

correctness standard of review and effectively substitute my decision for that of the Minister. As Lord Sumption noted in the United Kingdom Supreme Court decision of *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* “[h]owever intense or exacting the standard of review in cases where convention rights are engaged, it stops short of transferring the effective decision-making power to the courts”.⁶²

[51] I am further comforted in this conclusion by the Court of Appeal’s recent decision in *Dotcom v Minister of Justice*.⁶³ Mr Dotcom sought judicial review of the Minister’s surrender decision on the basis that there was a risk of disproportionately severe punishment in breach of s 9 of the Bill of Rights. The Court did not apply a correctness standard in holding that “it was open to the Minister to find that Mr Dotcom was not facing an irreducible life sentence.”⁶⁴

[52] I consider the most authoritative guidance is the approach taken by the Supreme Court in this case (see [36] to [38] above), supported by the approach in *Four Members*, adapted to the specific context of Minister Goldsmith’s decision. Thus, I consider the overarching question for determination is whether the Minister had a reasonable basis to be satisfied that the position had not changed to such an extent that the PRC’s assurances no longer protected Mr Kim from a real risk of torture or an unfair trial. Whether there was such a reasonable basis will include assessment of any expert advice provided by MFAT in its areas of expertise, which include matters of international and bilateral diplomatic relations, incentives for cooperation and general transnational criminal matters.⁶⁵

[53] Of course, there are a number of discrete issues that require consideration to enable determination of that overarching issue. These have been addressed by the parties under a number of distinct grounds of review, a practice that has developed in modern judicial review over decades. As Professor Dean Knight has recently noted,⁶⁶

⁶² At [31].

⁶³ *Dotcom v Minister of Justice* [2026] NZC 284 at [103].

⁶⁴ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*, above n 55, at [103].

⁶⁵ *Kim (No 2)*, above n 1, at [39].

⁶⁶ Dean Knight “The (forbidden) lyrics of deference: relativity in judicial supervision of administrative action in Aotearoa New Zealand” (paper presented to Administrative Law Forum, Stockholm, June 2025).

grounds of review have evolved from the overarching “tripartite” grounds famously formulated by Lord Diplock in 1985,⁶⁷ namely illegality, procedural impropriety and irrationality. That formulation aligns with Lord Cooke’s later statement that the “substantive principles of judicial review are simply that the decision-maker must act in accordance with law, fairly and reasonably”.⁶⁸ Professor Knight notes that reasoning through grounds of review is the dominant tradition in New Zealand,⁶⁹ and that the tripartite grounds carry with them more particularised sub-grounds.⁷⁰

[54] However, there is considerable overlap between grounds of review, both at the tripartite and sub-ground levels, and they should not be treated as if they are the equivalent of separate causes of action in a private law proceeding. As Professor Knight notes, in *Ririnui v Landcorp Farming Ltd*, the Supreme Court signalled they were agnostic about whether an alleged error was one of law or fact as it was sufficient the “exercise of public power ... was based on a material error.”⁷¹ Discrete grounds of review are a helpful organising device for assessing whether a decision has been made within its lawful boundaries, but care should be taken to avoid complexities that can detract from assessment of the overarching issues. This accords with judicial review being a “simple, untechnical and prompt” procedure.⁷²

⁶⁷ *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)* [1985] AC 374 (HL) at 410–411.

⁶⁸ Robin Cooke “The Struggle for Simplicity in Administrative Law” in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, 1986) 1 at 5. The threefold classification mimics Lord Diplock’s categorisation, although Lord Cooke observed that he expressed these principles in similar form some five years before *GCHQ*: At 6, referring to Robin Cooke “Third Thoughts on Administrative Law” [1979] NZ Recent Law 218 at 225. See also *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552; and *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 352.

⁶⁹ Knight, above n 66, at 4.

⁷⁰ At 5.

⁷¹ *Ririnui v Landcorp Farming Ltd*, above n 49, at [54] and [90] per Elias CJ and Arnold J, and Glazebrook and O’Regan JJ concurring on this point at [147] and [150].

⁷² CA leave to appeal decision, above n 20, at 19 citing *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 at [39], citing *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353; and *Commerce Commission v Powerco Ltd* CA123/06, 9 November 2006 at [40].

Issues for determination

[55] I consider the appropriate approach to assessing the overarching question for determination in this case is to address the parties' arguments under the following issues:

- (a) Has there been a material change in the PRC's incentive to comply with the assurances?
- (b) Has there been a material change in the bilateral relationship between the PRC and New Zealand?
- (c) Will the PRC interpret the torture and fair trial assurances consistently with international law?
- (d) Will the monitoring assurances be effective to prevent the real risk of torture?

[56] However, before turning to consider those issues, I will address two preliminary rulings in respect of the evidence of the Crown's expert witness, Graham Morton. I will also address the relevance of post-decision evidence in the context of this case.

Preliminary rulings on Mr Morton's evidence

Application to cross-examine

[57] On the first day of the hearing, I made an oral decision granting Mr Kim's application to cross-examine the Crown witness, Graham Morton, with reasons to follow. I decided that this was a rare case where cross-examination was appropriate.⁷³ I will state my reasons briefly. However, caution should be taken in relying on this decision as setting any sort of precedent. It was a decision made under time pressure on the first day of the hearing rather than with the additional time that a separate interlocutory hearing would have afforded.

⁷³ *Geary v Psychologists' Board* [2009] NZCA 134; [2009] NZAR 338 at [22]-[23]; and *Edwards v Toime (No 1)* [2005] NZAR 140 (HC) at [23].

[58] Mr Morton is the Deputy Secretary, Americas and Asia Group at MFAT and served as New Zealand's Ambassador to the PRC from 2022 to 2024. In his current role, and previously as New Zealand's Ambassador to the PRC, his responsibilities include managing New Zealand's bilateral relationship with the PRC. His previous roles have included High Commissioner to India from 2014 to 2017, Principal Advisor to the Asia and Americas Group from 2018 to 2020, and Director of the North Asia Division from 2009 to 2014.

[59] There was force in the Crown submission that the aspects of Mr Morton's evidence on which cross-examination was sought were not directly relevant to whether there have been material changes since the Supreme Court decision. For example, whether the assurances considered by the Supreme Court are "comprehensive" or whether they were negotiated over many years.

[60] However, I considered I would be assisted by hearing whether Mr Morton accepted he had made specific errors in his assessment of the material on which his opinions were based; and if so whether that changed his ultimate conclusion that the PRC's assurances could still be relied on and would remain effective. I considered Mr Morton's response could be of substantial assistance, given I had received affidavit evidence from four experts engaged by Mr Kim who reached the opposite conclusion. Further, this was a rare case where cross-examination could be accommodated within the allocated hearing time and would cause no delay to completion of the case. Importantly, it was accepted that the cross-examination would be confined to a limited number of clearly identified issues.

Admissibility of Mr Morton's evidence on PRC law

[61] At the same time as hearing argument on the application to cross-examine Mr Morton, I heard argument on the admissibility of nine paragraphs of Mr Morton's 58 paragraph affidavit. Mr Kim submitted that those paragraphs related to expert evidence on foreign law, an area where Mr Morton accepts that he has no expertise.

[62] There was considerable artificiality in providing a formal ruling in circumstances where I was required to read and consider the evidence to rule on its admissibility. For this reason, I indicated I would consider admissibility at the

conclusion of the case, but I could ultimately conclude that it is preferable to treat the issue as a matter of weight rather than admissibility.

[63] The passages of the affidavit to which objection were taken are primarily directed at the impact of changes in the PRC's domestic law on the diplomatic assurances provided. To the extent that Mr Morton sets out his understanding of those changes, given the limitations on his expertise, I accept caution is required before placing weight on matters involving technical aspects of the law. However, I do not accept that Mr Morton, as a former ambassador to the PRC and Deputy-Secretary at MFAT responsible for Asia, is unqualified to offer *any* opinion on the impact of changes on the PRC's domestic law on diplomatic assurances.

[64] First, I note that the Supreme Court's second decision expressly recognised that the Minister of Foreign Affairs and Trade's expertise "extends to general transnational criminal matters."⁷⁴ I accept the respondent's submission that such expertise necessarily extends to the Ministry and its officials.⁷⁵ Mr Morton is undertaking a similar expert assessment to that undertaken by the Minister of Foreign Affairs and Trade relied on by the Supreme Court. That advice was extensively referred to by the Supreme Court without any suggestion that the advice on the PRC's domestic law was inadmissible.⁷⁶ Moreover, I note Mr Kim's expert on the PRC's diplomatic relations, Dr Sophie Richardson, gives similar evidence about her understanding of changes in the PRC's domestic law and their impact on the assurances given. For these reasons, I consider the correct approach is to treat the limitations on Mr Morton's expertise as a matter of weight rather than admissibility.

The relevance of post-decision evidence

[65] Both parties adduced expert evidence that was unavailable to the Minister. The starting point is that judicial review applications are normally decided on the basis of the material before the decision maker.⁷⁷ Expert opinion evidence is admissible only if it is substantially helpful to the court in determining whether the decision was

⁷⁴ *Kim (No 2)*, above n 1, at [39].

⁷⁵ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*, above n 55, at [46].

⁷⁶ *Kim (No 2)*, above n 1, at [23], [30], [36]–[39].

⁷⁷ *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2025] NZCA 80, [2025] 2 NZLR 808 at [59].

lawful.⁷⁸ This can include contextual evidence or evidence explaining technical concepts the court is not familiar with. I accept Mr Kim's submission that the expert evidence I have received on the PRC's domestic law falls into this category.⁷⁹

[66] Post-decision expert evidence challenging the quality of the decision making, or the substantive reasonableness of an expert decision maker's assessments, is inadmissible because generally it is not relevant to the issues for determination on judicial review.⁸⁰

[67] However, the Court considers Bill of Rights consistency at the time the decision was made.⁸¹ This means post-decision evidence addressing Bill of Rights consistency that was reasonably available when the decision was made may be admissible.⁸²

[68] Further, post-decision evidence can be admitted to determine whether the material before the decision maker was sufficient to reach a reasonable decision.⁸³ Where a decision maker is alleged to have made a defective inquiry,⁸⁴ or material mistakes of fact,⁸⁵ it may be necessary to have regard to the evidence that would have been considered had further inquiries been made.

[69] Mr Kim submits that in the context of extradition proceedings where there is a risk of torture (or other ill-treatment), the Court should receive the best information it can obtain to determine these grave issues.⁸⁶ He also notes that it was accepted by the Supreme Court in *Kim (No 1)* and *Kim (No 2)* that updating evidence is appropriate.⁸⁷ I consider the case for admitting post-decision evidence on this basis alone is less

⁷⁸ At [59], citing Evidence Act s 2006, s 25(1).

⁷⁹ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50, [2004] 1 NZLR 289 at [53]-[56].

⁸⁰ *Lawyers for Climate Action NZ Inc v Climate Change Commission*, above n 77, at [59].

⁸¹ *New Health New Zealand Inc v Minister for Covid-19 Response* [2025] NZCA 592, [2025] 3 NZLR 877 at [116]-[117]; and *Chief Executive Land Information New Zealand v Te Whanau O Rangiwhakaahu Hapu Charitable Trust* [2013] NZCA 33, [2013] NZAR 539 at [117].

⁸² *New Health New Zealand Inc v Minister for Covid-19 Response*, above n 81, at [117].

⁸³ *Chief Executive Land Information New Zealand v Te Whanau O Rangiwhakaahu Hapu Charitable Trust*, above n 81, at [117].

⁸⁴ At [117].

⁸⁵ *New Health New Zealand Inc v Minister for Covid-19 Response*, above n 81, at [107].

⁸⁶ See *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department*, above n 45, at [56].

⁸⁷ See *Kim (No 1)*, above n 3, at [300] and [343]; and *Kim (No 2)*, above n 1, at [79].

compelling in the context of this case, given the more limited nature of the assessment the Minister was required to make. However, I have admitted and will consider all the evidence in this case, giving it appropriate weight in the context of the issues I must determine.

[70] In the above discussion, I have mentioned the relevance of post-decision evidence in the context of allegations of a material mistake of fact. It is worth noting at this point that the Court of Appeal has recently confirmed the distinction between the two types of mistake of fact that can amount to an error of law. The first type, confirmed by the Supreme Court in *Bryson v Three Foot Six Ltd*, is a flawed evaluation of incontrovertible facts that makes an ultimate conclusion insupportable.⁸⁸ The second is where there has been a mistake about a factual matter that has had a material impact on the decision maker's reasoning, or influenced the decision.⁸⁹ In the second situation, the decision maker may have reached a conclusion that was supportable on the evidence before them, but evidence not before them renders the conclusion insupportable or suspect.⁹⁰ Self-evidently, post-decision evidence is only relevant to the second category of mistake, namely a mistaken evaluation of incontrovertible facts.

Issue (a): Has there been a material change in the PRC's incentive to comply with the assurances?

The parties' positions

Mr Kim

[71] Mr Kim submits that the prospect of extradition from Western countries is no longer a compelling incentive for the PRC to refrain from torturing Mr Kim or denying him a fair trial. He says this is due to widespread rejection of extradition to the PRC by other Western countries and the PRC government's consequent use of kidnapping, coercion and other illicit techniques in such countries, from 2022 onwards. This means that Minister Mahuta's 2021 advice, that the PRC government had a compelling

⁸⁸ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26]–[28]; and *New Health New Zealand Inc v Minister for Covid-19 Response*, above n 81, at [91]–[93].

⁸⁹ *New Health New Zealand Inc v Minister for Covid-19 Response*, above n 81, at [91]–[93].

⁹⁰ At [98]–[100]; and *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [63] and [66].

incentive to comply with the assurances in Mr Kim’s case as a “test case”, is no longer the position.

[72] Mr Kim relies on the expert evidence from Professor David Clarke,⁹¹ and a joint expert report from Professor Eva Pils and Professor Dr Alexander Kaiser.⁹² Based on their evidence, Mr Kim submits that the 2022 decision of the European Court of Human Rights in *Liu v Poland* has prompted a broad rejection of extradition from countries with robust human rights protections.⁹³

[73] Professor Clarke notes that in *Liu*, the Court found it “established that the applicant would face a real risk of ill-treatment if extradited” to the PRC, and this risk was not personal to the applicant, but stemmed from a “general situation of violence” present in Chinese detention facilities, in which “torture and other forms of ill-treatment are credibly and consistently reported to be used”.⁹⁴ Professor Clarke accepts that only “informal declarations” were provided by the PRC government in *Liu*, which meant the Court did not address whether formal diplomatic assurances would be adequate.⁹⁵ He says the practical effect of the *Liu* judgment is that the finding of “a general situation of violence” has at least strongly complicated, if not precluded outright, extradition to the PRC by the 46 member states of the Council of Europe.

[74] In support of that position, he notes a March 2023 decision of Italy’s Supreme Court of Cassation that reversed a lower court judgment allowing the extradition of a Chinese citizen to the PRC.⁹⁶ The Court, following *Liu*, found that there was an unacceptable risk of being subjected to inhuman and degrading treatment following

⁹¹ Professor Clarke is a professor emeritus of law from George Washington University Law School in the United States and is a specialist in the PRC’s legal system. He provided expert evidence in respect of Mr Kim’s case in 2021 and 2024. He has been an expert witness in several cases involving Chinese criminal law and procedure in courts in the United States, the United Kingdom and New Zealand.

⁹² Professor Pils is a professor at Friedrich-Alexander-Universität Erlangen-Nürnberg where she holds the Chair of Human Rights Law. She is an interdisciplinary expert on international human rights law with a special focus on the PRC. Professor Dr Kaiser is an assistant professor at Friedrich-Alexander-Universität Erlangen-Nürnberg. Her research focuses on law, criminal justice, and transnational civil and political rights in the PRC and Taiwan.

⁹³ *Liu v Poland*, above n 6.

⁹⁴ At [83].

⁹⁵ At [82].

⁹⁶ Safeguard Defenders “Italy’s Highest Court Denies China Extradition” (2 March 2023) <<https://safeguarddefenders.com/en>>.

extradition.⁹⁷ He notes the Court found the Chinese government's assurances inadequate because they were "generic", simply listing relevant Chinese laws without addressing the issue of whether those laws were actually effective. He provides the following (translated) extract from the judgment:⁹⁸

[T]he mere allegation of the existence of a body of law that is theoretically capable of serving as a guarantee against the risk of inhuman or degrading treatment is insufficient in itself in the absence of concrete evidence of the effectiveness of such forms of protection and prevention. As clearly highlighted in the aforementioned "Liu" judgment of the ECHR, what makes the treatment of prisoners in the People's Republic of China unreliable is not the shortcomings in the legislation, in relation to which progress has been acknowledged, but rather the effective observance of such legislation and the possibility for independent bodies outside the administration to verify the actual conditions of detention and treatment.

[75] Professor Clarke further notes the non-governmental organisation *Safeguard Defenders* has reported that in 2023-24 proceedings before the Spanish National Court, the Spanish prosecutor sought but could not obtain assurances regarding conditions of pre-trial detention.

[76] Professor Clarke refers to other matters he says are consistent with the PRC's broad rejection of external scrutiny of the use of torture, including: in response to the January 2024 United Nations Universal Periodic Review of compliance by the PRC with human rights obligations, the PRC government declining recommendations in respect of torture and not engaging with well-documented rights breaches; the PRC failing to file its report for the sixth periodic review under the Convention against Torture, due in December 2019, until February 2025, and that report failing to acknowledge credible reports of systematic torture; and the 2023 United States Department of State's and the 2024 Australian Department of Foreign Affairs and Trade's Country Reports on the PRC noting credible reports of torture while in detention in the PRC.

[77] Further, Professor Clarke says that, following *Liu*, the PRC government relies very heavily on informal, and sometimes illegal, measures such as bounties, coercion and kidnapping. He says that these measures bypass legal safeguards and lessen any

⁹⁷ Cass.Pen., Sez. VI [Court of Cassation], 17 May 2023, n. 21125 (It.)
⁹⁸ At 2.3.

incentive for the PRC government and its officials to comply with assurances or human rights obligations. These practices include: establishing covert and unauthorised “police stations” in some countries; threatening individuals’ family members, a technique so common it has been studied by scholars under the label of “relational repression”; offering bounties for assistance in securing fugitives; and simple kidnapping. Professor Clarke says these actions are significant not only as reflections of PRC practice but because of the reactions of democratic countries. He quotes a Washington Post report that these reactions have included multiple governments launching investigations after the discovery of Chinese police “service stations” in dozens of cities from Dublin to Milan, reviving debates about whether the PRC and Europe can agree on basic law enforcement protocols.

[78] For similar reasons, Mr Kim’s other experts support Dr Clarke’s conclusion that these developments mean there is “now little or no incentive for the PRC government to comply with [the] assurances out of self-interest.”

The Crown

[79] The Crown supports the position taken in the Ministry of Justice briefing paper, namely that Mr Kim overstates the effect of the *Liu* decision because, in that case, no formal diplomatic assurances had been sought, and Mr Liu was Taiwanese (a group that has a special vulnerability). Further, the Crown submits that Mr Kim’s argument is also not the only inference logically available. If it is true that New Zealand is an outlier among Western countries by agreeing to extradite to the PRC, the incentive to comply with the assurances as a test case is stronger, not weaker. If the PRC complies with its assurances, that will support future extradition requests, particularly where — unlike in *Liu* — there are formal diplomatic assurances.

Assessment

[80] Mr Morton’s evidence was that the diplomatic assurances provided by the PRC can still be relied on and will be effective. In his role as Ambassador to the PRC, he was personally involved in some of the discussions about the assurances in this case. He says the assurances comprehensively address the specific risks of torture (or other

ill-treatment) and an unfair trial and have been negotiated in good faith at senior levels of the Chinese Government over many years.

[81] Mr Morton notes that between December 2023 and February 2024, officials, including him, from New Zealand and the PRC met on several occasions in Wellington and Beijing to progress specific measures related to operationalising the assurances. This included the PRC agreeing to the establishment of an additional New Zealand diplomatic position in the Shanghai Consulate General dedicated for up to 12 months (through the investigative phase, while Mr Kim is detained and Chinese officials investigate his case), the designation of senior points of contact within relevant Government Departments in the PRC, and designation of senior responsible officers to lead engagement on the implementation of the assurances. Agreement to these measures was formalised through the exchange of diplomatic notes he has produced as exhibits.

[82] Mr Morton described the assurances as the most comprehensive collection of assurances he has ever seen in his career. Appropriately, given his expertise, he did not engage in a detailed legal analysis of the *Liu* decision, or the other decisions referred to by Mr Kim's experts, but observed that the PRC continues to enter extradition agreements and seek extradition despite those decisions. In his view, the assurances are sufficient to meet the specific risks to Mr Kim and that the PRC will continue to abide by them despite those cases.

[83] As already noted, in this case the Supreme Court referred to the Minister of Foreign Affairs and Trade's expertise as including expertise in incentives to cooperate internationally, and found no evidential basis to reject her assessment.⁹⁹ In addition to his general expertise, Mr Morton has personal experience of engaging with senior PRC officials in respect of the assurances in this case both in his former role as Ambassador to the PRC, and more recently as the MFAT official responsible for relations with the PRC. In contrast, Mr Kim's international law experts, Professors Clarke and Pils, and Dr Kaiser, do not have the institutional, practical and personal experience Mr Morton brings to this case. Although Dr Richardson is an expert on Chinese politics, human

⁹⁹ *Kim (No 2)*, above n 1, at [39].

rights and foreign policy rather than international law,¹⁰⁰ she also cannot match Mr Morton's expertise and experience as a former New Zealand Ambassador to the PRC, senior MFAT official responsible for the PRC, and his personal dealings with the senior PRC officials involved in this case.

[84] I consider the *Liu* decision, and the other matters relied on by Mr Kim's experts, do little more than affirm the Supreme Court's finding that there is a real risk of torture following extradition to the PRC absent the specific and detailed diplomatic assurances. As the decision of Italy's Supreme Court of Cassation held in the decision referred to at [74] above, the risk of torture in the PRC is such that reliance on general protections in PRC law will be insufficient. The Supreme Court in *Kim (No 1)* recognised that was the position in this case, and it meant the Court was obliged to assess "first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon."¹⁰¹ After carefully undertaking that process, the Court considered the specific assurances provided by the PRC in this case would be effective.

[85] I accept developments since 2022, in particular the *Liu* decision, and its consequences, may have reduced the PRC's general incentive to seek extradition from countries with robust human rights protections. However, I accept Mr Morton's evidence that the PRC has not generally given up on extradition, and the senior PRC officials he has dealt with in this case remain motivated to comply with the specific assurances provided. Moreover, I accept the Crown submission that, as a matter of logic, the PRC government's recent difficulties with obtaining extradition from Western countries could equally increase its incentive to demonstrate compliance with diplomatic assurances.

[86] It follows that I consider there was a reasonable basis on which the Minister could be satisfied the PRC's incentives to comply with assurances had not changed to such an extent that a wider reconsideration of extradition was required, and that the

¹⁰⁰ Dr Richardson is currently the Co-Executive Director of the Network of Chinese Human Rights Defenders, a coalition of Chinese and international human rights non-governmental organisations.

¹⁰¹ *Kim (No 1)*, above n 3, at [94]–[96] citing *Saadi v Italy* (2008) 49 EHRR 30 (Grand Chamber) at [148]; and quoting *Othman v United Kingdom* (2012) 55 EHRR 1 (ECHR) at [188]–[189].

PRC's assurances continued to protect Mr Kim from a real risk of torture or an unfair trial.

Issue (b): Has there been a material change in the bilateral relationship between the PRC and New Zealand?

The parties' positions

Mr Kim

[87] Mr Kim submits the relationship between New Zealand and the PRC has materially changed to the point where there are no longer effective ways to ensure disputes about the assurances can be resolved.

[88] Mr Kim relies on two substantial changes. First, the two countries have become more confrontational, creating a risk of "adverse events" that could prevent diplomatic initiatives. Second, the PRC has become increasingly assertive internationally by challenging interpretations and attitudes to international commitments.

[89] Mr Kim places particular reliance on relying on a passage from New Zealand's Defence Policy and Strategy Statement 2023 as follows:

The relationship with China is significant for New Zealand, and its cooperation will continue to be essential in addressing many global challenges. At the same time, the Chinese Government's assertive pursuit of its strategic objectives is the major driver for the new era of strategic competition among states. An increasingly powerful China is using all its instruments of national power in ways that can pose challenges to existing international rules and norms. Beijing continues to invest heavily in growing and modernising its military, and is increasingly able to project military and paramilitary force beyond its immediate region, including across the wider Inda-Pacific. The wider Inda-Pacific is now the central global theatre for strategic competition. Inda-Pacific states are rapidly investing in their military and security capabilities in response to the range of security challenges they are facing. Intensifying strategic competition in the Inda-Pacific is increasing the potential for confrontation and means conflict could occur, potentially with little warning. Potential triggers include increasing tensions relating to Taiwan, maritime tensions and competing claims in the South and East China Seas, and ongoing tensions on the Korean Peninsula, exacerbated by the Democratic People's Republic of Korea's nuclear weapon and missile programmes. Even without deliberate intent, tactical miscalculation could lead to conflict with consequences that could spread across the region, including into the Pacific. Heightened competition and tensions in disputed

areas of the Indo-Pacific pose potentially significant impacts for New Zealand's interests.

The Crown

[90] The Crown's position is that Minister Goldsmith was entitled to rely on MFAT advice that Minister Mahuta's 2021 advice remained up to date. There was no relevant change in the bilateral relationship.

[91] The Crown says the bilateral relationship is, inevitably, constantly evolving. Minister Mahuta made this point in her 2021 advice to Minister Faafoi:

Since the former Minister of Foreign Affairs considered this issue in 2016, Aotearoa New Zealand's relationship with China has evolved. While we continue to work together well in areas of common interest, there are real areas of difference, particularly in our approaches to human rights and regional security. The Government has been on the record and clear about these issues.

...

That said, one area where we do have a strong common interest is effective law enforcement cooperation, where we have worked together constructively for many years. Criminal networks can and do exploit jurisdictional and enforcement gaps, which both Aotearoa New Zealand and China have a strong mutual interest in addressing. China's continued and effective cooperation in this case demonstrates the priority it places on law enforcement cooperation with Aotearoa New Zealand.

[92] The Crown notes that, in its first decision, the Supreme Court confirmed that "the Minister [of Justice] was entitled to rely on the assessment by MFAT officials and the Minister of Foreign Affairs and Trade as to the strength of the bilateral relationship". In its second judgment, the Supreme Court referred to the Minister of Foreign Affairs' expertise in relation to matters of international and bilateral diplomatic relations as well as incentives for cooperation internationally. There was "no evidential basis on which the court should not accept [her assessment]".

[93] The Crown notes that in her advice, Minister Mahuta distinguished Mr Kim's case from the detention of two Canadian nationals, Michael Spavor and Michael Kovrig, (the "two Michaels") and the two Australian citizens of Chinese descent. The Supreme Court referred to this evidence in its second decision. The Australian cases relied on by Mr Kim are not new.

[94] The Crown points to the summary of Minister Mahuta’s advice in the briefing paper, including the distinction she made between “real areas of difference” and areas of common interest where the two countries were able to work together constructively. The Ministry of Justice confirmed that MFAT officials considered that Minister Mahuta’s advice remained accurate:

MFAT officials advise that China continues to strongly value cooperation in law enforcement with other countries and that this remains the case, despite developments in their foreign policy positions. MFAT officials have also noted that there has been recent positive and constructive engagement between New Zealand and China about practical arrangements for monitoring the assurances in Mr Kim’s case.

...

In late 2021, five years had elapsed since the previous Ministerial consideration of the case. Given that length of time, fresh foreign affairs advice was thought appropriate. The 2021 advice is now a little over two years old. MFAT officials do not regard it as out of date or requiring refreshment or replacement.

[95] The Crown submits that, for the same reasons that the Supreme Court found Minister Faafoi was entitled to rely on Minister Mahuta’s advice (above at [34]), Minister Goldsmith was entitled to accept MFAT’s advice, including that Minister Mahuta’s advice was not out of date. Therefore, the Crown says, it was open to Minister Goldsmith to conclude that nothing in the bilateral relationship had materially changed whether surrender remained appropriate.

[96] The Crown says Mr Morton’s evidence on the bilateral relationship between the PRC and New Zealand should carry particular weight, because of his, and MFAT’s, diplomatic experience and foreign relations expertise. The Crown submits, applying *Four Members*, it is appropriate for the Court to defer to the judgement of the executive to recognise its knowledge and expertise relative to that of the Court; and it is well established that on matters of foreign policy, the executive is given a wide margin of appreciation.

Assessment

[97] Mr Morton’s affidavit states that the bilateral relationship between New Zealand and the PRC contains “areas of difference”, but these “[d]ifferences are

managed through diplomacy and dialogue”, and the “developments since October 2021 do not materially change the advice provided by former Foreign Minister Mahuta to then-Justice Minister Faafoi in October 2021”. He says that the geostrategic developments in the Indo-Pacific are not directly relevant to Mr Kim's case. He does not dispute that there have been statements that there is an increased risk of conflict, but says New Zealand and the PRC are not in conflict and maintain a functional diplomatic relationship. Differences are managed through extensive diplomatic engagement.

[98] Mr Morton says the Australian and Canadian cases that Mr Kim relies on to show the PRC's growing disregard for bilateral relations, are different to his case. The Australian cases involved individuals arrested on national security grounds in the PRC. In contrast, Mr Kim is charged with homicide, which does not touch on the PRC's domestic sensitivities. He notes that neither of the Australian cases involve extradition or assurances. The individuals were arrested while they were in the PRC and extradition was never sought. Mr Morton says the Australian and Canadian cases were not the product of ongoing international legal cooperation. The two Michaels were Canadian citizens detained in the PRC in 2018 following controversy over the potential extradition of Huawei's Chief Financial Officer from Canada to the United States. Their situation was specifically considered by Minister Mahuta. Their arrest was, in Minister Mahuta's view, related to political or international relations objectives.

[99] I accept the Crown submission that I should tread carefully before rejecting Mr Morton's evidence on the impact of developments in the bilateral relationship in this case. As already noted, the Supreme Court referred to Minister Mahuta's expertise on matters of international and bilateral relationships, and found no evidential basis to reject her assessment.¹⁰² I have already noted the contrast in Mr Morton's institutional, practical and personal expertise to that of Mr Kim's experts.

[100] Mr Kim emphasises that from 2023 onwards, and in contrast to the relatively benign position in 2021, both the New Zealand and the PRC government have

¹⁰² *Kim (No 2)*, above n 1, at [39].

indicated an increased, and increasingly unpredictable, risk of adverse events. That has included unprecedented official statements from 2023 onwards that there is a risk of armed conflict between the PRC and New Zealand or allies at little notice. There is no dispute that if the relationship entered a state of armed conflict there would be no incentive to comply with the assurances nor ability to monitor compliance. However, I accept Mr Morton's evidence that New Zealand's bilateral relationship with the PRC is constantly evolving, and the countries maintain a functional diplomatic relationship, with differences being managed through extensive diplomatic engagement.

[101] In 2021, Minister Mahuta's advice was that the relationship had evolved. There were "real areas of difference", particularly in approaches to human rights and regional security, but the Government had been on the record and clear about those issues. However, her advice was that there had also been many years of constructive and effective cooperation in the area of law enforcement, where there was a strong common interest. I accept that Mr Kim can point to further examples since 2022 of the New Zealand government going on the record to make clear the real areas of difference with the PRC, which has included noting the risk of armed conflict. However, there is no evidence that these areas of difference have materially impacted the many years of continued effective cooperation on international law enforcement. Indeed, Mr Morton's evidence is that they have not.

[102] I therefore accept the Crown submission that Minister Goldsmith was entitled to accept MFAT's advice, including that Minister Mahuta's advice was not out of date.

[103] It follows that I consider there was a reasonable basis on which the Minister could be satisfied the bilateral relationship had not changed to such an extent that a wider reconsideration of extradition was required, and that the assurances continued to protect Mr Kim from a real risk of torture or an unfair trial.

The evidence of changes to PRC law

[104] It is convenient to make some general observations about Mr Kim's evidence on the relevant changes to PRC law since 2022 before addressing the remaining issues. I will focus on Professor Clarke's evidence as it was the most extensive. However, I

note that Professor Pils and Dr Kaiser's joint report broadly agrees with Professor Clarke's conclusions on the changes (as does Dr Richardson, although as noted above, she is not a legal expert).

[105] Mr Kim filed a final affidavit from Professor Clarke following receipt of the Crown's written submissions, as those submissions alleged that Mr Kim had failed to provide admissible evidence of the asserted changes to PRC law. The Crown did not pursue the admissibility point following receipt of the affidavit and instead focused the weight to be given to the evidence.

[106] In an affidavit Professor Clarke filed in 2024, he said changes to PRC law meant cases such as Mr Kim's are now "... subject to wider and expressly authorised supervision and intervention by the Party leadership within the court, including but not limited to the judicial committee". The effect is that the prospect that political considerations will direct the Court outcomes in Mr Kim's case has increased. In particular, under new Supreme People's Court Guidance such intervention and control is "now not only legally permissible but required, with sanctions for court leaders who fail to take such steps."

[107] In Professor Clarke's 2026 report, he said Mr Kim's extradition request arose at a time "when the PRC government was seeking to engage with Western democratic countries through extradition treaties and, within the PRC, court and law reform intended to pursue, or appear to pursue, fair trial standards and the prevention of torture." However, in the last several years and particularly following the *Liu* decision, the PRC "continues to reject efforts to meet fair trial or other judicial standards under international law, rejecting concepts such as judicial independence as illegitimate and wrong, including through express statements to that effect in PRC law from November 2021".

[108] In Professor Clarke's final affidavit, he further explains the source of these comments as including:

- (a) A November 2021 Supreme People's Court Guiding Opinions on the Oversight and Management of "Four Types of Cases" (2021 Guiding

Opinions). He says this not only allows for but requires intervention by officials other than the judges hearing the cases. Such senior officials will almost certainly be Party members and in any case will be required to implement whatever senior Party officials' command.

- (b) Rejection of judicial independence and, more broadly, “Western rule of law practices” through the development of “Xi Jinping Thought on the Rule of Law”. For example, this was conveyed in an important December 2021 speech by Xi Jinping. He also gives the example of a January 2026 article in an official Chinese newspaper as one of the many mechanisms that give effect to Xi Jinping Thought within the PRC legal system. The article reports that the Secretary of the Party Leadership Group and Procurator-General of the Supreme People's Procuratorate, were holding a special symposium with experts and scholars to jointly study and implement Xi Jinping Thought on the Rule of Law. The report states that the symposium included “from a basis of elementary logic demolish erroneous Western viewpoints such as so-called ‘constitutional government’, ‘independent three powers [of government]’, and ‘judicial independence.’” Professor Clarke explains that Xi Jinping Thought is given legal effect through a complex range of mechanisms, including The State and Party Constitutions, which have expressly given constitutional status to Xi Jinping Thought to a greater degree, law reform instruments, such as the Guiding Opinions, and other steps, such as the State Council “Opinions on Strengthening Legal Education and Legal Theory Research in the New Era”.
- (c) Professor Clarke explains that it is difficult to describe the overall structure of the PRC legal and constitutional system in straightforward terms or by comparison to countries that follow the rule of law. However, he says three points can be made. First, each of these developments constitutes a change in approach that intensifies and entrenches earlier trends that Chinese authorities specifically disclaim the notion that courts should follow only the law in their judgments; they are required to pay attention to political factors as well. Second,

these various forms of legal change do bear on all state institutions, including the PRC courts, and on judges and others involved in criminal cases. Third, the changes from late 2021 onwards are consistent in rejecting judicial independence and, more widely, “Western rule of law ideas”.

[109] Professor Clarke’s 2024 affidavit also says the PRC government position has become increasingly inclined to reject any international human rights standards or comparisons and intolerant of any form of criticism. He says that:

... in addition to the broader promotion of the PRC and Party conception of law as distinct and superior, it is now for example the legal duty of PRC officials and all other citizens involved in any legal matter with international aspects – as with Mr Kim’s case – to uphold “national sovereignty, security, dignity, honor, and interests.”

[110] In Professor Clarke’s view, this means “for a doctor or defence lawyer to raise suspicions that, for example, Mr Kim had been tortured — however well-founded — or other misconduct is now wholly implausible”. For this last proposition he refers to the July 2023 Foreign Relations Law of the People’s Republic of China, which provides:

State organs and armed forces, each political party and mass organization, enterprises, public institutions, and other social organizations, as well as citizens, all have the responsibility and obligation to maintain national sovereignty, security, dignity, honor, and interests in diplomatic exchanges and cooperation.

[111] Professor Clarke considers these changes mean the premise that the judicial committee would not consult political authorities or decide in accordance with Party views is now “impossible”. However, he starts from the position that the Supreme Court’s finding that the judicial committee could act akin to an appellate court “greatly misconceives the functioning of the judicial committee”. He considers the Supreme Court’s finding the “fair trial requirements of [PRC] domestic law” prohibited consultation was “never realistic and is now even more dubious.” Further, he says the premise that the PRC might seek to afford judicial independence or other fair trial rights in terms of the ICCPR “is now, even more clearly than before, not tenable.

Instead, a coerced confession, a show trial, or both for domestic propaganda reasons is now still more likely.”

[112] Professor Clarke concludes that reasons to believe both that the PRC government would comply with its diplomatic assurances and that they would be effective is now untenable. He says that cases such as Mr Kim’s are now subject to wider and expressly authorised supervision and intervention by the Party leadership within the Court, including but not limited to the judicial committee. The Supreme Court’s finding that such intervention would be contrary to the fair trial requirements of domestic law (which he describes as unrealistic at the time but even more unrealistic now) is now contradicted by the 2021 Guiding Opinions. The Guiding Opinions mean such intervention and wider control of such cases is now not only legally permissible but required, with sanctions for court leaders who fail to take such steps.

Issue (c): Will the PRC interpret the torture and fair trial assurances consistently with international law?

The parties’ positions

Mr Kim

[113] Mr Kim submits that the Supreme Court’s findings that the PRC will interpret the torture and fair trial assurances consistently with international law no longer hold true, and his fair trial rights will not be met.

[114] Mr Kim says the Supreme Court’s decision was based on findings that: the diplomatic assurances and PRC law would be interpreted consistently with rights against torture and fair trial rights;¹⁰³ and despite concerns the judiciary is not “in practice independent”, the law did provide for judicial independence.¹⁰⁴ This meant Mr Kim could be afforded a trial compliant with art 14 of the ICCPR (the right to a fair and public hearing by a competent, independent and impartial tribunal).¹⁰⁵ He

¹⁰³ *Kim (No 1)*, above n 3, at [213] and [217]; and [294]–[295].

¹⁰⁴ At [302].

¹⁰⁵ See *Kim (No 1)*, above n 3, at [447]–[465]; and art 14(1) of the ICCPR relevantly provides “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...”.

notes these findings were necessary because the diplomatic assurances state at the outset that they “do not contradict Chinese laws and regulations nor grant Mr Kim himself any privilege exceeding Chinese laws and regulations.”

[115] Mr Kim says this led to the Supreme Court finding that the PRC would follow a mutually agreed interpretation of the Convention against Torture (Convention) which would protect Mr Kim (for example, from the PRC’s rejection of psychological torture being prohibited by the Convention).¹⁰⁶ Further, the Supreme Court found that defence counsel for Mr Kim would be able to present a “normal defence” due to the diplomatic assurances despite accepting that defence counsel are systematically obstructed from doing so.¹⁰⁷

[116] However, Mr Kim says the PRC government now rejects this position both as a matter of policy and importantly as a matter of law. In particular, he says changes to PRC law have rejected judicial independence and so preclude a trial before an independent tribunal. Mr Kim says his expert evidence establishes that this means the rights-compliant application of PRC law and of the assurances, as found and relied upon by the Supreme Court and Minister Goldsmith, are no longer possible as a matter of PRC law.

[117] Mr Kim says the changes would require his case to be decided by a judicial committee, which in practice is subject to Party influence. Further, the PRC has taken a series of steps to dismiss and challenge international law, the international rules-based order, and international human rights obligations in particular. Mr Kim says an example of this is the PRC’s response to the OHCHR report. Moreover, the 2023 Foreign Relations Law of the People’s Republic of China entrenches in law that compliance with international obligations is directed by, and conditional upon, the Party.

¹⁰⁶ At [213]–[217]. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

¹⁰⁷ At [371]–[375] and [382]–[383].

The Crown

[118] The Crown notes that the assurances include two broad assurances that the PRC will comply with relevant international obligations:

- 3 As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the People's Republic of China (PRC) will comply with the Convention to ensure Mr Kim Kyung Yup will be brought to trial without undue delay, pursuant to the Criminal Procedure Law of the People's Republic of China.

...

- 13 The PRC will in its dealings with Mr Kim Kyung Yup, comply with applicable international legal obligations and domestic requirements regarding fair trial.

[119] In respect of the third assurance, the Supreme Court held the PRC “must have intended to accept a definition of torture and cruel, inhuman and degrading treatment or punishment that is mutually acceptable to the PRC and New Zealand”.¹⁰⁸ On the 13th assurance, the Court held that “[t]he assurance can only sensibly be understood as indicating that the PRC will comply with the fair trial standards set out in the ICCPR”.¹⁰⁹ The Crown says those findings remain sound because none of Mr Kim’s submissions directly address how the PRC will interpret the assurances it has given New Zealand in this case. The Supreme Court’s conclusion that the PRC must have intended an interpretation of torture that was “mutually acceptable”, and that the fair trial assurance can only sensibly be understood as a reference to the ICCPR, is not undermined by the PRC’s codification of its foreign relations law or its response to United Nations reports.¹¹⁰

[120] The Crown submits the Supreme Court rejected a similar argument that the assurances allow the PRC to “act in accordance with its interpretation of the right to a fair trial in art 14 ICCPR rather than meeting international standards as to fair trial.” The Court noted that in advancing that argument Mr Kim referred to the Human Rights Action Plan of China (2021–2025). The Court said that “[w]e do not see this point as

¹⁰⁸ At [217].

¹⁰⁹ At [295].

¹¹⁰ At [217].

critical in the assessment of the real risk to Mr Kim, given the relevant domestic law contains the protections with which we are concerned.”¹¹¹

[121] The Crown relies on Mr Morton’s evidence that the PRC has not “walked away” from multilateralism, and his view that the assurances can be relied on and will remain effective. His evidence is that “recent developments are not novel but reflect an intensification of trends which were apparent before 2022, including codification of existing practices.”

[122] The Crown submits the examples given by Mr Kim of what he says are the PRC’s rejection of international law (including the UN report about the Uyghur people) are not directly relevant to Mr Kim’s case. They do not, the Crown says, establish a sufficiently material change in circumstance that precluded the Minister from finding that extradition remained appropriate and that a wider investigation was unnecessary.

[123] The Crown says the risk that Mr Kim’s case would be decided by a judicial committee has already been expressly considered by the Supreme Court. The Court received further submissions about the committees, which can decide the outcome of sensitive cases even though the members of the committee did not preside over the hearing. The Court observed:¹¹²

... It may also be that it will be considered mandatory to refer Mr Kim’s case because it could be seen as a case involving foreign affairs, given that diplomatic assurances are involved ... We therefore consider that, absent further inquiries changing the above assessment, any Minister making a decision about extradition would have to consider there was a real possibility that Mr Kim’s case would be referred to a judicial committee.

[124] As a consequence of the Court’s concern about the risks of a referral to a judicial committee and the impact on Mr Kim’s fair trial rights (including because political representatives are sometimes able to attend judicial committees), New Zealand sought answers to questions about judicial committees. The PRC provided the following response:

¹¹¹ *Kim (No 2)*, above n 1, at [59] citing The State Council Information Office of the People’s Republic of China *Human Rights Action Plan of China (2021–2025)* (10 September 2021).

¹¹² *Kim (No 1)*, above n 3, at [347].

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 the judicial committee meetings in relation to Mr Kim's case ...

[125] In its 2022 decision, the Supreme Court rejected Mr Kim's argument that "the response leaves open the option of persons other than judicial committee members being consulted", and observed:

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.

Assessment

[126] There is some symmetry between Mr Kim's expert evidence and Mr Morton's evidence. In effect, the experts agree the PRC's trend of rejecting Western ideas has intensified and there has been codification of concerning practices.

[127] On their face, the three central documents relied on by Mr Kim as recording the changes in PRC law, the 2021 Guiding Opinions, the 2023 Foreign Relations Law, and amendment to the Party Constitution, appear capable of being read consistently with fair trial rights.

[128] For example, the 2021 Guiding Opinions appear capable of being read consistently with the Supreme Court's view that the judicial committee process can operate fairly provided the assurance that there will be no third party input is adhered to. Likewise, art 6 of the Foreign Relations Law, read in conjunction with other articles that emphasise respect for international law and international relations,¹¹³ appears to be an unsurprising general obligation to act in accordance with national

¹¹³ Foreign Relations Law of the People's Republic of China (July 2023), arts 4, 19, 32, and 39.

interests. Finally, the resolution amending the Party Constitution is a three-page document setting out high-level general principles (and rhetoric) that emphasise the importance of incorporating Xi Jinping Thought into the Party Constitution and of Party members following Xi Jinping's leadership.

[129] However, given Professor Clarke's evidence about the difficulty of interpreting PRC law, I must be cautious about comparing these documents to what I would expect to see to establish important changes to New Zealand law. The changes would fall well short of that standard. However, given Professor Clarke, Professor Pils and Dr Kaiser's undoubted expertise, I accept Mr Kim's evidence that the changes mean there is generally an increased likelihood of an unfair trial in the PRC.

[130] This is especially so given Mr Morton does not really contest the point. Rather, he in effect acknowledges it, but says this is simply an intensification of a trend that makes no material difference to the comprehensive and specific assurances given in this case. As already noted, this evidence is given from the perspective of a New Zealand former diplomatic and senior official with experience of mutual law enforcement cooperation with the PRC, and direct dealings with the senior officials responsible for the assurances in this case.

[131] Moreover, Mr Morton's view is echoed in the Supreme Court's rejection of the argument that the Human Rights Action Plan of China (2021–2025) was not critical to its conclusion that the assurances would be effective as the fair trial protections were contained in PRC domestic law.¹¹⁴ There is no suggestion that the domestic law containing those protections no longer exist,¹¹⁵ even if fair trial rights have been further eroded since 2022 by the general changes relied on by Mr Kim's experts. However, there was a real risk of an unfair trial at the time the Supreme Court made its decision. Once that threshold was met, the focus shifted to assessment of the assurances being provided to address the risk. The nature of the diplomatic assurances, combined with Minister Mahuta's expert view, satisfied the Supreme Court that the

¹¹⁴ *Kim (No 2)*, above n 1, at [69].

¹¹⁵ *Zhōnghuá Rénmín Gònghéguó Xíngshì Sùsòng Fǎ* (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective January 1980, revised 2018) arts 11, 14, 33–34, 38–39, 50, 54–58, 120, P.R.C Laws.

Minister was entitled to conclude they would be effective. The Supreme Court did not consider further evidence about the general risk of unfair trial in the PRC in the Human Rights Action Plan for China altered this conclusion.

[132] Professor Clarke’s position is that this was a misconceived and untenable conclusion at the time and is “even more dubious” now. Similarly, Professor Pils and Dr Kaiser’s evidence starts from the position that the PRC judiciary are dependent functionaries of the PRC Party-state, incapable of affording a fair trial before an independent and impartial judiciary, which is a position that the Supreme Court did not accept given the assurances provided in this case.¹¹⁶

[133] I consider Mr Kim’s expert evidence applies a lens to the likely effectiveness of the assurances that the Supreme Court’s decision does not allow me to adopt. The Supreme Court’s assessment was that the general risk of an unfair trial was met by the specific assurances provided. In addition, Mr Morton’s expert evidence is that the assurances remain effective and will be complied with. In these circumstances, I am unpersuaded that further entrenchment of the general fair trial risks known to the Supreme Court, was a material change that required the Minister to undertake a wider reconsideration.

Issue (d): Will the monitoring assurances be effective to prevent the real risk of torture?

Mr Kim’s position

[134] Mr Kim submits that the monitoring assurances will now be ineffective to prevent torture for four main reasons:

- (a) The UN High Commissioner for Human Rights, in preparing the report about the Uyghur people, was obstructed in their inquiry, which suggests that the PRC is unlikely to cooperate with New Zealand officials trying to monitor Mr Kim in Shanghai.

¹¹⁶ *Kim (No 2)*, above n 1, at [65]–[68].

- (b) The changes in the PRC's domestic law make it less likely that a Chinese doctor would report torture.
- (c) Mr Kim's depression makes it unlikely that he would report torture.
- (d) In Australian and Canadian cases, the PRC has denied consular access, suggesting that it will not comply with the monitoring assurances.

Assessment

OHCHR report

[135] I accept the Crown submission that the OHCHR report arose in a different context of the human rights situation in Xinjiang, China. I accept the Crown's point that there is very likely to be ongoing reports or information of this nature, addressing the PRC's general human rights compliance, in prolonged extradition proceedings such as this.

[136] The concerns relating to human rights breaches in Xinjiang were expressly considered by Minister Mahuta and addressed by the Supreme Court. The Supreme Court concluded that they are met by the specific assurances provided in this case.¹¹⁷ Although the report raises general concerns about the PRC obstructing a United Nations monitoring body, that is of little relevance to whether the PRC will comply with high-level diplomatic assurances relating specifically to Mr Kim's case. Further, Mr Morton's expert evidence is that the assurances remain effective. In these circumstances, I consider it was open to the Minister to be satisfied the report did not raise anything sufficiently material to the extradition decision to require wider consideration.

Will changes to PRC domestic law make it less likely a Chinese doctor will report torture?

[137] The assurances provide that New Zealand can select a doctor to examine Mr Kim when he is in the PRC but require the doctor to be qualified to practise in the

¹¹⁷ *Kim (No 2)*, above n 1, at [36]–[38].

PRC. As noted above, Professor Clarke says that the changes to PRC law makes it “wholly implausible” that a Chinese doctor or defence lawyer would raise suspicions that Mr Kim had been tortured.

[138] In relation to the argument that Chinese doctors would not report torture, the Supreme Court acknowledged that “the evidence of Mr Ansley [was] that ‘a Chinese doctor would not ever report torture by prison staff, police or prosecutor’”.¹¹⁸ However, the Court concluded that the medical examinations “still provide[d] some additional protection”.¹¹⁹

[139] As already noted, I consider Mr Kim’s expert evidence applies a lens to the likely effectiveness of the assurances that the Supreme Court’s decision does not allow me to adopt. Further entrenchment of the general position known to the Supreme Court does not undermine the Court’s assessment that the risk of a torture was met by the specific assurances provided. Moreover, Mr Morton’s expert evidence is that despite the further entrenchment of the known position the assurances remain effective. In these circumstances, I am unpersuaded that the changes to PRC domestic law was a material change to the risk of a doctor failing to report torture that required the Minister to undertake a wider reconsideration.

Mr Kim’s depression

[140] Mr Kim has provided expert evidence that he suffers from persistent depression. The evidence includes that the most prominent feature of his condition is severe demoralisation and a sense of entrapment and hopelessness. Further, the evidence includes that it cannot be predicted whether Mr Kim would be willing and able to report torture or ill-treatment to consular visitors because “there are many unpredictable variables that could influence his decision to make a report”.

[141] The Supreme Court considered the assurances in this case were sufficient to protect Mr Kim despite his poor mental and physical health.¹²⁰ I accept the Crown submission that the evidence falls short of establishing sufficient change in Mr Kim’s

¹¹⁸ *Kim (No 1)*, above n 3, at [244].

¹¹⁹ At [246].

¹²⁰ At [467]–[468].

mental health issues (which are not new) to materially increase the likelihood of Mr Kim not reporting torture. In fairness to Mr Keith, he did not appear to suggest changes to Mr Kim's mental health would alone be sufficient to render the Minister's decision unlawful.

The Australian and Canadian cases

[142] As already noted, Minister Mahuta distinguished Mr Kim's case from the detention of two Canadian nationals (the "two Michaels") and the two Australian citizens of Chinese descent. The Supreme Court referred to this evidence in its second decision.¹²¹ I accept the Crown submission that concerns about denial of consular rights in the cases of Australian and Canadian nationals is not new and the circumstances are materially different to Mr Kim's case for the reasons explained by Mr Morton (set out at [98] above).

Other alleged errors in the Minister's decision and the Ministry's advice

[143] Mr Kim's other arguments about alleged errors in the Minister's decision overlap with the arguments I have already addressed, but for completeness I will consider them separately to the extent necessary.

[144] Many of the remaining arguments rely on the overarching submission that the Minister failed to undertake the three-stage assessment of the assurances required by the Supreme Court in this case:¹²²

- (a) First, it is necessary to assess the risk to the individual considered in light of the particular characteristics and situation of the individual and the general human rights situation in the country where the person would be sent.
- (b) Second, it is necessary to assess the quality of assurances given, and whether, if they are honoured, they would adequately mitigate the risk the individual would otherwise face.
- (c) Third, a decision-maker must assess whether, in light of the situation in the receiving state and any other relevant factors (such as the strength of the bilateral relationship between the receiving and sending states), the assurances can be relied upon.

¹²¹ *Kim (No 2)*, above n 1, at [36]–[39].

¹²² *Kim (No 1)*, above n 3, at [132] (footnotes omitted).

[145] However, the application of that test must be considered in the context of what was required of the Minister in the particular circumstances of this decision. As I have already explained, the Minister correctly considered he was not required to undertake a wider reconsideration of extradition in the absence of a change in circumstances sufficiently material to indicate it should be reconsidered. This required an overall assessment of any changes in risk, and the adequacy and reliability of the assurances to meet that risk.

Did the Minister wrongfully reframe Mr Kim's arguments?

[146] Mr Kim submits that the Minister's decision letter wrongly framed his arguments as engaging "general human rights" and "foreign policy issues" that have "no direct connection" to Mr Kim's case. He says this was contrary to the Supreme Court's observation that the risks of extradition must be considered within the broader context of the general human right situation in the country.¹²³ However, this passage in the Court's decision was about whether, when making an extradition decision, the Minister must first make a preliminary assessment about the general rights situation before evaluating the risks for a particular individual. The Court held, contrary to the Court of Appeal, that the general and individual assessments should be conducted together, rather than the general assessment being conducted first.¹²⁴

[147] Mr Kim's submission is in essence that the Minister failed to undertake a wider reconsideration of the extradition decision. For reasons I have already explained in detail above, I consider there was a reasonable basis for the Minister to be satisfied there was no real risk that the position had changed to such an extent that a wider reconsideration of the extradition decision was required.

Did the Minister's conclusion on lack of direct connection between PRC foreign policy issues and Mr Kim's case overlook important matters?

[148] Mr Kim submits that the Minister's conclusion that examples of the PRC's general conduct had no direct connection to his extradition overlooked how those examples illustrated that the assurances could no longer be relied on. This included

¹²³ At [58].

¹²⁴ At [64]; and *Kim (No 2)*, above n 1, at [19]: "The risk to Mr Kim ... had to be assessed in light of the general human rights situation in the PRC...".

that the PRC is no longer incentivised to comply with the extradition and that New Zealand is no longer in a position to ensure the PRC interprets the assurances consistently with international law. However, I have already held there was a reasonable basis for the Minister to conclude that there was no material change to the PRC's incentive to comply with international law.

[149] Mr Kim says the examples also illustrated that New Zealand is no longer able to ensure the PRC complies with the assurances. The Crown notes that New Zealand has the same mechanisms available to encourage the PRC to comply with the assurances that it has always had. This includes that if the assurances are not complied with New Zealand is able to disclose this information to other countries. Mr Morton also explained that the consequence of a failure to comply with the assurances would include direct consultation between the two governments at "very high levels". I consider that, as the mechanisms to ensure compliance have not changed, this point cannot succeed when there was a reasonable basis for the Minister to conclude that there was no material change to the PRC's incentive to comply with international law.

Did the Minister overlook the relevance of Liu, and the Canadian and Australian cases?

[150] Mr Kim says that the Minister's conclusion that *Liu*, and the Canadian and Australian cases were not comparable to Mr Kim's extradition, overlooked the point that Mr Kim relied on them to illustrate: that the PRC no longer had an incentive to comply with the assurances because the PRC was unable to pursue extradition with European Union countries post-*Liu*; and the PRC could not be relied on to take a conciliatory approach to its commitments given the change in the bi-lateral relationship. For the reasons already explained, I do not accept these submissions.

Did the Minister place insufficient weight on the change in circumstances?

[151] Mr Kim says that the Minister's statement that "not every new piece of information or change in circumstances will warrant reconsideration of a prior decision" was incorrect. This is because, given the human rights at stake, "careful scrutiny" is required. I have already addressed this point in detail above. In this specific context, the Minister was required to assess whether there was a sufficiently

material change in circumstance since the Supreme Court decision to require a wider reconsideration of the extradition decision. It follows that there was no error in the Minister stating that not every new circumstance will justify revisiting the extradition decision.

Did the Minister err in his description of the level of scrutiny given to Mr Kim's case?

[152] Mr Kim says that the Minister's decision letter wrongly said that his "case has had exhaustive and careful consideration, on many occasions, at the highest levels" is inconsistent with the record. The essential issue is the Minister's statement that the exhaustive and detailed consideration has not occurred on "many occasions". Mr Kim says it is only Minister Adams and the Supreme Court's assessments of his case that meet this description. This is because Ministers Faafoi and Goldsmith's decisions were essentially limited reassessments. I consider nothing turns on the Minister's phrasing in this context. The Minister was aware of the history of the proceedings from the briefing paper and Mr Kim's February 2024 submission letter. Moreover, the Minister's statement simply echoes what the Supreme Court said:¹²⁵

... Given the purposes behind extradition, the time that has already elapsed since the extradition request was made and *the detailed consideration that has already been given to the matter to date, both by the Minister and the Courts*, we consider that we should adjourn the appeal to give the appellants the opportunity to make the further inquiries and seek the further assurances we have identified

Was the Ministry's advice only concerned with whether the assurances remained reliable?

[153] Mr Kim submits that the Ministry's advice was "concerned only with whether the assurances themselves remained reliable" and did not sufficiently engage with whether there had been a material change in circumstances. I accept the Crown submission that this is not an accurate characterisation of the Ministry briefing paper read as a whole. I consider the Ministry briefing paper focused on whether there had been a sufficiently material change in circumstance since the Supreme Court decision to require a wider reconsideration of the extradition decision.

¹²⁵ *Kim (No 1)*, above n 3, at [472] (emphasis added).

Did the Ministry's advice wrongly minimise the importance of due process where there is a risk of torture?

[154] Mr Kim says that the Ministry's advice that "requiring a fresh full assessment at each moment would lead to the extradition process becoming interminably stuck on repeat" wrongly minimises the importance of due process and careful assessment where torture is concerned. As I have already said, in the context of this case, I do not consider there was any error in the Minister focusing on whether there had been a material change in circumstance since the Supreme Court decision that required a wider reconsideration of the extradition decision. I consider the Ministry's advice is materially consistent with this position.

The specific discrete grounds of review

[155] My assessment of the above issues addresses the essence of Mr Kim's allegations that the Minister's decision was unlawful. However, I will also briefly address Mr Kim's specific grounds of review to ensure all material matters have been considered.

[156] Mr Kim pleads four grounds of review: illegality, natural justice, irrationality/patent error of fact and impermissible purpose. I will address each in turn.

Illegality

[157] I have already addressed the allegation that Minister Goldsmith's decision was illegal because he did not undertake a wider reconsideration of extradition.

[158] The other grounds of illegality include that the Minister: relied on the findings of the Supreme Court in a manner contrary to law; failed to consider, address or give effect to the recommendation of the Committee against Torture; determined that surrender remains appropriate even though extradition serves no lawful purpose; made a surrender order in reliance on his decision; and was not told of relevant information available to him.

[159] Many of these issues were not the subject of separate submissions to the submissions addressing the issues I have already discussed, and my above conclusions deal with most of them. However, I will briefly address some aspects.

[160] First, the Minister was bound by the Supreme Court's findings and there was nothing unlawful about the approach he took to those findings.

[161] Second, in 2023, the United Nations Committee against Torture recommendation from its Seventh Periodic Review of New Zealand, briefly considered Mr Kim's case, and recommended that "[t]he State party should thoroughly assess the situation of each individual case".¹²⁶ That broad statement is incapable of rendering the Minister's decision unlawful. The Minister was entitled to rely on the totality of the assessment of Mr Kim's case in concluding that extradition remained appropriate.

[162] Third, extradition of Mr Kim continues to serve a lawful purpose by ensuring those accused of serious crimes are tried and, if convicted, suitable sanctions are imposed.

[163] Fourth, for the reasons set out above, no material information was withheld from the Minister, nor was there a failure to obtain relevant information. Nothing sufficiently material had changed since the Supreme Court decision that required a wider reconsideration of the extradition decision, or precluded the conclusion that extradition remained appropriate.

Breach of natural justice

[164] The requirements of natural justice are always context specific. In the context of the decision Minister Goldsmith was required to make, I consider the requirements of natural justice were met. Mr Kim was given an opportunity to provide submissions and duly provided a 36 page letter with voluminous annexures. The Minister read the letter and relied on written advice from officials that analysed it. I consider this was sufficient to meet the requirements of natural justice in this case.

¹²⁶ United Nations Committee against Torture *Concluding observations on the seventh periodic report of New Zealand* CAT/C/NZL/CO/7 (2023) at [26].

Unreasonableness/error of fact

[165] It is often particularly difficult to draw a distinction between unreasonableness grounds of review and error of fact grounds of review. A decision made without all the necessary facts, or based on materially incorrect facts, could hardly be a rational decision. Moreover, the test for a *Bryson* mistake of fact is often indistinguishable from *Wednesbury* unreasonableness,¹²⁷ namely a decision contrary to the only reasonably available conclusion on the facts.¹²⁸

[166] The overlap is stark in this case. Given the nature of Minister Goldsmith's decision, any mistake of fact needed to relate to whether there was a sufficiently material change in circumstances to require a wider reconsideration of the decision. This is so whether it was a mistaken evaluation of incontrovertible facts (the first type of mistake of fact discussed at [70] above), or a material mistake of incontrovertible fact revealed by post-decision evidence (the second type of mistake referred to at [70] above).

[167] For the reasons discussed above, the further evidence provided by Mr Kim in these proceedings has not persuaded me there was further information that could have materially impacted on the Minister's decision. It follows it was reasonable for the Minister to proceed on the basis of the material provided,¹²⁹ and there was no failure by the Ministry to provide material information.¹³⁰ Moreover, there was (and remains) a reasonable basis on which the Minister could be satisfied the position had not changed to such an extent that the assurances no longer protected Mr Kim from a real risk of torture or an unfair trial. Thus, there was no material mistake of incontrovertible fact revealed by post-decision evidence, and the decision was reasonable.

¹²⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (EWCA Civ).

¹²⁸ *Bryson v Three Foot Six Ltd*, above n 88, at [26]–[27].

¹²⁹ *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 (HL).

¹³⁰ *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139.

Impermissible purpose

[168] Mr Kim submits that the Ministry advised Minister Goldsmith to proceed with extradition to avoid further judicial review proceedings. Mr Kim relies on the following passage from a briefing paper dated 12 December 2023 informing the Minister of the UNHRC’s report on Mr Kim’s complaint:

80. It is open to you to review the matter yourself and make your own entirely fresh determination on whether to surrender Mr Kim to China. If a new decision was to be made, it would require a full consideration of all the circumstances of the case, all relevant legal and factual factors, the judgments of the courts, and the most up-to-date information about any and all issues.

...

83. *Any new decision you make would (if it is not in Mr Kim’s favour) be able to be subjected to new judicial review proceedings in the High Court, and with further rights of appeal. This would likely take several years.*

84. We do not recommend this option.

85. Over the past 12 years, Mr Kim’s case has been given careful and detailed consideration by Ministers, the New Zealand courts and the UNHRC. The New Zealand Supreme Court has authoritatively confirmed the surrender decision. The UNHRC has found that Mr Kim’s rights would not be breached by surrender. We do not see that there is any reasonable justification for recommencing the process of making a surrender decision. Starting afresh at this stage would probably mean the extradition could never be successfully concluded.

(emphasis added).

[169] I consider there was nothing improper about Ministry officials pointing out that an “entirely fresh” reconsideration of the extradition decision could result in complex judicial review proceedings. Given the progress of this case to date, that was little more than a statement of the obvious. It was accompanied by what I have held was correct advice that the Minister was entitled to undertake a limited reconsideration of whether there had been any material change to the position already authoritatively confirmed by the Supreme Court.

[170] In this context, it is drawing a long bow to suggest that the Ministry was advising the Minister to conclude that extradition remains appropriate simply to avoid judicial review proceedings. This part of the advice was focused on the choice

between an entirely fresh decision and a limited reconsideration. Noting that the former would be more likely to expose the decision to judicial review does not on its own establish an impermissible purpose given the other factors the officials relied on to advise against a full reconsideration.

Conclusion

[171] For the reasons summarised at the start of this judgment, Mr Kim's application for judicial review fails.

Costs

[172] If there are costs issues that cannot be agreed, the parties should agree a timetable for the filing of brief submissions, and I will deal with costs on the papers. The parties can revert to me if a timetable cannot be agreed.

La Hood J

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