

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 154/2025
[2026] NZSC 46**

BETWEEN MILES JOHN MCKELVY
Applicant

AND UNITED STATES OF AMERICA
Respondent

SC 155/2025

BETWEEN MILES JOHN MCKELVY
Applicant

AND UNITED STATES OF AMERICA
First Respondent

DISTRICT COURT AT AUCKLAND
Second Respondent

Court: Ellen France, Williams and Miller JJ

Counsel: R M Mansfield KC for Applicant
B J Thompson for Respondent in SC 154/2025 and
First Respondent in SC 155/2025
No appearance for Second Respondent in SC 155/2025

Judgment: 5 May 2026

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] The District Court found the applicant, Mr McKelvy, eligible for surrender to the United States of America under the Extradition Act 1999 in relation to

cocaine offences.¹ Mr McKelvy simultaneously appealed and applied for judicial review of this decision, but both applications were dismissed by the High Court;² Gordon J described the judicial review application as “entirely duplicative of the appeal”.³ The Court of Appeal then denied Mr McKelvy leave to bring a second appeal against the extradition eligibility decision and dismissed his appeal against the High Court judicial review decision.⁴

[2] Mr McKelvy now brings two applications for leave to appeal to this Court.

[3] The first is an application for leave to appeal from the judgment of the Court of Appeal dismissing Mr McKelvy’s appeal against the High Court judicial review decision.

[4] The second is an application for leave to appeal directly from the High Court judgment dismissing his appeal against the District Court eligibility decision. It is a leapfrog appeal because the Court of Appeal refused leave to bring a second appeal and this Court has no jurisdiction to hear an appeal from that decision.⁵ This Court may entertain a direct appeal from the High Court but the circumstances must be “extremely compelling”.⁶

[5] The essence of the United States’ case, as disclosed by the Record of Case (ROC), is that Mr McKelvy was one of five men who conspired to export a large quantity of cocaine by ship from Peru to New Zealand, its ultimate destination, via Beaumont, Texas (which is a port city) and Romania. The indictment and statement of conduct filed by the United States allege that the drugs were to be secreted inside a generator carried inside a shipping container. Mr McKelvy would then receive the shipment in New Zealand and attend to the necessary customs paperwork. Evidence of the alleged conspiracy is to be given by an undercover agent of the United States Drug Enforcement Administration.

¹ *The United States of America v McKelvy* [2023] NZDC 10632 (Judge P Winter) [DC judgment].

² *McKelvy v United States of America* [2023] NZHC 3698 (Gordon J) [HC judgment].

³ At [181].

⁴ *McKelvy v United States of America* [2025] NZCA 436 (Woolford, Jagose and Powell JJ) [CA judgment].

⁵ Criminal Procedure Act 2011, s 213(3).

⁶ *Burke v Western Bay of Plenty District Council* [2005] NZSC 46, (2005) 18 PRNZ 560 at [4]. See also Senior Courts Act 2016, s 75.

[6] The alleged conspirators have been charged in the United States with conspiracy to import the drugs to, and export the drugs from, Texas, amongst other charges. A supplement to the ROC confirms that the DEA agent was in the United States when the conspiracy was entered, although he also travelled to Romania to meet some of the conspirators. He did not meet Mr McKelvy but the two communicated directly via Wickr (a messaging application) once the other conspirators introduced them. It appears Mr McKelvy did not leave New Zealand at any relevant time.

[7] The principal question in the proposed appeal is whether the double criminality requirement in the Extradition Act and the Treaty on Extradition between New Zealand and the United States of America has been satisfied.⁷

[8] In *Ortmann v United States of America*, this Court addressed the requirements for an extradition offence in relation to the United States. In essence, it is necessary that the extradition court be satisfied that the alleged conduct would amount to conspiracy to import or export cocaine at New Zealand law.⁸ There is no doubt for present purposes that it is an offence at United States law.⁹

[9] Mr McKelvy properly accepts that conspiracy to import or export cocaine is a qualifying offence.¹⁰ However, he contends that the ROC does not establish that the drugs would have landed and cleared customs in Beaumont, Texas. Instead, it “only establishes that the conspiracy involved a shipping route through the United States”. Such transit, he says, does not amount to an “import” for the purposes of the Misuse of Drugs Act 1975.¹¹ Mr McKelvy submits that the double criminality requirement is therefore not made out.

[10] The United States accepts that the ROC does not specify whether the drugs would be unloaded in Beaumont, Texas, nor whether they would clear customs.

⁷ Extradition Act 1999, s 24(2)(c); and Treaty on Extradition between New Zealand and the United States of America 791 UNTS 253 (signed 12 January 1970, entered into force 8 December 1970), art 4.

⁸ *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [148].

⁹ DC judgment, above n 1, at [37].

¹⁰ Misuse of Drugs Act 1975, s 6(2A)(a).

¹¹ Section 6(1)(a).

It notes, however, that the ROC contains a discussion between Mr McKelvy's alleged co-conspirators and the undercover agent, to the effect that "the cocaine would be shipped from Peru to Beaumont, Texas, in the United States, and from there to Romania and finally New Zealand". On this basis, the United States submits that Mr McKelvy's interpretation of the ROC is not seriously arguable. There is accordingly no need for this Court to determine whether transit through territorial waters amounts to an "import", but in any event, the United States submits that it does.

[11] In the District Court, Judge P Winter surveyed the New Zealand authorities on importation and held that they support the proposition that goods in transit may be viewed as imported even if they do not clear customs.¹² Gordon J in the High Court was of the same view,¹³ as was the Court of Appeal.¹⁴

[12] Having regard to the very serious consequences for Mr McKelvy should he be required to serve a long prison sentence far from home, we reviewed the ROC ourselves. It does not specify whether the drugs would be unloaded at Beaumont or clear customs there. But it does justify an inference that the ship would dock at Beaumont, there being no reason to go to that port unless to deliver or take on cargo or perhaps to take on fuel and supplies.

[13] The argument that drugs in transit in a New Zealand port are not imported into New Zealand does not have sufficient prospects of success to warrant leave.¹⁵ As Gordon J reasoned, the interpretation that "import into ... New Zealand" in s 6(1)(a) of the Misuse of Drugs Act simply means bringing drugs into New Zealand from an external source accords with the authorities and the objects of that legislation.¹⁶

¹² DC judgment, above n 1, at [52]–[60].

¹³ HC judgment, above n 2, at [87]–[118] and [121].

¹⁴ CA judgment, above n 4, at [14]–[19].

¹⁵ For the proposition that this Court may deny leave to appeal where a proposed argument has insufficient prospects of success, see *LFDB v SM* [2014] NZSC 197, (2014) 22 PRNZ 262 at [21].

¹⁶ HC judgment, above n 2, at [87]–[118] citing *R v Hancox* [1989] 3 NZLR 60 (CA), *R v Barreiro-Teixeira* HC Auckland CRI-2005-092-4272, 10 May 2006 and *R v Geesman* (1970) 13 CRNS 240 (Que SP).

[14] The second proposed ground is that the ROC does not establish a prima facie case that Mr McKelvy knew of a plan to import cocaine to the United States.¹⁷ This argument accepts, for present purposes, that Mr McKelvy may have been party to a conspiracy to import into New Zealand but not that he intended to import drugs into the United States.

[15] The Court of Appeal reviewed the ROC and concluded that an inference that Mr McKelvy knew the drugs would travel via the United States, relying among other things on Mr McKelvy's knowledge of the necessary customs paperwork, was reasonably available.¹⁸ Gordon J had reached the same conclusion, after careful analysis of the evidence.¹⁹

[16] The argument that the inference was not reasonably available raises no question of general or public importance, but it could warrant leave on the miscarriage of justice ground.²⁰ However, we do not consider that the proposed appeal has sufficient prospects of success to justify leave.²¹ The ROC supports an inference that Mr McKelvy, as a member of a small group who planned the smuggling operation, and the person responsible (on his own account) for the paperwork needed to import the container into New Zealand, knew not only of the method but also of the route the drugs would take.

[17] The applications for leave to appeal are dismissed.

Solicitors:

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¹⁷ As required by s 24(2)(d)(i) of the Extradition Act: see *Ortmann*, above n 8, at [118] and [161].

¹⁸ CA judgment, above n 4, at [22]–[25].

¹⁹ HC judgment, above n 2, at [151]–[152].

²⁰ Senior Courts Act, s 74(2)(a)–(b).

²¹ See *LFDB*, above n 15, at [21].