



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

23 June 2026

MEDIA RELEASE

BW v COMMONWEALTH OF AUSTRALIA

(SC 22/2025) [2026] NZSC 81

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

Order prohibiting publication of the name, address and identifying particulars of the appellant until further order of the District Court.

What this judgment is about

When a person in New Zealand is alleged to have committed a criminal offence in a foreign country, that country may issue an extradition request for the return, or surrender, of that person to face the charges against them.

Part 4 of the Extradition Act 1999 provides for a simplified extradition process from New Zealand to Australia or any other designated country. Under section 45(1), the court must determine whether a person to whom this simplified process applies is eligible for surrender. The court may determine that such a person is not eligible if a discretionary restriction on surrender applies under section 8.

This judgment concerns the correct approach to the discretionary restriction in section 8(1)(c), namely that because of “the amount of time that has passed since” the offence was committed or was allegedly committed, “and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person”.

Background

The appellant, Mr BW, is accused of assaulting a man in Perth, Australia, where Mr BW was living at the time. The alleged offending—an unprovoked attack against the victim in the car park of a fast-food restaurant—occurred on 8 November 2014 and resulted in the victim

suffering grievous bodily harm. Without surgery, the injuries sustained by the victim would have been likely to cause permanent damage.

The assault was reported to the Western Australia Police on 24 November 2014 and, in February 2015, around the time Mr BW returned to New Zealand, he was identified as the person responsible. On 17 June 2015, a magistrate at the Rockingham Magistrates Court in Western Australia approved the issuing of an arrest warrant for Mr BW. It was not until some six years later, on 10 June 2021, that a request for Mr BW's extradition was signed by a magistrate in Western Australia. Inquiries were then made as to Mr BW's whereabouts and, on 23 September 2022, the warrant was endorsed by a New Zealand District Court Judge. Mr BW was arrested in October 2022 and made aware for the first time that he was a suspect in the 2014 assault.

Except for the period between February 2020 and February 2021, in which there were border closures due to the COVID-19 pandemic, the delays in the above-mentioned six-year period either went unexplained or were attributable to police or prosecution services.

In the intervening time, Mr BW had returned to New Zealand to live in his home settlement. He stopped drinking alcohol, was employed in various industries, and reconnected with his iwi and whānau. Importantly, in July 2021, Mr BW entered into a relationship and he and his partner soon began planning a future together. In December 2022, their son was born.

Decisions below

Judge Cathcart in the District Court found that, although the delay on the part of the Australian authorities was inexcusable, this did not mean Mr BW's extradition would be unjust or oppressive. On 4 April 2023, the Judge therefore issued a surrender order under section 47 of the Extradition Act.

Ellis J in the High Court considered that the District Court Judge had erred in his analysis of oppression. On 19 June 2023, she allowed Mr BW's appeal and quashed the surrender order.

The Court of Appeal judgment, delivered on 12 February 2025, concluded that Ellis J had erred by failing to give sufficient consideration to the principle of comity and the seriousness of the alleged offending. The Court held that, while the issues on appeal were finely balanced, and despite the delay attributable to the Australian authorities, it was neither unfair nor oppressive for Mr BW to be extradited.

However, a combination of further delays since the District Court hearing and the effect of section 72(2)(a) of the Act (which prevents the court on appeal from having regard to evidence that was not before the District Court) meant that the Court had no information as to changes in Mr BW's circumstances, nor as to the Commonwealth's readiness to prosecute Mr BW, nor whether, were he to be prosecuted, he could be bailed back to New Zealand before trial. The Court explained that, while it did not have the power to seek undertakings from Australia addressing these questions, the Minister of Justice did. In light of this, the Court of Appeal referred Mr BW's case to the Minister under section 48(1) of the Act.

On 16 June 2025, the Supreme Court granted Mr BW leave to appeal against the decision of the Court of Appeal. The approved question was whether the Court of Appeal was correct to

allow the appeal and find that the High Court erred in law when it concluded it would be oppressive to extradite Mr BW to Australia.

Supreme Court decision

By a majority as to the outcome comprising Winkelmann CJ, Glazebrook, Ellen France and Williams JJ, the Supreme Court has allowed the appeal. Miller J dissented and would have dismissed the appeal.

Winkelmann CJ, Glazebrook and Williams JJ

The majority first dealt with the proper interpretation of section 8(1)(c), with reference to case law from New Zealand and analogous overseas jurisdictions, holding that the Court of Appeal had erred in law in several respects in its application of that section.

The majority held that a causal link between the delay and the oppression or injustice is required. Further, the terms “unjust or oppressive” denote a high threshold. This is reinforced by the public interest in extradition and, in particular, extradition for serious offending (see at [77]–[78]).

A holistic assessment of the *combination* of all of the particular circumstances (including the circumstances of the alleged offender and the nature and seriousness of the alleged offence) is required (see at [77]).

The relevant circumstances to be considered include particular and relevant aspects of the public interest, although, contrary to the view of the Court of Appeal, the provision does not envisage a balancing of private and public interests (see at [78]). The relevant circumstances also include particular aspects of comity, where relevant. But, in this case, the Court of Appeal was wrong to treat comity as a separate and heavily weighted principle in the evaluative exercise (see at [79] and [92]).

The nature and seriousness of the offending are also to be considered. In principle, the more serious the offending, the more difficult it will be to show that extradition would be unjust or oppressive. However, lengthy delay since the offence was allegedly committed can diminish the significance of that factor. Further, in marginal or borderline cases, where the delay is prosecutorial (including where police are responsible), this could tip the balance towards the high threshold of injustice or oppression being met (see at [80]). The Court of Appeal erred by not reaching this conclusion once it had found Mr BW’s case was finely balanced (see at [93]).

The majority rejected the Commonwealth’s submission that the “ordinary results” of extradition, for example disruption to family and cultural connections, can never reach the level of oppression. In combination with the triviality of the charge, bad faith or the passage of time, the wider circumstances of the case may well make extradition oppressive or unjust even if some of those circumstances are not exceptional in their own right. It is the whole case that must be considered (see at [81]). The interests of children in particular must be given considerable weight (see at [83]).

The relevant circumstances also include those related to the delay (including any responsibility the defendant bears in relation to that delay and any sense of security engendered by that delay). Where the delay was caused by the person, it would have to be very lengthy indeed before it would become oppressive, absent other exceptional circumstances (see at [85]). A sense of security is more likely to indicate oppression if the person is not responsible for the delay (see at [86]).

Applying the section 8(1)(c) test to Mr BW's case, the majority agreed that the alleged offending was very serious, but held that this factor had diminished seriousness because of the long delay (see at [96]–[97]). Some weight had to be accorded to Mr BW's relative youth at the time of the alleged offending and the difficulties he would have in defending the charge because of the delay (see at [98]–[99]). Importantly, the strong evidence of reconnection with his whānau and iwi, and the birth of his young son, pointed strongly towards a finding of oppression (see at [100]–[102]).

The majority concluded that, taking all of these circumstances into account, because of the long and inexcusable delay, to extradite Mr BW would be oppressive. Mr BW was therefore ineligible for surrender (see at [103]–[104]).

The Court made an order continuing Mr BW's interim name suppression until an application for permanent name suppression is dealt with by the District Court (see at [107] and [111]).

Ellen France J

Ellen France J agreed with the majority as to the test for oppression and that it would be oppressive to order Mr BW's surrender (see at [113]).

Ellen France J also agreed with Miller J's analysis of the extradition pathways at [134]–[151] of Miller J's reasons. Ellen France J highlighted that the statutory scheme differentiates between those powers exercised by the Minister of Justice and those exercised by the court and that distinction is an important one (see at [114]). Differing from Miller J, Ellen France J did not consider referral to the Minister was appropriate in this case. There was sufficient information properly before the Court to conclude surrender would be oppressive (see at [115]).

Miller J

In dissent, Miller J would have upheld the decision of the Court of Appeal to refer Mr BW's case to the Minister of Justice (see at [116]). Miller J considered that the Extradition Act provides extradition courts with four main decision-making pathways, including discharge, surrender, and referral to the Minister (see at [132]–[151]). Having reviewed these pathways, Miller J—differing from the reasoning of the Court of Appeal—would have referred Mr BW's case under section 48(4)(a)(i) of the Extradition Act, on the basis that the discretionary restriction in section 8(1)(c) may apply (see at [155] and [185]–[186]).

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