



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

4 NOVEMBER 2020

## **MEDIA RELEASE**

MATHIAS ORTMANN AND OTHERS v UNITED STATES OF AMERICA AND ANOTHER (SC 54/2018)

FINN HABIB BATATO v UNITED STATES OF AMERICA (SC 55/2018)

MATHIAS ORTMANN AND ANOTHER v UNITED STATES OF AMERICA (SC 56/2018)

KIM DOTCOM v UNITED STATES OF AMERICA (SC 57/2018)

KIM DOTCOM v UNITED STATES OF AMERICA AND ANOTHER (SC 58/2018)

[2020] NZSC 120

## **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](http://www.courtsofnz.govt.nz).

### **Introduction**

The United States of America has requested the extradition of Messrs Ortmann, van der Kolk, Batato and Dotcom (the appellants) to the United States to face trial for criminal copyright infringement and other related charges. There are 13 charges in total. The request was made under the Treaty on extradition between New Zealand and the United States of America. The issue in the appeal was whether the appellants are eligible for surrender in respect of these charges under the provisions of the Extradition Act 1999.

### **Background**

In 2005, Mr Dotcom, along with Messrs Ortmann and van der Kolk, established a business providing cloud storage and file sharing facilities for internet users. The business was known as Megaupload. Mr Batato later joined Megaupload as an employee.

The United States says that through Megaupload, the appellants breached copyright in commercially valuable property such as movies, games and music. The United States alleges that the Megaupload business model (by design) encouraged third parties to upload digital files that infringed copyright which could then be shared. The United States alleges that the appellants knew that third parties were uploading infringing material to Megaupload and that they incentivised this and profited from it.

### **Case history<sup>1</sup>**

Extradition under the Extradition Act is a two-stage process. First, the court must determine whether the person is eligible for surrender to the requesting country. If the court finds the person is eligible for surrender, it is then for the Minister of Justice, at the second stage, to determine whether the person should be surrendered. These proceedings relate only to the first stage.

In December 2015, the District Court held that the appellants are eligible for surrender to the United States in respect of each of the 13 counts (offences) with which they are charged. The appellants appealed against the District Court decision by way of case stated. This is a narrow form of appeal limited to points of law. The High Court and Court of Appeal dismissed the appellants' case stated appeals, upholding the decision of the District Court that the appellants are eligible for surrender on all counts.

The appellants also applied for judicial review of the District Court decision that they are eligible for surrender. The applications for judicial review alleged that the District Court made a number of procedural and substantive errors, some of which overlapped with the grounds raised by the appellants in their case stated appeals.

The appellants' applications for judicial review were dismissed by the High Court. The Court of Appeal dismissed appeals by the appellants against the High Court decision, concluding that the judicial review proceedings were an abuse of process. The Court of Appeal considered that the grounds raised in the judicial review proceedings duplicated the grounds raised by the appellants in their case stated appeals. It also considered that the appellants were attempting to bypass the appeal provisions in the Extradition Act. This meant that the Court of Appeal did not consider the merits of the applications for judicial review.

The appellants were granted leave to appeal to the Supreme Court against the Court of Appeal's findings that they were eligible for surrender and that their judicial review proceedings were an abuse of process.

### **The Supreme Court's decision**

The Supreme Court has dismissed the appeals against the Court of Appeal's finding in the case stated appeals that the appellants are eligible for surrender, except in relation to count 3 (conspiracy to commit money laundering). The Court has concluded that the appellants are not eligible for surrender in respect of that count. The Court has allowed the appeals in the judicial review proceedings and sought further submissions in relation to that aspect of the

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<sup>1</sup> A more detailed synopsis of the case history can be found [here](#).

case. A final determination as to whether the appellants are eligible for surrender in relation to counts 1, 2 and 4–13 will be made after the judicial review appeals are resolved.

The first issue for the Court was whether the United States was required to establish double criminality; that is, whether the appellants' alleged conduct, if proved, would constitute an offence both in the United States and New Zealand. The Court held that the United States, and any country requesting surrender under Part 3 of the Extradition Act, must establish double criminality as a prerequisite to extradition. This means that in the present case, the United States had to establish that the conduct of the appellants alleged in the United States charges would also be criminal offences in New Zealand if the conduct had happened here.

The second issue was what is required by s 24(2)(c) of the Extradition Act. The Court held this requires the extradition court to be satisfied that the conduct with which the appellants are charged:

- (a) is an offence contained in the extradition treaty;
- (b) would constitute an offence in the requesting country punishable by a maximum penalty of not less than 12 months' imprisonment; and
- (c) would constitute an offence under New Zealand law, again punishable by a maximum penalty of not less than 12 months' imprisonment, had it occurred in New Zealand.

The Court held that the first two of these requirements ((a) and (b)) were satisfied. The third issue was whether requirement (c) was satisfied.

The Court held that the conduct alleged by the United States in counts 2 and 4–8 would constitute an offence in terms of s 131(1)(c), (d)(i), (d)(iii) and (e) of the Copyright Act 1994. The offences created by s 131 criminalise knowingly dealing with an infringing copy of a copyright work. Each offence is punishable by more than 12 months' imprisonment. The Court also found that none of the carve-outs and exemptions to liability in the Copyright Act apply. On this basis, the Court held that s 131 of the Copyright Act provides a matching New Zealand offence for counts 2 and 4–8.

The Court then considered whether the conduct alleged would constitute offences under the Crimes Act 1961. The Court held that the Copyright Act is not a code, so does not preclude liability under the Crimes Act for offences relating to copyright infringement. It has also found that the conduct alleged in counts 1, 2 and 4–13 would constitute various offences under the Crimes Act. The Crimes Act therefore provides matching New Zealand offences for these counts. However, the Court has held that there is no matching New Zealand offence for count 3.

The fourth issue was whether the United States was required to prove the existence of copyright under s 24(2)(d) of the Extradition Act for counts 4–8. Section 24(2)(d) requires the requesting country (here, the United States) to produce evidence which, if accepted, would prove the matching New Zealand offence identified at the s 24(2)(c) stage. Contrary to the view of the High Court and Court of Appeal, the Court held that copyright status must be proved to a prima facie standard under s 24(2)(d) of the Extradition Act for counts 4–8.

However, the Court held that the evidence tendered by the United States satisfies this requirement.

The fifth issue was whether it was open to the High Court and Court of Appeal to confirm the District Court decision on a case stated appeal given what the appellants argued were serious flaws in the District Court judgment. This Court has dismissed the appellants' argument that the High Court and Court of Appeal acted beyond their powers in relation to the case stated appeals.

Finally, the Court held that the Court of Appeal erred in concluding that the judicial review proceedings were an abuse of process. Rather, the Court of Appeal should have engaged with the grounds raised in the judicial review applications to determine whether these grounds were truly duplicative of the grounds raised in the case stated appeals. Those grounds that did not overlap with the case stated appeals needed to be addressed.

### **Result and next steps**

In the result, the Court allowed the appeals in the judicial review proceedings. It has directed the parties to file brief submissions identifying the issues that remain outstanding in the judicial review proceedings and setting out their view as to which court should resolve these issues.

The Court also allowed the case stated appeals in part and discharged the appellants in respect of count 3. The case stated appeals were otherwise dismissed. This means that unless the appellants are successful in the judicial review proceedings, they will be eligible for surrender on all counts other than count 3.

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