IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC22/25**

BETWEEN	**BW**
	Appellant
AND	**COMMONWEALTH OF AUSTRALIA**
	Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

26 September 2025

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

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SUMMARY OF ARGUMENT

1. In 2014, BW allegedly assaulted a man in Perth, Australia in an unprovoked attack. BW continued the assault after the victim was on the ground and unconscious. The victim required surgery, without which the injuries were likely to cause permanent injury. After considerable delay an extradition request for BW was received in 2022. Although he cannot be tried for the offence in New Zealand, BW says that he should not be surrendered to Australia because he would be separated from his whānau and particularly his young child. He has also reestablished his cultural connections and says the delay gave him a false sense of security. The issue in this appeal, then, is whether BW's surrender to Australia is oppressive under s 8(1)(c) of the Extradition Act 1999 (the **Act**).

2. Australia is not only our geographical neighbour but because of our close economic and social ties, and our mutual trust in each other's criminal justice system, extradition is conducted as a semi-borderless arrangement. On this occasion, there has been significant delay in requesting BW's extradition. He has naturally gotten on with his life, however the threshold for oppression is set deliberately high and must be considered in the context of the particularly close relationship with Australia and the serious nature of the offending.

3. There is a constant and weighty public interest in extradition. For the oppression test to be satisfied, something more is needed than 'inherent and inevitable consequences' or 'commonplace hardship'. Disruption to BW's whānau and reconnection with his community and culture, while undoubtedly qualifying as hardship, cannot meet the threshold of cruelty or harshness.

BACKGROUND

4. The Commonwealth of Australia has requested the extradition of BW from New Zealand to face a trial on criminal charges arising from a violent incident resulting in grievous bodily harm in Perth in 2014. The Court of Appeal agreed with the determination of the District Court that BW

should be surrendered. The respondent submits that the Court of Appeal correctly determined that the consequences of extradition do not meet the high standard of oppression in s 8(1)(c) of the Act.

5. In the District Court, BW unsuccessfully resisted surrender on oppression grounds that, essentially, he was now well-established in New Zealand and that his whānau would be disrupted.[1]

6. On a question of law appeal, Ellis J held that the District Court Judge erred in his "oppressiveness" analysis. She found that the oppression threshold had been met, emphasising the effect of the delay on BW's circumstances and those of his family. However, her Honour did not give sufficient weight to the principle of comity and the seriousness of the offending when making a determination under s 8(1)(c) of the Act.[2]

7. The Court of Appeal concluded that:[3]

> [m]oreover, while BW has expressed commitment and connection to his culture, we are not satisfied that the consequences of extradition are beyond the inevitable and inherent consequences such that extradition would be oppressive.

8. The Court of Appeal did not, however, confirm BW's surrender. Instead, the Court referred the case to the Minister in light of the lack of information about BW's current situation and the best interests of his child.[4] The Court also had questions about Australia's position.

9. BW now appeals the Court of Appeal's decision. BW essentially contests issues of weight – that the Court of Appeal erred by considering 'comity' or 'public interest' in the s 8 analysis of the Act, while simultaneously arguing that the Court should have placed more weight on BW's personal circumstances (impact on his whānau, and his cultural reconnection).[5]

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1 *Commonwealth of Australia v BW* [2023] NZDC 5941 ["District Court Decision"]: Supreme Court Case on Appeal ["SC COA"] **[[SC COA 50]]**.

2 *BW v the Commonwealth of Australia* [2023] NZHC 1587 ["High Court Judgment"] **[[SC COA 35]]**.

3 *Commonwealth of Australia v BW* [2025] NZCA 8 ["Court of Appeal Judgment"] at [65] **[[SC COA 28]**.

4 Court of Appeal Judgment at [65] **[[SC COA 28]].**

5 BW submissions in support of appeal, dated 5 September 2025 at [2].

Alleged offending and BW's move to New Zealand

10. BW is faced with a charge of *With Intent to do Grievous Bodily Harm to Another* – punishable by a maximum of 20 years' imprisonment in Western Australia.[6]

11. The charge relates to an attack in a carpark of a fast-food restaurant in Perth on 8 November 2014. The victim was sitting inside a motor vehicle in the front passenger seat with the front passenger door window down. In an unprovoked attack, BW allegedly ran up to the victim, jumped into the air and kicked the victim once to his head, through the open vehicle passenger door window.[7]

12. After the victim exited the motor vehicle, BW allegedly punched the victim once to his head, and after the victim was knocked unconscious and fell backwards onto the ground, unconscious, BW allegedly kicked the victim once to his head and two times to the victim's right shoulder.[8]

13. As a result of the incidents, the victim sustained significant injuries including:[9]

    13.1 a comminuted right scapula fracture with intraarticular extension;

    13.2 a comminuted impacted fracture of right distal clavicle requiring surgery for fixtation;

    13.3 sustained haematoma to his right fronto-temporal scalp; and

    13.4 contusion to his left hand.

14. Medical reports concluded that without surgery, the injuries were likely to cause permanent injury to the victim's health.[10]

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6 Affidavit of Detective Sergeant, Roy Michael Morrish at [5] **[[SC COA 72]]**.

7 At [6.2] **[[SC COA 73]]**.

8 At [6.4] – [6.7] **[[SC COA 73]]**.

9 At [6.8] **[[SC COA 73]]**.

10 At [6.9] **[[SC COA 73]]**.

15. The incident was reported to the police on 24 November 2014.[11] On 6 February 2015, the victim identified BW as being the person responsible for the attack.[12]

16. On 17 June 2015, an arrest warrant for BW was issued by the Rockingham Magistrates Court.[13] On 25 June 2015, Rockingham Detectives submitted a request seeking approval to extradite BW from New Zealand to Perth, Australia.[14] It appears that BW moved from Perth to New Zealand within the 7 months between the incident on 8 November 2014 and 17 June 2015, when the first request was submitted to extradite BW.

17. New Zealand authorities received the extradition request from Australia on 25 February 2022.[15] The warrant for BW's arrest was endorsed by his Honour Judge Large at the Napier District Court on 23 September 2022.[16] BW was arrested by New Zealand Police on 5 October 2022 and appeared before the Gisborne District Court on 7 November 2022.

SUBSTANTIVE SUBMISSIONS

18. The respondent's position is that the Court of Appeal was correct – the high standard of oppression reflects public interest considerations derived from the seriousness of the offending and comity. Whether BW's changes in personal circumstances meet the high threshold of oppression has been subject to fulsome scrutiny by the lower Courts, and both the District Court and Court of Appeal have correctly found that the impact on BW's personal circumstances are inevitable and an ordinary result of extradition.

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11 Affidavit of Detective Senior Sergeant Elliott dated 16 December 2022 at [8]: Court of Appeal Additional Materials ["CA AM"] **[[CA AM 4]]**.

12 Affidavit of Detective Sergeant, Roy Michael Morrish at [16] **[[SC COA 75]]**.

13 At [7] **[[SC COA 73]]**.

14 At [8] **[[SC COA 73]]**.

15 High Court Judgment at [10] **[[SC COA 37]]**. It is a matter of public record that the New Zealand borders were closed for non-citizens between 19 March 2020 and 12 April 2022. During that time the DPP granted an extension of the extradition approval due to the pandemic.

16 High Court Judgment at [10] **[[SC COA 37]]**.

Comity and the semi-borderless arrangement for the enforcement of the criminal law

19. Part 4 of the Act governs extradition based on an endorsed or backed warrant and double criminality. There is no prima facie case requirement. The person sought may not adduce evidence to show the alleged conduct has not occurred. This is how the Act meets its objectives under s 12 of facilitating requests for the extradition of persons to New Zealand and providing a means for New Zealand to give effect to requests for extradition from Australia.

20. This system reflects a high level of mutual trust and respect in the criminal procedures of each country: "There is a justified expectation that the respondent's human rights (including right to a fair trial) will be met by Australia".[17] Te Aka Matua o te Ture | Law Commission described the Part 4 procedure as recognising "the particularly close and trusting relationship New Zealand has with [Australia]".[18]

21. The principle of comity means because of the close and trusting relationship, Australia expects that if a person wanted for prosecution is in New Zealand and commits a crime, New Zealand will back their warrant. New Zealand expects the same. Comity gives rise to the assumption that the requesting state will give the individual a fair trial according to its laws and underlies the whole theory and practice of extradition.[19]

22. This principle of comity is engaged by the Act at numerous points. For example:

    22.1 Comity is relevant in the Act's allocation of procedure. As Australia is a highly trusted extradition partner, the Act extends the "fast track" back warrant procedure.

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17 *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [18].

18 Te Aka Matua o te Ture | Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at [7.18].

19 *The Republic of Argentina v Mellino* [1987] 1 SCR 536 at 555.

22.2 Comity is relevant to the injustice limb of s 8(1) of the Act. It is only where a fair trial in the requesting state is "not possible", having regard to that state's trial protections that it would be unjust to extradite.[20]

22.3 Comity is relevant if and when the extradition proceedings fall for the Minister to decide. Comity was held to be the "overarching principle" in a Ministerial decision under Part 4.[21]

It is evident that comity is a constant and weighty public interest consideration in numerous points of decision under the Act.

23. The England and Wales cases (while in a different statutory and human rights context)[22] also emphasise the importance of the public interest in extradition and the prosecution of serious crime across borders. In *Norris v Government of the United States of America (No 2)*, the United Kingdom Supreme Court held that: [23]

> [s]uch an assumption [about the importance of extradition in general] is an essential element in the task of weighing, on the one hand, the public interest in extradition against, on the other hand, its effects on individual human rights. This is not to say that the latter can never prevail. It does mean, however, that the interference with human rights will have to be extremely serious if the public interest is to be outweighed.

24. This meant in *Norris* that it would only be if some "quite exceptionally compelling feature" is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves.[24]

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20 *Mercer,* above n 17 at [43]

21 *McGrath v Minister of Justice* [2014] NZHC 3279; [2015] NZAR 122 at [57].

22 Primarily the European Convention on Human Rights and Fundamental Freedoms 213 UNTS 213 UNTS 221 (4 November 1950), art 8.

23 *Norris v Government of the United States of America (No* 2) [2010] UKSC 9; [2010] 2 AC 487 at [55].

24 At [56].

25. In *H(H) v Deputy Prosecutor of the Italian Republic, Genoa*,[25] Lady Hale explained that public interest is as follows:[26]

> There is a constant and weighty public interest in extradition; that people accused of crimes should be brought to trial, that people convicted of crimes should serve their sentences; that [in that case] the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.

26. These observations about public interest in England and Wales are echoed in Canada where the oppression assessment sits only with the Minister.[27] The legal environment is otherwise closer to that in New Zealand given the very similar refusal ground where "the surrender would be unjust or oppressive having regard to all the relevant circumstances".[28]

27. In *M.M. v. Minister of Justice Canada on behalf of the United States of America* it was observed that the Minister must consider the best interests of children who may be affected by extradition when the material before him or her shows that this is a relevant concern.[29] However, the Minister must do so in light of all of the circumstances, including "the realities of the impact on children of the criminal processes under domestic law" and the importance of complying with Canada's

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25 BW suggests that the Court of Appeal erred by considering *H(H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor Intervening)* [2012] UKSC 25, [2013] 1 AC 338 stating that "courts should be cautious to place any significant reliance on the balancing test mandated by the European Convention to the analysis required by s 8(1)(c) of the Act". However, it is worth noting that the Court of Appeal in *Radhi v District Court of Manukau* [2017] NZCA 157, [2017] NZAR 692 referred to Lady Hale's comments in *HH* noting that the Court is "cautious of placing particular reliance on this decision because it was applying a European Convention ([article 8])….it is noted that the UK Supreme Court recognised that the interests of the children were relevant to an extradition application. It is also to be noted that the Court emphasised the public interest in extradition and the need to eliminate safe havens for persons accused of criminal offending". The Court of Appeal in *Tukaki v Commonwealth of Australia* [2018] NZCA 324 [2018] NZAR 1597; then subsequently referred to *HH* noting that Lord Hale's comments on public interest after noting that public interest in extradition explains the threshold in ss 7, 8 and 48 of the Act.

26 *Tukaki,* above n 25 at [31] citing *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at [8(4)].

27 The Minister of Justice has a more expansive role and may consider explicitly consider oppression pursuant to s 44(1) of the Extradition Act 1999 (SC) which allows refusal of surrender if it "would be unjust or oppressive having regard to all the relevant circumstances". The role of the courts in determining eligibility is restricted so that it is related to the role of a magistrate at a preliminary hearing, see: *The Republic of Argentina v Mellino* [1987] 1 SCR 536 at 549.

28 Extradition Act SC 1999 (c 18), s 44(1).

29 *M.M. v. Minister of Justice Canada on behalf of the United States of America*, 2015 SCC 62, [2015] 3 SCR 973 at [149].

international obligations to its extradition partners.[30] This was because "extradition directly concerns important bilateral international obligations to extradition partners and ultimately the viability of international mutual assistance in criminal matters."[31]

28. Comity considerations are heightened in cases of serious offending. That is because s 8 of the Act contemplates considerations of seriousness of offending. Section 8(1)(a) states that "[a] discretionary restriction on surrender exists if, because of…the trivial nature of the case…".

29. As the Court of Appeal has held in *Pearson v Commonwealth of Australia*, the Act provides in this way for matters relating to the seriousness of the alleged conduct and the likely penalty to be considered.[32] Seriousness is a common principle in the international jurisprudence. The extradition request in *R on the application of Cepkauskas v District Court of Marijampole Lithuania* concerned some car theft and other offending. The requesting country, Lithuania, admitted that the car thefts were of "average gravity" and the Court held that "this is not one of those cases in which the very serious nature of the alleged offences weighs heavily against a finding of oppression."[33] In the s 8(1)(c) analysis, the graver the offence – the higher the threshold of oppression.[34] With a maximum sentence of 20 years – BW's offending is not of 'average gravity'.

30. BW refers to a journal article by Rynae Butler written in 2017 analysing the Law Commission's report, to shed light on Part 4 of the Act. Butler refers to the *Commonwealth of Australia v Mercer*[35] litigation to demonstrate that the Court of Appeal displays a more restrictive reading of oppression and asks whether it is reasonable to infer comity as operating as a justification for the restrictive reading of oppression.

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30 At [149].

31 At [150]

32 *Pearson v Commonwealth of Australia* [2024] NZCA 447 at [109]

33 *R on the application of Cepkauskas v District Court of Marijampole Lithuania* [2011] EWHC 757 (Admin) at [32]

34 *Kakis v Goverment of the Republic of Cyprus* [1978] 1 WLR 779 (HL) at 784

35 *Mercer,* above n 17.

However, that is precisely the respondent's position – without reference and consideration to comity, there is a risk that the high threshold for oppression is watered down.[36]

Protections under the Act

31. Despite the semi-borderless arrangement with Australia, ss 7, 8 and 48 of the Act, incorporate protections against extradition.

32. Initially, in a request from Australia, the District Court must decide under s 45 of the Act whether the person is eligible for surrender: whether he or she is an extraditable person; the requesting country is an extradition country; and the offences are extradition offences.

33. But section 45(4) of the Act states that a Court may determine that a person is not eligible for surrender if the person satisfies the Court that a discretionary restriction on the surrender of the person applies under s 8 of the Act. This may be understood as a limit on the principle of comity.

34. Section 8(1)(c) of the Act provides:

> A discretionary restriction on surrender exists if, because of—
>
> (c) the amount of time that has passed since the offence is alleged to have been committed or was committed, —
>
> and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

Delay

35. BW relies on the discretionary restriction ground in s 8(1)(c) of the Act. Delay is the gateway in subsection (c). Once 'the amount of time' that has passed is established (i.e. that there has been a delay), the ultimate question is whether it would be "unjust" or "oppressive" to surrender the defendant having regard to all the circumstances of the case.

36. The notion of causation applied to s 8(1)(c) means it is insufficient to say that a period of delay has created the opportunity for a change of

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[36] Rynae Butler '*Imbalance in Extradition: The Backing of Warrants Procedure with Australia under Part 4 of the Extradition Act 1999*' [2017] NZCLR 63 at 79 < View of Rynae Butler "Imbalance in Extradition: The Backing of Warrants Procedure with Australia under Part 4 of the Extradition Act 1999" [2017] NZCLR 63>.

circumstances. Any defendant will have got on with their life in some fashion when presented with a breathing space following their alleged offending. Rather, there must be some tangible link connecting delay with the cause of the alleged oppression. Delay is only relevant in the s 8(1)(c) analysis when the effect of delay, or the effects of those events which would not have happened before the trial of the defendant if it had taken place with ordinary promptitude, means that surrender is unjust or oppressive.[37]

37. The applicable delay principles are summarised by the Court of Appeal in *Mercer*:

37.1 If the requesting state has been "inexcusably dilatory" in bringing the offender to justice, that *may* make the extradition oppressive.[38]

37.2 the extradition Court should be wary of reviewing the actions of foreign authorities leading up to the request.[39] The requesting state will usually be in a better position to assess the dilatoriness of its authorities and grant a remedy where appropriate, such as a stay for abuse of process.[40]

37.3 prosecutorial delay, therefore, may in borderline cases, tip the balance in favour of finding oppression but it should not be over-emphasized."[41]

38. In the present case the delay was some seven years. In New Zealand domestic criminal law terms the delay is middling and no tangible, delay related prejudice is apparent.[42] If BW's prosecution was to occur domestically, a judge would not be persuaded that there cannot be a fair

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37 *Kakis*, above n 34 at 782.

38 Emphasis added. See *Kakis*, above n 34 at 785; and *Mercer,* above n 17, at [53].

39 *Mercer,* above n 17, at [53].

40 At [53].

41 At [53].

42 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [32]

trial in the light of the burden and standard of proof and the steps that must be taken to mitigate the risk of prejudice in terms of directions and other trial management.[43] But that is the remedy being sought here. It would be incongruous to remove Australia's right to try BW purely because of the passing of time, when that could not justify a stay of proceedings if the prosecution occurred here. Such a course would, in effect, censure the officials of a friendly foreign state.[44] All of this, against a lack of fault on behalf of the victim.

39. There is no substantial difference between this case and *Tukaki* where the delay was similar – seven years between the complaint and the making of the request[45] – and Mr Tukaki also drew on removal from culture, cultural practices and whānau.[46] Mr Tukaki left Australia well before the complaint was made and was nevertheless surrendered.[47] Like BW he did not breach bail or escape custody.

40. This is not an extreme case of delay which has been so protracted, that the Court will be ready to assume that it has given rise to injustice and oppression.[48] It certainly bears no comparison to *Wenting v High Court of Valenciennes.*[49] In that case the offending was in 1989[50] and the European Arrest Warrant was issued in 2006[51] some 17 years later: '[o]n any view that is a very considerable period of time".[52] Extradition was refused in light of the delay, his partner's health, the life he had built in the subsequent decades and his lack of reoffending.

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43 *CT v R* [2015] 1 NZLR 465 at [32]

44 The Supreme Court declined leave in *Tukaki v Commonwealth of Australia* [2018] NZSC 109.

45 *Tukaki,* above n 25, at [4]

46 At [40].

47 At [4].

48 *Woodcock v Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 WLR 1979 at [29].

49 *Wenting v High Court of Valenciennes* [2009] EWHC 3528 (Admin)

50 At [4].

51 At [12]

52 At [7].

Oppression

41. This limb "is directed to hardship to the accused resulting from change in his or her circumstances between [the] alleged offending [and] the extradition application".[53]

42. The primary question for this Court, is whether the 'oppression ground' for restricting surrender under s 8(1)(c) of the Act is met by BW. The threshold for establishing oppression is set deliberately high.[54] As discussed, the high standard of oppression reflects public interest considerations deriving from the seriousness of the offending and comity:

    42.1 "Oppressive" means "oppressing, harsh or cruel".[55]

    42.2 The Court of Appeal in *Mercer* stated that "oppression" invites a case-specific analysis and courts should be wary of hardship based on a simple change of circumstance because of flight to another country.[56]

    42.3 Extradition by its nature involves a degree of disruption which does not by itself make the defendant's return necessarily oppressive.[57]

    42.4 The test for oppression will not easily be satisfied – hardship, a commonplace consequence of an order for extradition is not enough.[58]

Sense of security

43. Earlier case law discusses instances where defendants have been 'lured' into false sense of security about future of prosecution. BW seeks to rely

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53 *Mercer,* above n 17 at [51].

54 *Mercer,* above n 17 at [52]; see also *Curtis v Commonwealth of Australia* [2018] NZCA 603, [2019] 2 NZLR 621 at [44]; *Tukaki,* above n 25, at [29]; see also the Supreme Court in *Tukaki v Commonwealth of Australia* [2018] NZSC 109 declining leave to appeal the Court of Appeal's judgment, noting that "oppressive sets a deliberately high threshold" at [5].

55 *Mailley v District Court at North Shore* [2016] NZCA 83 at [58].

56 *Mercer,* above n 17, at [52].

57 Clive Nicholls *Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance* (3rd ed, Oxford University Press, Oxford, 2013) at [5.59].

58 At [5.63].

on the "false sense of security engendered in BW".[59] However, BW did not know that the prosecution regarded him as a suspect. The argument that a defendant has engendered a false sense of security only arises in narrow circumstances – where the defendant has been granted that 'security' and is aware of it.

44. In *Curtis,* the Police received a complaint and were contemplating a charge but elected to deal with Mr Curtis, a young person, in an alternative way. He was moved into a "youth refuge home" and received counselling.[60] Accordingly the delay induced "a sense of security from prosecution".[61]

45. Likewise in *Kakis*, the appellant was a member of a Cypriot revolutionary movement subject to a warrant arrest for a murder allegedly committed in 1973.[62] Following a coup that ousted the incumbent Government, Mr Kakis left Cyprus in September 1974 to live in England with the permission of the new Government.[63] In December 1974 the previous Government was in power but proclaimed an amnesty.[64] Mr Kakis returned for a short visit and returned to England.[65] Then in February 1976 the Cypriot Government sought to extradite Mr Kakis from England.[66] The House of Lords declined extradition on the basis of oppression.

46. For BW though, it came as a complete surprise to him (he says) that he was wanted by the Western Australian Police.[67] So unlike *Curtis* and *Kakis* there is no assurance (in *Curtis* of alternative disposal and in *Kakis* of an amnesty) to BW that has been broken. From BW's perspective he was not a suspect and his return to Sydney cannot have promoted a sense that

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59 BW submissions in support of appeal dated 5 September 2025 at [89] and [108].

60 Curtis, above n 54, at [59]-[60].

61 At [119].

62 *Kakis*, above n 34 at 781.

63 At 781-2.

64 At 782.

65 At 782.

66 At 782.

67 District Court Decision at [38] **[[SC COA 59]]**

the Perth authorities no longer wanted him.[68] As far as he knew he had never been identified by the victim – there was no sense of security for him to rely on.

Whānau

47. Contrary to what BW suggests, the Court of Appeal appropriately considered the impact on BW's whānau and undertook a "proper, genuine and realistic analysis".[69] BW's argument is posed as one of a lack of consideration by the Court of Appeal – but really it is one of weight.

48. It cannot be said that the Court of Appeal did not consider the impact on BW's whānau or "how the child's interests would have been served or undermined by extradition".[70] Rather, the Court of Appeal referred to BW's submissions that:[71]

    48.1 "The interference with BW's family unit was an important relevant consideration in this case."

    48.2 "The removal of BW from his cultural connections was also relevant to the assessment of oppression."

    48.3 "BW's growth as a person will also be severely disrupted if he is required to be extradited."

    48.4 "The Act, and in particular s 8(1)(c), should be interpretated in a way that is consistent with New Zealand's obligations to observe international instruments such as the United Nations Conventions on the Right of the Child (UNCROC)."

49. Further, the impact of extradition on BW's whānau was central to the analysis of all three lower Courts. This included:

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68 District Court decision, at [41] **[[SC COA 60]]**

69 BW submissions in support of appeal, dated 5 September 2025 at [91].

70 BW submissions in support of appeal, dated 5 September 2025 at [91].

71 Court of Appeal judgment, at [49] **[[SC COA 23]]**.

49.1 that BW will be separated from his partner and young son for a period and that will inevitably affect relationships and the economic strength of his whānau;[72]

49.2 the evidence of BW's mother stating that surrender will have a "huge emotional toll on everyone" and a "huge impact on the whānau unit generally" and that extradition would cause "real hardship";[73]

49.3 that BW developed his life in New Zealand openly;[74]

49.4 that BW and his partner would not have chosen to have a child if they had known that he would be extradited; and[75]

49.5 that BW would be removed from his cultural connections[76] despite being reconnected with his whānau and is endeavouring to live his life according to tikanga.[77]

50. Contrary to BW's submissions, all the considerations above by their very nature capture the interests of the child.[78]

51. The disruption to BW and his whānau described by the District Court and Court of Appeal is a significant but inevitable consequence of extradition – it is not harsh or cruel and does not meet the high threshold of oppressiveness:

51.1 The District Court held that the case "falls well short of the high threshold required" and "even taken collectively, the circumstances relied upon do not reach the acute level of oppression".[79]

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72 District Court Decision at [48] **[[SC COA 61]]**; High Court Decision at [37] **[[SC COA 46]]**.

73 District Court Decision at [48] **[[SC COA 61]]**; Court of Appeal Judgment at [34] **[[SC SCOA 18]]**.

74 District Court Decision at [58] **[[SC COA 61]]**.

75 District Court Decision at [45] – [46] **[[SC COA 61]]**; Court of Appeal Judgment, at [60] **[[SC COA 26]]**.

76 District Court Decision at [60] **[[SC COA 64]]**.

77 Court of Appeal Judgment at [63] **[[SC COA 27]]**.

78 BW's submissions in support of the appeal at [91].

79 District Court decision at [60] – [61] **[[SC COA 65]]**.

51.2 The Court of Appeal held that: [80]

> While extradition would have the effect of separating BW from his child, the public interest in extradition is heightened by the seriousness of the alleged offending. Moreover, while BW has expressed commitment and connection to his culture, we are not satisfied that the consequences of extradition are beyond the inevitable and inherent consequences such that extradition would be oppressive.

52. Further, there was no error in the Court's consideration of the United Nations Convention on Rights of the Child in this case.[81] In particular, the Court of Appeal noted that "[G]iven the country's ratification of UNCROC, it is axiomatic that it is relevant in this context".[82]

53. In so far as BW suggests UNCROC provides a right for a child to not be separated from their parents against their will as grounds for refusal of surrender, the Court of Appeal's decision in *Radhi v District Court of Manukau*[83] is instructive. That case considered the competing interests involved in extradition requests where the rights of a defendant's children are engaged. In the context of a referral under s 48(4)(a)(ii) of the Act, Mr Radhi sought to rely on UNCROC and other international treaties emphasising the importance of family life, noting that these had been taken into account in the deportation context.

54. However, the Court considered that while the international covenants in relation to children are relevant in an extradition case, it is necessary to bear in mind that the issue is not whether it is in a child's interest to be separated from his or her parents. The issue is whether a parent should be extradited, with a consequence being that the parent and child may be separated.[84]

55. While both deportation and extradition may involve separation of parents from their children, unlike deportation, extradition involves an

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80 Court of Appeal Judgment, at [65] **[[SC COA 28]]**.

81 BW submissions in support of appeal, dated 5 September 2025 at [90].

82 Court of Appeal Judgment, at [61] **[[SC COA 26]]**.

83 *Radhi,* above n 25, at [44].

84 At [34].

element of international reciprocity of considerable public interest to New Zealand.[85] The Court in *Radhi* said of expert evidence that the children in that case were vulnerable and needed their father's presence and support, that "[r]egrettably this is frequently the case when persons must serve prison sentences or be extradited."[86]

56. Surrender being ordered despite obligations to young children is also common internationally. In *Carruthers v Canada*, Mr Carruthers was 24 years old at the time of the offence; in the four years between the offence and the extradition proceedings, he had overcome his addiction, gained employment, and become a stepfather and father.[87] Mr Carruthers was nevertheless extradited. Similarly in *Canada (Minister of Justice) v. Hanson*, Mr Hanson was extradited after a five-year delay even though he had "the support of family and friends, has made significant progress in rehabilitating himself, and has made important contributions to his community".[88]

57. The situation is no different in Australia. *Bannister v New Zeeland* concerned an extradition request for offending in 1975-6.[89] The arrest warrant was issued in 1998. The Court found that because of the use of representative charges it would be unjust or oppressive to return the appellant to New Zealand.[90] Importantly for present purposes, however, the Federal Court of Australia did not uphold another ground: that the Judge in the lower court failed to give appropriate weight to the hardship likely to be caused to the appellant, his wife and children as a result of his extradition.[91] As here, Mr Bannister drew on UNCROC.[92]

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85 At [34].

86 At [57].

87 *Carruthers v Canada (Minister of Justice)* 2019 ABCA 490 at [5].

88 *Canada (Minister of Justice) v Hanson* 2005 BCCA 77 at [29].

89 *Bannister v New Zealand* [1999] FCA 362, (1999) 86 FCR 417 at [8].

90 At [29].

91 At [2].

92 At [3].

58. Despite the over 20-year delay, the Court would not have refused surrender on this ground saying: [93]

> [a]s to the application of the Convention, we suggest that the extradition of the appellant to New Zealand is unlikely to have any adverse effects upon his children. It will require his absence only for the time necessary to complete the prosecution. As was pointed out in argument, there is probably no reason why they could not go with him. In truth, the threat to the welfare of the children lies in the possibility that he will be convicted and sentenced to imprisonment. Any detriment will be attributable to his conviction and sentence, not to his extradition. The interests of children are often considered in the sentencing process.

59. The Court of Appeal similarly accepted that BW will be separated from his son. But that is frequently the case in extradition and, indeed, in domestic criminal prosecutions. How does BW's extradition become "oppressing, harsh or cruel"? It will be disruptive and create hardship for him and his whānau but as demonstrated above, it is not more than the "usual or inevitable circumstances"[94] or a "common place hardship"[95] of extradition.

Cultural connection

60. The essence of BW's submission is that the principle of comity has been improperly emphasised at the cost of giving due weight to considerations of tikanga. BW argues that whakapapa and whanaungatanga provide standalone grounds that justify declining surrender.

61. No other principles are cited by BW although tikanga is an integrated normative system that resists concentration on isolated values.[96]

62. The situation shares some similarities to *Doney v Adlam (No.2)*.[97] In that case, where the trustee creditor and the debtor were close whānau, the debtor cited whanaungatanga and manaakitanga in support of her position that she had done enough to repay the debt despite the money

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93 At [33]

94 *Tukaki,* above n 25, at [29].

95 Clive Nicholls *Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance* (3rd ed, Oxford University Press, Oxford, 2013) at [5.63]

96 Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24) at [3.09] – [3.10].

97 *Doney v Adlam* (No 2) [2023] NZHC 363, [2023] 2 NZLR 521.

still owing.[98] She did not call any expert evidence on tikanga.[99] For their part, the creditor emphasised muru, hara, and utu and argued that the central aim must be to retore mana.[100] Ultimately, Harvey J held that "in terms of tikanga, it is evident that traditional concepts including hara, muru, utu are as relevant as whakapapa, whanaungatanga, tino rangatiratanga and manaakitanga in this proceeding".[101]

63. Therefore, without evidence it is difficult to say exactly how all the relevant tikanga principles resolve in the present case, but it is acknowledged that whanaungatanga must be relevant in assessing oppression.[102] The Court of Appeal has said that "the removal of a person from their culture, cultural practices and whānau are all factors to be weighed under s 8 [of the Act]".[103]

64. However, in criminal law, mana, hara, muru and utu and ea must also be appropriately considered.[104] This was the case in *Foley v R* where whanaungatanga in the sense of discharging obligations to care for and support others was conceded as providing some mitigating effect on sentence.[105] But the Court of Appeal noted that mana, utu and ea had to be considered also such that, on balance, the sentence did not need to be disturbed on appeal (for that reason at least).[106]

65. In the context of extradition there is some analogy between the integrated norms of tikanga and the interplay between public and private interests in the oppression assessment. The analogy can be taken only so far because the cases cited above do not attempt to declare the content of tikanga (and cannot).[107] But what can be said is that the assessment

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98 At [92].

99 At [81].

100 At [74].

101 At [106].

102 *Tukaki,* above n 25, at [38].

103 *Tukaki,* above n 25, at [40]; Court of Appeal Judgment, at [63] **[[SC COA 27]]**.

104 *Foley v R* [2023] NZCA 456, (2023) 31 NZTC ¶26-009 at [33].

105 At [33].

106 At [33].

107 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [270].

engages a range of tikanga concepts and not all of them reinforce a conclusion that surrender would be oppressive to BW. Relying on whakapapa and whanaungatanga in isolation will not answer the question of whether there will be oppression.

66. In the end, the question is whether the oppression standard is met. The Court of Appeal in *Tukaki* assumed that Mr Tukaki would suffer from separation from his whānau, who he had recently formed a deeper connection to, and that this extended to hapū and iwi too.[108] Nevertheless, the Court held that: [109]

> Mr Tukaki does not describe any particular hardship that will flow from that disruption, no particular relationship that will be harmed, no particular responsibility that will be foregone which makes the usual incidence of extradition so acute in his case as to reach the threshold of oppression.

67. It was accepted by the Court of Appeal that "BW's mother said that he was an important part of their whānau and that he supports her in maintaining their home" and "BW had undertaken voluntary work at the Whakatō Marae since 2021 and for an iwi trust during the COVID-19 pandemic". However, the Court of Appeal ultimately found that these factors, while they demonstrate a specific hardship, only constitute 'usual and inevitable consequences of extradition', which are not, of themselves, oppressive, compelling or extraordinary:[110]

> While extradition would have the effect of separating BW from his child, the public interest in extradition is heightened by the seriousness of the alleged offending. Moreover, while BW has expressed commitment and connection to his culture, we are not satisfied that the consequences of extradition are beyond the inevitable and inherent consequences such that extradition would be oppressive. There is a high degree of comity between New Zealand and Australia, which is compounded by the seriousness of the offending and the "constant and weighty" public interest in extradition.

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108 *Tukaki,* above n 25, at [38].

109 At [40].

110 Court of Appeal Judgment, at [65] **[[SC COA 28]]**.

68. The contrast with *United States v Leonard*[111] discussed in *Tukaki*[112] is instructive here too. The case concerned the requested extradition of two Aboriginal men to the United States for importing drugs.[113] The Ontario Court of Appeal held that in surrendering the two men, the Minister had committed significant errors. The difference between the situation of the men in *Leonard* and those in both *Tukaki* and the present case are striking. Like BW, an appellant in *Leonard* faced the prospect that a sentence would almost certainly sever his ties to his family and Aboriginal culture and community with which he so closely identifies.[114]

69. As the Court of Appeal explained, however, the appellants in *Leonard* could be tried in Canada instead, whereas for Mr Tukaki (and BW) "the choice…is stark. He is either surrendered for extradition, or New Zealand operates as a safe haven for him on that charge."[115] Further for Mr Leonard there was a gross disparity in sentencing outcomes, he was young, he produced evidence of a life affected by systemic discrimination and disadvantage and the extradition would mean that his young child was placed in foster care.[116]

70. It cannot be said that the Court of Appeal "was wrong to rely on the risk of a safe haven being created – as an argument pointing away from surrender – when BW was not a fugitive." The extent of the Court of Appeal's reference to 'safe havens' in the judgement is merely:[117]

> [63] Finally, it is significant that BW has reconnected with his whānau and is endeavouring to lead his life in accordance with tikanga. This Court in *Tukaki* acknowledged that "the removal of a person from their culture, cultural practices and whānau are all factors to be weighed under s 8 [of the Act]". However, and relevantly in this case, the Court commented:

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111 *United States v Leonard* 2012 ONCA 622, (2012) 112 OR (3d) 496.

112 *Tukaki,* above n 25, at [46].

113 At [47].

114 *Leonard*, above n 111, at [94].

115 *Tukaki,* above n 25, at [51].

116 At [51].

117 Court of Appeal Judgment, at [63] **[[SC COA 27]]**.

> [39] … If the consequences are no more than the inevitable consequences of extradition, then to allow that they meet the threshold of oppression would be to create the "*safe havens*" referred to in *HH v Deputy Prosecutor of the Italian Republic, Genoa*.

71. In other words, "safe havens" are not just relevant to cases involving fugitives. It is not just a place a bail breaching defendant flees to. It may simply be a place that someone who has not evaded the authorities cannot be removed from to face trial in another country. This is made clear in *Tukaki*, where Mr Tukaki relied on his cultural reconnection to defeat the extradition request and the Court referred to the safe havens problem. Like BW, Mr Tukaki could not be considered someone who evaded law enforcement.[118]

72. The outcome might have been different if BW shared Mr Leonard's personal circumstances (and in particular the prospect of foster care and the ability to try him domestically). An isolated concentration on whakapapa and whanaungatanga does not impeach the Court of Appeal's conclusion.

26 September 2025

M J Lillico | N N El Sanjak
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant

118 *Tukaki,* above n 25, at [4].

Statutes

1. Extradition Act 1999, ss 7, 8, 12 and pt 4

Cases

2. *Commonwealth of Australia v Mercer* [2016] NZCA 503

3. *The Republic of Argentina v Mellino* [1987] 1 SCR 536

4. *McGrath v Minister of Justice* [2014] NZHC 3279, [2015] NZAR 122

5. *Norris v Government of the United States of America (No* 2) [2010] UKSC 9, [2010] 2 AC 487

6. *H(H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2012] UKSC 25, [2013] 1 AC 338

7. *Radhi v District Court (Manukau)* [2017] NZCA 157, [2017] NZAR 692

8. *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597

9. *Pearson v Commonwealth of Australia* [2024] NZCA 447

10. *R on the application of Cepkauskas v District Court of Marijampole Lithuania* [2011] EWHC 757 (Admin)

11. *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 (HL)

12. *MM v Minister of Justice Canada on behalf of the United States of America* 2015 SCC 62, [2015] 3 SCR 973

13. *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465

14. *Tukaki v The Commonwealth of Australia* [2018] NZSC 109

15. *Woodcock v Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 WLR 1979

16. *Wenting v High Court of Valenciennes* [2009] EWHC 3528 (Admin)

17. *Curtis v Commonwealth of Australia* [2018] NZCA 603, [2019] 2 NZLR 621

18. *Mailley v District Court at North Shore* [2016] NZCA 83

19. *Carruthers v Canada (Minister of Justice)* 2019 ABCA 490

20. *Canada (Minister of Justice) v Hanson* 2005 BCCA 77

21. *Bannister v New Zealand* [1999] FCA 362, (1999) 86 FCR 417

22. *Doney v Adlam* (No 2) [2023] 2 NZLR 521

23. *Foley v R* [2023] NZCA 456, (2023) 31 NZTC 26-009

24. *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239

25. *United States v Leonard* 2012 ONCA 622, (2012) 112 OR (3d) 496

26. *Zanzoul v The Removal Review Authority* HC Wellington CIV-2007-485-1333, 9 June 2009

Texts

27. Rynae Butler "Imbalance in Extradition: The Backing of Warrants Procedure with Australia under Part 4 of the Extradition Act 1999" [2017] NZCLR 63 at 79

Other

28. Te Aka Matua o te Ture | Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at [7.18]

29. Clive Nicholls Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance (3rd ed, Oxford University Press, Oxford, 2013) at [5.59, 5.63]

30. European Convention on Human Rights and Fundamental Freedoms 213 UNTS 221 (4 November 1950), art 8

31. Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24) at [3.09] – [3.10]