NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF THE IDENTITY OF THE COUNTRIES THAT HAVE PROVIDED DETAILS ABOUT THEIR DEALINGS WITH THE PEOPLE'S REPUBLIC OF CHINA IN NEWS MEDIA OR THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE REMAINS IN FORCE.

NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 57/2019
[2022] NZSC Trans 1

BETWEEN **MINISTER OF JUSTICE**
Appellant

AND **KYUNG YUP KIM**
Respondent

HUMAN RIGHTS COMMISSION
Intervener

Hearing: 4 February 2022

Coram: Glazebrook J
O'Regan J
Ellen France J (via AVL)
Arnold J
French J (via AVL)

Appearances:	U R Jagose QC and A F Todd for the Appellant (via AVL) A J Ellis, B J R Keith and G K Edgeler for the Respondent (via AVL) A S Butler, R A Kirkness and C S A Harris for the Intervener (via AVL)

CIVIL APPEAL

MS TODD:

E ngā Kaiwhakawā, tēnā koutou. Kei kōnei māua ko Ms Todd, mō te Karauna.

GLAZEBROOK J:

I'm sorry, I can't really see who is actually there. Sorry, we just have two for the Crown do we?

MS TODD:

Your Honour, yes, Ms Jagose and Ms Todd.

GLAZEBROOK J:

Thank you very much, and for the respondent?

MR ELLIS:

Yes Ma'am. Ellis on one screen and Keith and Edgeler appearing for Mr Kim, if you can see us.

GLAZEBROOK J:

Thank you yes. So what we have is the respondent going first, and Mr Ellis will you start and split the argument with Mr Keith, or what's happening?

MR ELLIS:

Yes. I'm conscious of your injunction to stick to 90 minutes and not say anything that we've already dealt with so my approach is quite simple. I have got five points to raise, which are quite brief, and I imagine, depending on whether you ask me any questions or not, I'll get that done hopefully in 15 or 20 minutes,

and Mr Keith is going to deal with the more detailed nuances of a two page outline, if anybody can get it done in the best sense there.

GLAZEBROOK J:
Thank you Mr Ellis.

MR ELLIS:
If I might start by saying I've got these five issues. One is the Human Rights Action Plan of China, which I've only got three items to read to you, and then there's a comment about independence that goes with it. That's two issues. There's an issue of costs which I want to address you on very briefly, and the fourth issue is the *Philippines* case that is on our two page chart in single footnote, and it should have been handed up so that you've got it, a Human Rights Committee case, *Cagas v Philippines* lastly.

So starting with the Human Rights Action Plan of China, which was referred to by Professor Pils in tab 10 of the 6 December submissions, but the Chinese have a Human Rights Action Plan (2021-2025) under the heading "VI: Participating in Global Human Rights Governance." There's "1. Fulfilling Obligations to International Human Rights Conventions." The text of that says: "China will submit its performance reports to relevant human rights treaty bodies, engage in constructive dialogue with them, and adopt and implement suggestions that are reasonable and feasible in the Chinese context."

Now I think that gets to the crux of what we've been arguing since 2012. Obviously Mr Edgeler are the sole survivors from the beginning of this, but the Chinese do in human rights, not what international human rights required, but their interpretation of what is reasonable and feasible in the Chinese context. If every state did that then the human rights system would collapse. One's got to approach human rights on the basis that they're international and if you sign up to an international treaty you've got to apply it, or if it's a matter of customary international law you do to. So the approach for a fair trial here is what is reasonable and feasible in a Chinese context. Well that isn't consistent with the covenant and linked with that is my second point, which is that trying to

understand how the Chinese approach their conceptualisation of independence and a particular academic article suggested that the word “court” is of pivotal importance according to the authorities of explanation means that individuals don’t have the judicial power but the courts where the judges perform their duties do and that’s understandable in the context of a communist regime where the state is all powerful but in your judgment, it’s the only passage I’m going to refer to, short passage, 330 in your judgement where you set out a discussion on Article 14, fair and public hearing, and then the Bangalore Principles, saying the independence has to be free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, and at 331 you say the Judges must be independent as well as independent of judicial colleagues in respect of which decisions a judge is obliged to make independently, and footnote the Bangalore Principles. Well, the judicial committee doesn’t fit that regime. You’ve got to be independent of influences from anybody else and it simply doesn’t work. So there is no way that my client can get a fair trial because the Judges are not independent of their judicial, or non-judicial colleagues in that matter, members of the judicial committee.

So that was the first two. The third issue – and I don’t really want to spend my time talking to you about costs so I’m just going to abbreviate this very strongly – we sought to uphold the decision below. You know that the Crown appealed and wanted to resolve torture or fair trial issues. Ultimately, we had some considerable toing and froing and we’ve been before your Court from the time the Crown lodged their appeal in August of 2019, over two and a half years, and during that time we have discussed what has become apparent, that this is the first proceeding to consider diplomatic assurances and to the extent that they have done and we’ve gone to the trouble of even making submissions to the Torture Committee on several occasions during the course of this.

So because of having filed the original appeals and the costs appeal, since then we’ve filed another five sets of submissions at your request and we’ve also had to get for our client’s assistance international experts. So it’s been a massive appeal and I think as Mr Edgeler put it to Mr Keith we’ve done enough work for three appeals. I mean that’s the simple fashion. So we would like costs on an

enhanced basis and if, in due course, you want a one-page memorandum on it I'm happy to oblige but I really don't want to say any more than that.

Then I wanted to take you – well, then, I did forget to say something in terms of the (inaudible 10:13:30) principle. Equally, in terms of the Beijing Principles of the Independence of Judiciary in the LAWASIA Region, and I thought, of course, they are relevant in as much as, of course, they were promulgated and chaired by China in Beijing and they say, more or less, what you say in paragraphs 330 and 331. Article 3: "The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source."

Then in 6: "… any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgement in accordance with Article 3."

So the Chinese were well aware of that when they chaired the meeting and agreed these principles in 1997.

So now turning to the footnoted case. I'm not sure how you pronounce it. *Cagas v Philippines* and hopefully you've got copies of it. Do you?
1015

GLAZEBROOK J:
We don't have any new cases, no.

O'REGAN J:
When was it handed up?

MR ELLIS:
Was it yesterday or the day before?

MR KEITH:

May it please the Court, the registrar asked for hand-ups by 4 pm yesterday and we put it in at about two, I think, yesterday afternoon. It's just the one short case.

GLAZEBROOK J:

Well, we'll see. Mr Registrar, have we got an electronic copy of that?

REGISTRAR:

Having a look in the file for it, Judge.

MR ELLIS:

Well, it's only eight pages. I'm sure you could, if you can't find it, you've got internet there, you'd find it in a flash. *C-A-G-A-S v The Philippines* 788/1997 October 2001 decision. It's really very simple. Even if you haven't got it, I'll just take you to it. It's not going to take me long.

O'REGAN J:

I've just got it on the internet as you suggested.

MR ELLIS:

Thank you, right.

GLAZEBROOK J:

Sorry, I didn't catch the name. My internet is not working very well, I don't think, but…

O'REGAN J:

C-A-G-A-S v Philippines.

MR ELLIS:

While the others are looking for it, the case was a – I was spending the week thinking about the injunction to not say anything new and thinking, well, what have I missed, and starting to draft a case for the next stage if that was going to happen. So obviously I was looking at international cases and this came

along, and what the case shows is some certain similarities to Mr Kim in that it involved three authors complaining to the Human Rights Committee in respect of charges of murder that they were facing in respect of six women's bodies found at the house of one of the victims and the dead ladies were bound and their heads smashed and the evidence, as in this case, was all circumstantial, there's no eye witnesses, and the authors complained to the Committee only of a violation of Article 14(2) which is a breach of the presumption of innocence. But the Committee found more extensive breaches than that even though they weren't claimed and we have to bear in mind that the only complaint was breach of the presumption of innocence.

So those were the facts as far as we need to concern ourselves, and then in the operative paragraphs, at paragraph 7 of the Committee's views, at 7.3, the Committee said with regard to the allegation of Article 14 breach, on the account of denial of bail, the Committee finds that the denial did not a priori affect the rights of the authors to be presumed innocent. "Nevertheless, the Committee is of the opinion that the excessive period of preventive detention, exceeding nine years, does affect the right to be presumed innocent and therefore reveals a violation of Article 14(2)," and in our case Mr Kim has been detained for eight years plus he has significant health difficulties and he now has physical illnesses too, so I say it is actually worse than the *Philippines* case, and returning to the judgment.

In 7.4 with regard to the issues raised under Article 9(3), that's the arbitrary detention, 9(1) to 9(4), right to go before a judge and get out of jail, and 14(3), which is undue delay, the Committee on its own motion raises these and it notes: "At the time of the submission the authors had been detained for a period of more than four years and had not yet been tried."

The Committee further notes: "At the time of the adoption of the Committee's views, they appear to have been detained without trial, for a period in excess of nine years which would seriously affect the fairness of the trial. Recalling its general comment 8, pre-trial detention to be an exception as short as possible, and noting there's no explanation provided, the Committee concludes there's a

violation of 9(3) and further there's a violation of the undue delay provision 14(3) bearing in mind that the authors weren't claiming this and nobody claimed a violation of Article 9(1), an arbitrary detention, and this is the majority.

There's two minorities, one honour talks to allegations which is irrelevant for us, and there's two dissenting from South America, one member of the American Court of Human Rights, and a jurist from Columbia which I'll get to in a second, but the situation is, of course, that Mr Kim says he's been arbitrarily detained for eight years. So there's a breach, he claims there's a breach of 9(1), 9(3): 14(1), fair trial; 14(2), presumption of innocence; 14(3), undue delay, including the delay int his court, so he's now claiming breaches of all of those and their New Zealand equivalent and that's, of course something we haven't dealt with before.

Then in the individual opinion of Ms Quiroga and Mr Posada on page 6 of my copy, those two members say in paragraph (a), there's a clear violation of 9(3) and (14) and (3). "It should be noted that such a lengthy deprivation of liberty can only be considered as equivalent to the serving of a sentence…"

So they consider, in their case, they've done nine years, well what else can be considered. He's already done eight years in detention, plus you've got this torture row syndrome, you're waiting to find out what's going to happen which preys on your mental health, and in paragraph (b): "The fact that for so many years no trial has been held, apart from constituting a violation of article 14(3)," the undue delay one, "… inevitably jeopardizes the production of evidence. This vitiates any trial… that may possibly be held. Thus, for example, the possibility that the judgement may be based on statements by witnesses, made many years after the events occurred, places the accused in a situation of defencelessness, contrary to the guarantees granted by the Covenant. It is not possible for a trial for homicide or murder, whichever the case may be, held nine or more years after the events, to be a 'fair trial' in the terms established by article 14(1)."

And they adopt that, too, and say besides all the Chinese arguments about the lack of a third trial, I say because of the extended time of 12 years since the first action of the Chinese government issuing the warrant in March 2010, so next month it's 12 years, it is not possible because of the delays in New Zealand for my client to have a fair trial. He was not allowed to cross-examine the witnesses at depositions, was refused, and he won't get to cross-examine them at any trial that is held in China. So it simply is not possible, and I know you can say in New Zealand terms we have lots of trials that are after 12 years but this is murder and this is the international findings because we don't have a statute of limitation. Maybe we're behind the eight ball. So I now claim that because of the excessive time that it has taken, and nine years was excessive and we've got 12, that it is not possible for Mr Kim to receive a fair trial because of the effluxion of time and the inability to bring his case properly, so independently of anything that has been advanced previously about China.

Then lastly, in my set of submissions, there's a matter of Mr Kim's health. We've made a fresh application for the Minister asking him to not extradite because of the extenuating circumstances of his brain tumour, his kidney and liver diseases. The Minister has decided to wait upon the decision of this Court before he considers that, so I mean if we have to come back with another judicial review in years to come then obviously it's going to have taken even longer than 12 years.

But one thing occurred to me that may become significantly relevant and it was more in the argument that we raised about how you have to consider the gross violations of human rights because, before you get anywhere, because we have Mr Kim, as Mr Keith's reminded me yesterday, there's a 50% chance according to Mr Bok, the consultant neurosurgeon, that he's going to need a kidney transplant by the time he gets to 60 which, as he's 47 this year, he's – that's 13 years away. So presumably there's a lesser requirement before then.

Well, we know from the evidence that we've submitted that the conditions, medical conditions, in Chinese jails are not too good and how you get a transplant when we have equally in the High Court and Court of Appeal put

submissions that there's mass slaughter of the Falun Dong to harvest organs of 60 to 100,000 people a year are killed, where's Mr Kim going to get a kidney from, and the argument that goes with that, that you harvest some innocent Falun Dong practitioner so you can have a kidney, is going to be difficult and a lengthy one. It does raise some really serious issues of whether the Chinese, as the People's Tribunal recently and the Speaker of the House of Representatives in the US this morning said, you know, we mustn't accept human rights abuses in China. They, according to the People's Tribunal, have committed genocide and are continuing to do so. So how we send somebody to a country where genocide is practised I don't know.

Anyway, that issue, if we get to it on another day, because, of course, the Minister can't leapfrog the application that we've made from his office to this Court, it has to go through the (**inaudible** 10:29:59) process, will be a difficult and illuminating one.

So unless your Honours have any questions, I'll surrender to Mr Keith.

GLAZEBROOK J:
Thank you, Mr Ellis. Mr Keith?

TECHNICAL DIFFICULTIES (10:30:20)

GLAZEBROOK J:
All right, thank you. Mr Keith?

MR KEITH:
E ngā mana, e ngā reo, rau rangatira mā, tēnā koutou. May it please the Court. On a technical point, and I'm sorry if I now look something goldfish-like, I have made the camera as close as I can to me, which means you don't get the lovely Mr Edgeler, I'm sorry. If there's anything else, obviously, I can do, do let me know.

As Dr Ellis has said, I have the privilege to address the detail of the points that the Court referred for further work in paragraphs 472 to 474 of the 4 June judgment, and as we set out, and as the Court knows well, those fall for today's hearing into two parts. One, a series of specific requests and enquiries, specific issues and enquiries concerning unaddressed risks for Mr Kim, and I will come to why I have termed them that, and then there's the question of changes in circumstance.

On the first point about unaddressed risks, these are not matter that are new. They were not newly found in the appeal hearing in February two years ago. They are not newly raised by us. The question is the unfairness of the judicial committee system, questions of difficulties in consular monitoring for torture, both raised in 2016 by Mr Kim and particularly by the expert witness, Mr Ansley. What the Court has held in its June judgment, June of last year, is that the Minister had not addressed those matters or aspects of them. There are also the criminal process matters.

So we have these matters, deficiencies in the Minister's decision, which the Court has given an exceptional opportunity to address following the *Aswat* decision in the United Kingdom, and I'll point, and this is really the gravamen of the disagreement between the Crown and ourselves, is that the Minister is not in our submission absolved from doing anything less about those risks than about any other risk of torture or unfair trial. So it is for the Minister to be satisfied, and the Court have made this explicit, and the references are in the submissions and I'll come to them, the Court has made it explicit that the Minister must address those risks, must investigate them, must, if possible, resolve them through assurances, must determine if they have been answered, and that is why we say the same test, and this is at point 2.1 to 2.3 of the hand-up, the same test applies to these issues, and that stands to reason. There is no reason why, for example, the investigation and assessment required of the Minister in respect of the judicial committee at this late stage should be anything less rigorous, less demanding upon the Minister, than it would have been if the Minister had done his job correctly, or rather the then

Minister her job correctly, in 2016 and investigated the judicial committee, for example.

My learned friend seemed to believe that this is a summary process, that this is some sort of last gasp, very short, very general inquiry, and I'll take your Honours to the Minister's letter where he takes that position. But we say, short and simple, in terms of the points put for further inquiry by the Court, this is as at 1.1, the Minister was required to investigate and address those matters no less carefully, no less fully, than any other aspect of the risks to Mr Kim. The Minister has not done that and that, aside from all of the other material, and I will come to touch on some of it, that really is the end of the matter.

The Court has, for example, said that the Minister must be satisfied that the meetings to suppress exculpatory evidence that Mr Ansley described in 2016 did not take place or do not take place. There was a general question about meetings concerning disclosure put by the New Zealand government in its July queries to the PRC government, all of this I should say is digested in table 8 to our appendix, which I will come to, but the Court put that requirement that the Minister be satisfied of this. There are two problems. China did not answer the question, and the Minister has not addressed it. Both of those are, in my submission, fatal to the present appeal, and that applies to the other queries too for the various reasons set out in table A, and I will come to some of those as quickly as I can given time constraints.

The second limb is as described at 1.2, the Court noted, both the majority judgment and the two judges in their separate judgment, that circumstances may well have changed since 2016 when the record was compiled, and while the Court did, and we're not, of course, reopening the issue or seeking to dismiss the cross-appeal which was reliant upon post-2016 material, that material does indicate a change, but more to the point taking up the Court's point in the 4 June judgment, we have set out in detail first to the Minster and now to the Court those material changes, and I will come again quickly to some of those. But I think there are three in particular that I just want to highlight now, and again the details are in the table to which I will take your Honours next.

The three in particular are these. First, we have, and this is the expert evidence of Professor Pils and her colleagues and Professors Cohen and Clarke. Very clear statements, unrebutted by the Minister, that this is no longer an ordinary case. Mr Kim is no longer, as the Minister relied upon in 2016, as the Court has relied upon in the June judgment, upholding that 2016 assessment, he is no longer any sort of ordinary offender, and the reasons for that are straightforward. In the five years since that decision of the Minister, since that record was complied, two things have happened. One, this case itself has acquired a profile. It has been the subject of critical comment by the Chinese Minister of Foreign Affairs, and we have handed that material up. For example, it's also been the subject of very prominent news coverage.

So Mr Kim, and this is the evidence of those five experts, and also Mr Ansley talking about denial of medical care to high profile difficult dissenting prisoners, Mr Kim is no longer in the ordinary category and that has two consequences, one for the risk of torture, the other for the risk to fair trail, and again this is in Professor Pils and Professors Clarke and Cohen.

The first point as to torture, in 2016 the Minister was able to say, and the Court has upheld, that there was no reason to seek a confession from Mr Kim because confessions were not required in a case with significant forensic evidence. What is changed, what is new, is with that profile, high profile cases in China, say the experts, and these are experts as to Chinese law and practice, high profile cases now expect public shows of repentance, they are frequently staged, prisoners are often drugged or otherwise coerced, and this is all in the evidence that went to the Minister. None of it was addressed and it is in the record before you, in the report before you.

So that is the number 1 problem in terms of this not being an ordinary case. Torture is now a different and very particular risk to Mr Kim. This is not a systemic problem. This is, that his case has become prominent and as a prominent person who has been seen to defy this extradition request, he is at particular risk of torture for that reason. Likewise Mr Ansley says that a difficult

prisoner may be denied medical care after conviction as a form of punishment or sanction. So that is the first problem in terms of the ordinary case.

The second, and again this is Professor Pils and her colleagues, and Professors Clarke and Cohen, is that in a high profile case the prospect of political direction by all sorts of means is now extremely high, and that is political direction not only as to results, but to create, as Professor Pils and her colleagues put it: "The appearance of an orderly trial." That can even extend, they say, to coercion, drugging, or other measures to produce statements of good treatment by the prisoner. So we are dealing with a wholly different risk to Mr Kim than we have in 2016 and that is particular and individual to him. Again, not considered by the Minister.

Second significant change, and more specific to torture, this is again Professor Pils and her colleagues, but it is also backed up by Human Rights Watch in the submission they made to the Minister. We have what is called "white torture". That is the use of techniques that are deliberately undetectable or disputable. Professor Pils gives the example: "For example, for instance, of using psychotropic medication to induce compliance and also make the victim unable to remember what was done to them and then timing that so as to avoid detection by medical visits or others." So we again have a very specific particular risk, changed circumstance, not addressed by the Minister. The last –

ELLEN FRANCE J:
Mr Keith, just in relation to that, the complaint that torture may be undetectable isn't new, is it?

MR KEITH:
The complaint that torture monitoring is really difficult, we did deal with that in the February appeal, and I remember we had some discussion in the oral argument about whether a specialised torture NGO, like in the *Othman* case involving Jordan, would be better placed.

We also have the issue that your Honours have ruled on it as to whether a Chinese doctor would be any help in detecting torture. So I can't really speak to that except the only evidence was that they wouldn't be but that that is a matter that your Honours have already addressed. This is a different problem that we have newly reported, post-2016, deliberate practices to evade torture then used in these cases by China including to create compliance an induce an orderly trial.

ELLEN FRANCE J:
Yes, I suppose I'm just indicating I'm not quite sure how it ultimately is different in terms of the risk to Mr Kim from the matters that have already been addressed.

MR KEITH:
The two differences in risk to Mr Kim. One is the no longer ordinary problem. So that is –

ELLEN FRANCE J:
Yes, I understand that.

MR KEITH:
And moving on to the second. In terms of the white torture, Ma'am, our point is that in 2016 we had evidence from the then-foreign minister, Minister McCully, that he was confident that consular staff could undertake the monitoring and could detect torture and the like. We have not had any new evidence, any new confirmation of what to do in the face of deliberate techniques to avoid detection. And we didn't have the evidence then, we do now, we do post-2016, of the use of those deliberate techniques.

I suppose the second point, and again, I said either undetectable or deniable, the use of medication, and this is something Professor Pils and her colleagues described, prisoners are told to take something that they believe, that they are told, they need and then don't know what has happened to them. And again, we don't have any response to that, we don't have any further enquiry about

how consular staff would undertake effective monitoring in that regard. So that is the change we would point to, Ma'am.

The third and last of the selected points on changes in circumstance that I wanted to speak to is the question of judicial independence. Now, Dr Ellis has already touched on this very briefly but the simple point is that since 2016 we have had a series of official statements and acts by the Chinese government documented in commentary by Chinese academics, that some forms of interference with the judiciary are bribery, local corruption, that kind of thing have been diminished. There has been a much greater centralisation.

But what we have also seen at a formal level is an emphasis upon party leadership and adherence to party directions through the Courts, and as for example Professor He Xin, whose work your Honours have cited in relation to the judicial committee, but in a 2021 article that Professor Pils and her colleagues put up, and that you have, I can find the reference if needed, but the reference is in Professor Pils', has pointed to the centralisation of control by the party, also new measures to sanction judges have taken a step out of line. So once again we have in 2016 the Minister believing that the, or assessing that the Chinese system was moving towards greater independence, moving away from party control, that is no longer the case. The developments beginning, with respect to the Chief Justice, in 2017 denouncing judicial independence and the separation of powers, which your Honours have, through to constitutional and legal reforms in 2018, party dicta in 2020, that has changed the context, and this is where Professor Pils and her colleagues, and also Professors Clarke and Cohen, come to in saying that at the present time, as at now, well as at the time they were writing in October 2021, the capacity of a trial court to act independently has been significantly diminished. The other aspect of that, too, that they point to is that again, we did not have in 2016 and we do have now, are quite detailed commentary from within China on what is called the dependence of the judiciary, that is that they are dependent functionaries, say these very worthy scholars, of the party state. So that is again a change and not one addressed by the Minister.

Now I was just touching on those as examples, but they are also probably the most critical points. There are a host of others and I will just give your Honours the references to those as I work through the outline and very quickly through our appendix. I can speak very quickly to points 2.1 to 2.3 of the outline. First up as this court has held in paragraph 132 of the June judgment, the assessment of risks to Mr Kim has three parts. It is not simply a question of whether assurances are upheld as the Minister has put forward. That is point 3, but prior to that have we correctly understood the risks, do we know what they are. Second, do the assurances fit the risk, that is, complied with the Court says will they protect the practice and then we get to a question of reliability, and when I say that the Minister is obliged to address all of these matters, I can see no reason, and the Court's judgment gives no reason, why the Minister does not apply that same three-part test to these risks that he has previously in respect of the known 2016 risk, previously failed to address, and why he also is not required to do so in respect of changed circumstances. To the contrary, and if anything, we are at a last instance hearing. We are dealing with these new issues, the Minister is dealing with these new issues in a court from which there is no domestic appeal. As such, as this is why we use the word "conclusively" at the top of the hand-up, the Minister's assessment will need to be beyond doubt. There would need to be conclusive, clear, unequivocal answers to the risks to Mr Kim for the appeal to be upheld, and that is again just lacking here for reasons I'll come to, some of the reasons I've touched on already.

Point 2.2, and again the references, and this is at page 3 of the respondent's appendix, the consistent case law of the full court of the European Court of Human Rights, and of the Committee Against Torture, neither binding on this court but both highly authoritative, emphasised that assessment of risks of torture and assurances must be rigorous, current, that is the present day, not five years ago, and based on objective evidence, that is not speculation, not subjective use of a Minister, but fact, and that is what we have tried to provide for our part in this further process since last June. It's what the Minister has not done. That same approach we say applies to fair trial risks. There is no reason why it should not.

Then third, and this really arises from the approach that the Minister has taken, and it's probably a good point to take your Honours to some of the voluminous paper we put before you, the duty to address the identified risks, and whether safeguards against those risks are actually effectual in practice. Falls first to the Minister, the Minister is the statutory decision-maker here. He has that statutory function. He has the capacity to investigate, seek further evidence, and so on. But what the Minister has actually done, and this, if your Honours can go to the joint report at annex 11, it's very near the end – I don't have individual page numbers – annex 11, 16 November, Minister's letter, if I can take your Honours to page 2 of that letter, all we have from the Minister is at paragraph 12, 13 and 14. We have the Minister making statements, some of which, I'm afraid, are just not factually accurate and I'll come to those, about the response that China has provided, and then we have a general comment that China's response satisfactorily addresses the Court's specific questions, and your Honours will recall that the Court had set nine areas of further inquiry in its June judgment and those were the subject of questions put through Foreign Affairs to China in early July of last year. So the Minister says he considers it satisfactorily addresses the questions.

I should interpolate at that point the Minister was on notice from very early in September, the day we got the Chinese response, in fact, that the PRC answers did not, in fact, contain answers to some of the questions put, and we'll come to some of those.

For example, the Court has directed that the Minister must be satisfied that the judicial committee must not consult any outside personnel such as party officials and a specific question as to whether the committee would consult was put by, in fact, China. It wasn't answered. It's not even mentioned.

Similarly, I've already touched on these meetings to withhold exculpatory evidence described by Mr Ansley. A general question was put. No answer was given by China.

And then I'll come to the answers that, in fact, confirm the risks to Mr Kim because there are some of those, but the critical passage and why I've taken your Honours to this letter, such as it is, and I do mean to be critical of it, is paragraph 14. The Minister having engaged in this fairly long, at the request of the Crown, process, having received quite full submissions from us, including some very substantial expert assistance and more empirical material and the NGO submissions, has simply said: "I do not propose to set out a detailed analysis…They are not matters about which I need to issue formal findings…they are questions that remain live before the Court, for the Court to rule on." When I said I mean to be critical of the Minister, this is why. It is patent, both from the Court's judgment in which it directed that the Minister must be satisfied of certain matters and under the Extradition Act and as a matter of constitutional propriety that the Minister cannot pass the buck, cannot simply say: "Gosh, I'm not going to address these questions," and I wouldn't normally –

ELLEN FRANCE J:

Is that what the Minister is saying, Mr Keith? I mean the Minister says at paragraph 7: "The issues identified by the Court have been addressed to my satisfaction."

MR KEITH:

Yes.

ELLEN FRANCE J:

Now you may say that that's not sufficient and I understand the submissions in relation to that, but isn't the Minister then saying: "Well, my being satisfied, now the Court has to be satisfied," which is correct in the sense that the Court has asked this inquiry to be undertaken and if ultimately we weren't satisfied then – I mean isn't that all he's saying?

MR KEITH:

I don't think so, Ma'am, for two reasons. One, if your Honours can turn to page 4 of the respondent's appendix? So the submissions we are working our

way through. So that's page 4 of our appendix, beginning with the words "adequacy and reliability of assurances". Set out as an example of what the Court asked the Minister to do, required the Minister to do, at footnote 6, quoting 463, the Minister was obliged to check that the Court had set out the law and practice about criminal disclosure. The Minister must be satisfied that meetings for disclosure do not take place without the defence being provided with all material. As I say, there were questions asked about that but there was no answer given, and then the Minister has –

ELLEN FRANCE J:
I understand you're making an argument that there wasn't a basis for the Minister to be satisfied, right? That's your submission. All I'm querying is this notion that the Minister is then passing the buck in some way. To my way of thinking, the better submission is there wasn't a basis for being satisfied. But I understand the submission that you're making.

MR KEITH:
I think I'm making both to which your Honour refers, so –

ELLEN FRANCE J:
I appreciate that.

MR KEITH:
The second is the language of paragraph 14, that the Minister does not need to make formal findings. So the Court has said the Minister must be satisfied, for example, about these meetings, the excerpt at footnote 6. The Minister has said nothing about it, hasn't said: "Yes, I'm satisfied," "No, I'm not." We just have a general statement without reference to the question that the answers generally are satisfactory, and I don't think that that is in the spirit either of the Act or of what the Court directed the Minister to do.

So I suppose there is an intermediary point as well, Ma'am, which says that the Minister, having this point raised before him, was obliged to do something, was obliged to say: "Well, you say that there is no answer in the Chinese response.

Here is what I have to say about that," but there is no mention of any omitted answers. My learned friends in some of the submissions on other specific points have said: "Well, maybe the omission doesn't matter," or: "We say the admission doesn't matter," for this reason or that reason. But that's a submission by counsel. It's not something the Minister has done. All we have is what the Minister says here, and I suppose, Justice France, just to round out that point and move on quickly, the objection, the criticism that I make is really about that wording of saying: "I do not need to make formal findings. These remain live before the Court." Of course the Minister's decision would be scrutinised by the Court but what we have here is really the Minister declining to make any specific decision on a point about which the Court required the Minister to be satisfied.

If I can move to point 3 in the outline. So these are risks raised in 2016 held not to have been address by the appellant Minister. This was in the June judgment. Your Honours will find at the back of the respondent's appendix a very carefully detailed list of every query that the Court required the Minister to undertake, and that runs through from the question about whether Mr Kim would be visited and held in Shanghai through to this question about defence disclosure and along the way the judicial committee. So that's set out at 3.1 to 3.3.

I have already touched on what some of the problems with that exercise were. For instance, in respect of 3.1 we say that that consular monitoring question necessarily engaged the question of whether consular monitoring now can be effectual, whether the greater protections relied upon by the Court in the June judgment based on the 2016 record, whether the greater protections in Shanghai were still present, and short point, for example, is that the only suggestion of urban places being safer for torture was in 2005. Everything since then has said it is endemic across China, and we've set out other points at 1.1(a), 1.1(b) of the table.

The same in respect of the consular visits, and I've already touched on the white torture and so on. There are other problems with consular access too, again not addressed by the Minister.

MR ELLIS ADDRESSES THE COURT – TECHNICAL ISSUES (11:00:23)

MR KEITH:
If the Court is happy for me to carry on, Dr Ellis has emphasised he is, I'll keep going.

The further points in terms of those risks not addressed by the Minister, we've set out where the Chinese government answers have not addressed questions raised, and I can also direct your Honours, just quickly, as the sort of summary listing, footnotes 35, 34 and 24 are the lists of respectively questions not answered, questions answered in a way that actually confirms the risk to Mr Kim. So, for example, one of the questions and answers confirmed that the judicial committee may determine factual and legal issues of its own motion without notice to the parties and without an opportunity for submissions. So we have a very clear, fair hearing, public hearing and equality of arms problem in terms of the Court's judgment.

O'REGAN J:
Can I just confirm with you, Mr Keith, that all of those points are in the table to your submission?

MR KEITH:
Yes, they are?

O'REGAN J:
That's a comprehensive table?

MR KEITH:
That is a comprehensive table and one thing that we have done is the – so I'll just explain how the table works and it's probably, I hope it's self-explanatory,

but we have set out in the first column what the Court asked for. We have set out in the second column what China said, and then we have set out what we have to say about that, including through the experts, the NGO reports and the official and empirical material.

I should also say that 1.1 and 1.2 are the category that we talk about at 3.4 of the outline. That is where some other inquiry was needed in light of what the Court wanted. So, for example, for the inquiry about consular monitoring to be effectual now because of the further evidence we put up, there would need to be some inquiry about how consular monitoring would work in the face of the obstacles that were pointed to, on the one hand the use of torture and so on, the undetectable torture and so, on the other hand the many obstacles set out to consular access by similar governments. So the Canadians, the Australians, the Germans, Taiwan, numerous others have sought to exercise consular visiting rights and have been obstructed, and, as Professors Cohen and Clarke explain in their expert briefs, those refusals have been in breach of specific and stringent terms of bilateral treaties between Canada and Australia at least and China and those stringent provisions are, of course, of higher standing, higher consequence, one would hope, for China than mere non-binding assurances.

So these are matters that again we say the Minister needed to address in order to address the Court's underlying concern about effective, timely visiting monitoring and resolution of any problems, but he didn't.

In answer to Justice O'Regan's very specific question about – or rather to pick up the particular point, 2.3 on page 7 of that table, the Court's inquiry was whether the parties' submissions cover all matters before the judicial committee. The question, as summarised by China, this is the excerpt from their diplomatic note, the underlined part is their summary of the question, that is, whether there's scope to make submissions on a particular issue that didn't come up at trial. That is the collegial panel, your Honours will recall, is the trial Court and the judicial committee is the backroom. The Chinese government answer, and this is at page 8 of that table, the judicial committee may require the collegial panel to provide supplementary facts, evidence and legal opinions

but not directly asking for submissions, the defendant has ample opportunities to make them. So here we have China confirming that the judicial committee can make decisions about points not brought up in the hearing without submissions from the defence counsel, and the others are, as I said, set out in that table.

The other point, the one last point I was going to make about the emissions, and about the evidence that we put out – sorry, two last points. First, and it probably goes without saying, in fact the foreign minister says in one of her two short letters that the response provided by China will have been provided at a high level. Professor Pils and her colleagues explain that the emissions and the terms of these answers will, as you'd expect, have been provided at a very senior level, they will have been checked, and so on. These are not, they say, mistakes they, where there is an omission, which is a conscious omission, but then they also go on to say, and this is echoing Dr Ellis' point about how the PRC conceives of such matters as trial rights. They say these answers, and you will have got some flavour of them from the answer we just pointed to, the defendant having ample opportunity, even though objectively a defendant doesn't, they say that these answers and these omissions reflect the Chinese government position on these rights. That is China is not seeking to satisfy international expectation. It is seeking to put forward its own conception of these rights, and the passage that Dr Ellis talked about in the National Plan of Action from China, and I can just give your Honours the reference, it's in tab 10 of our December authorities, page 27 of the printed copy, but I won't go to it, China is putting forward its own view of these rights. It is not the same view as the international standards that it has declined to ratify.

The last point in terms of that, at 3.7, this is where the, when you have through our experts and the NGOs, showing that the responses given by China are unverifiable or otherwise ineffectual. It just goes to the point that, for example, we know, because it is a matter of Chinese law, and we canvassed this in the June 2020 submissions, and they're quoted again here, as a matter of Chinese law the proceedings of the judicial committee take place in private. It's deliberations are recorded but those records are State secrets. So we said very

early in this process to counsel for the Minister, we would need to know how any statement or assurance about what the judicial committee will do or won't do. We would need to know how that can be monitored. How can that, compliance with that, or the accuracy of any statement, be verified, and what can be done about that. And there is no answer to that because no enquiry was made about it. So we're just left with the position under Chinese law that these bodies seek in secret, deliberate in secret, and while their reasoning is reflected – well, while their intervention and decision is reflected in the judgment, we also have the empirical evidence of Chinese scholars that the reasons, if political, are translated into legal explanations. So we don't get the actual reasoning of a judicial committee, we get some translation of it, some other version. So we can't see what the judicial committee said. Consular monitors can't see it. If there is impact on Mr Kim, there is nothing to be done, even to detect it let alone do anything about it. Again, not answered by the Minister, and in this case very clearly established in Chinese law.

That was all I had to say about the Court's specific questions. I'm conscious of making up some time and I only have a short amount of it left, but on the question of changed circumstances, which as I say both the majority and the separate judgment of the Court pointed to, we put, and because we weren't addressed by the Minister at all with the exception of the medical material and the questions about particular incidents involving China, we didn't replicate this table, we have simply referred your Honours on to the table as put to the Minister. I will just give your Honours the reference. So the easiest place to find them is at page 15 of the respondent's appendix, beginning at paragraph 21. Then the table itself is in annex 5 to the submissions to the Minister, and at pages 25 and onwards, and what we've done there, so annex 5 to the report at page 25, it's a table called appendix 1, and the particular passage is at – sorry, it's at appendix 2, page 32, my apologies. So at page 32 and following we've set out changes in circumstance since the 2015/2016 record. I don't know, and I do apologise if I gave this impression, that this was a challenge to the court's June decision. There was a reference in a minute, and I am sorry if this part of what we said gave that impression. All we have sought to do here is to run through the critical findings in the June judgment,

set out the basis which we're not disputing in the 2016 record for those critical findings, and then since 2016 what has changed, what is new, and so your Honours will see, for example, at page 32 item 2.1, in 2016 the Minister assessed, and the Court upheld, that there was a move away from torture and forced confessions towards a legal structure in which torture is illegal. But as at now, and you'll see in the third column all of this material is relating to events since 2016, all of the material has been that the legal measures have been ineffectual. Professor Pils and her colleagues say in particular certain reforms in 2018 have actually been counterproductive, and all of the reporting is now that torture is endemic, and I have already touched on the new use of torture for production of public confessions and the like. So we say that where the Court and the Minister, or where the Court has upheld findings by the Minister based on 2016, if those circumstances have changed, the risk has changed, the first element of the Court's three-part test, and when one looks at assurances or promises by China, when one looks at the efficacy of monitoring, those must change to, that assessment at least must change. Sometimes the terms of the assurance must change to, for example, with the white torture. But again the Minister has, with the couple of exceptions that I've noted, not engaged with any of this post-2016 material.

At 4.3, and I still remember the exchange I had with two members of the court in particular about the assurance about fair trial rights at international law, we now have, and I think it is an important point, I would not raise it otherwise, what China has to say about its assurance that it would follow applicable international fair trial guarantees. So my learned friends, or the appellants, very properly asked China what it meant by that assurance and this is set out at 3.1, table B, of the respondent's appendix. That is on page 16 of that table at the very back of the respondent's appendix, and your Honours will see at 3.1 we have set out the relevant passage in the judgment. At column 2 we have set out what the New Zealand government asked, that is, asking to interpret the 2015 assurance about applicable international legal obligations. "Does that mean," and this is three lines from the bottom: "Does that mean that the PRC will, in Mr Kim's case, comply with the fair trial standards set out in Article 14 of the International

Covenant on Civil and Political Rights (as well as…Chinese law)?" and China's answer, simply put, is China will follow China's law.

It could have said: "Yes, we will follow the Covenant." It did not, and why I can say it did not is straightforward. We know under Chinese law it can't be an issue, that the Chinese legal system does not provide for public hearings where the judicial committee is involved and the judicial committee does not satisfy any of the criteria for suspending public hearings, that the Covenant does allow closed hearings in matters such as Family Court cases and the like or national security or whatever, but the judicial committee has none of those reasons and no reason was sought anyway. Likewise, I have touched on judicial independence. One has a right –

O'REGAN J:
Can I just stop you there, Mr Keith?

MR KEITH:
Yes, Sir.

O'REGAN J:
Just looking at that answer in 3.1, doesn't it say they'll comply with the International Covenant as well as domestic law, rather than instead of domestic law, instead of the International Covenant?

MR KEITH:
I think it is "instead of", Sir. They say that the relevant fair trial standards have been stipulated by Chinese law, but why I touch on the two examples I've just given, Chinese law does not stipulate a public hearing, it does not stipulate an independent tribunal. So far as Chinese law provides those things, China, on this answer, does not follow Article 14.

GLAZEBROOK J:
Although these have already been findings against Mr Kim in the main judgment, so what you're really saying is that those findings were wrong?

MR KEITH:

No, Ma'am, I'm not because I wouldn't attempt to do that here. What I'm saying is we have –

GLAZEBROOK J:

Well, what exactly are you doing then?

MR KEITH:

Yes, Ma'am. What I am saying is we have a change in circumstance quite beyond the Court's or the parties' control. China has, through this opportunity, provided a clarification of what it meant. We didn't have that in 2020 when we had this hearing. We certainly didn't have it in 2016. We have it now, that this is what China says it will do. So it is not a question of this Court having been wrong. It is a question of none of us having this information until now, and this isn't in the nature of, you know: "I went off to the library as I'm wont to do." It is China has in response to a very specific question put by the New Zealand government as part of the formal diplomatic note provided its indication of what this assurance does and doesn't mean, and when one takes that together with the other material, the finding –

GLAZEBROOK J:

What I'm having difficulty with is that we never thought that the judicial committee hearings were public, so the fact that they are not public was something that was before the Court at the time of the decision and the finding was that the Chinese law complied with international law apart from the specific queries that we asked to be put to the Chinese government.

MR KEITH:

Ma'am, the particular finding that we have an issue here, and I'm only focusing on this specific point, is the Court made a finding against the submissions of both parties, and I'm not contesting that, that China had given an assurance at the general proposition that it would comply with Article 14. So that is what the assurance meant. We now have China saying that that is not what the assurance meant. So, so far as the court relied upon that, being overtaken by

events, it has been overtaken by China making clear what it did and didn't meant.

GLAZEBROOK J:

But then you have to say were the aspects of fair trial that we relied on, in relying on that submission, which to be honest I don't think we did because we were relying on the fact that Chinese law actually complied with Article 14, rather than the other way around, and you can't rely on the judicial committee hearings not being public because that was clear form the decision that we understood that to be the case.

MR KEITH:

Ma'am, all I am saying is that so far as the Court relied upon its interpretation of this undertaking by China that it would comply with applicable international obligations regarding fair trial, as an answer to any of these concerns, for example about the judicial committee, but also for example about how counsel might conduct themselves, how judicial independence might or might not be observed. That finding has now been upset by what China itself has said. That is the narrow point that I'm looking to make. It was one component of the Court's decision. It is a component that China has now upset. I'm not looking –

ELLEN FRANCE J:

Well for myself, Mr Keith, I'm not sure that the response does mean what you say, and I have difficulty, other than looking at some specifics such as the matter raised by Justice Glazebrook, how this is other than a challenge to the Court's earlier decision.

MR KEITH:

Well, Ma'am, I think the Court is obliged to consider what China has said about the assurance that, itself, gave. If we are placing reliance upon the earlier assurance about international fair trial rights, and China is saying, well, it actually means something else, or to take your Honour's point, even if it is ambivalent about what that means, or we are not sure about what it means, it

certainly does not say unequivocally that they will comply with Article 14. I'm not challenging the Court's earlier decision. I am saying had the Court had this it would have been a different question, we have it now. And to back that up, and I suppose this is a combination of changed circumstance if you like, and the statement, we have the statements, official statements by China since 2016 not before the Minister then about judicial independence and the like, and we have the statements by Professors Clarke and Cohen and Pils and her colleagues saying that this conception of the judiciary as dependent is now one that China puts forward, and if one takes the two things together, we are left with China not, and this is what Professor Pils and her colleagues say, what Professors Clarke and Cohen say, China is not now in its international pronouncement, willing to modify how its system works. It is putting forward its system and seeking acceptance of that.

So whether one views it in changed contextual circumstances, that is the position of the Chinese judiciary has changed, and we've touched on this in the table that I took your Honours to before, or whether one does it in light of what I think China has said here, one gets to the same point that the Chinese judicial system, as understood by the Minister in 2016, as upheld by the Court on the basis of that record, has now changed materially.

Now I am conscious that I have only a short amount of time remaining. I'll be fairly quick moving through the rest of the outline, but I don't in any way want to discourage the Court's questions. As we say at the end of, below paragraph 4.4, the Minister, and this was expressed in the record, looked only at medical evidence and at some of the material about changes, China's diplomatic posture, and he only sought advice from the Minister of Foreign Affairs about that, there was, for example, no advice sought about what the Chinese legal system is doing now, no inquiry about monitoring of white torture, nothing like that. There were just these two narrow areas of inquiry. We say the Minister had to look at the lot or at least to say: "I don't think these are material on a specific basis, that they do not materially alter the context of my predecessor's decision." Of course they altered the context, of course they were material. But the Minister hasn't even made that assertion. He's instead

taken this curious and unexplained formal position that for some reason medical evidence is relevant, questions about reliability of assurance are in some limited sense relevant, but other than that the changes in risk, the changes in enforceability of any assurances, don't actually matter, says the Minister, or rather not matters he needed to address, doesn't even go that far.

Last and to sum up in the short time remaining, and this the short points at 5 and they are by way of conclusion –

GLAZEBROOK J:
But, Mr Keith, if you need just another five minutes or so don't hesitate to take them. We want to – this point I think you're coming to is an important one, so…

MR KEITH:
Most grateful to your Honour. I don't know whether your Honours are planning on rising at 11.30 which is in four minutes from now, if I could head on to that and then possibly take the break just – anyway, if I could carry on to the break and then check over the break if there's anything that I can fill in in a few minutes or anything I think I've missed. Likewise, if the Court has questions, as I say, please don't let me deter those in any way. It's most important, I think, that we engage with this material. Is that approach all right?

GLAZEBROOK J:
So, Mr Keith, can I just check? You're saying that you'll speak for another four or five minutes, we'll then take the break and then you will see what you might have to add after the break, is it?

MR KEITH:
There are a few minutes more I might need to do, yes, Ma'am, if that's all right.

GLAZEBROOK J:
Thank you, that's fine.

MR KEITH:

So turning to 5 and taking it slightly more slowly than I had planned then, say at 5.1 the Minister has not assessed the specific risks. So, for example, the Minister has not made, in the letter to which I took your Honours or otherwise, made any assessment of the various matters that the Court said the Minister needed about satisfied about, and to go back to the point that her Honour, Justice France, was making, one can either view that as the Minister saying: "I don't have to do this," which may be the less powerful submission, at the very least we have the Minister not addressing, for example, that he has no answer to some of the questions that his officials put to the Chinese government, or not addressing that some of the answers, in fact, confirm problems rather than resolve them. So there is no ministerial assessment of that.

Second, and this is really to pick up the points made by the Court following the *Aswat* decisions, when one looks at *Aswat (No 1)* and *Aswat (No 2)*, and your Honours will recall these were the genesis of the report-back procedure. That sort of opportunity is as we say at line 2 of 5.2 except the idea that a defendant Minister, or rather an appellant Minister in this Court, in a judicial review can be found not to have addressed the matter but be given a chance to address it, is highly unusual, and our submission is simply that a Minister and the requesting government, in this case China, faced with that sort of opportunity must take it transparently and robustly. That is what it is for. It is designed to resolve matters that can be resolved conclusively and as members of the Court may recall, and the *Aswat* cases are in the bundle, I won't go to them unless you wish, but as the Court will recall in *Aswat* there were specific concerns about mental health care for Mr Aswat in the United States. They had not been addressed by the Minister. Counsel for the Minister at hearing made the point that these had not been addressed and sought an adjournment to do so and was granted that adjournment, and what came back, and *Aswat (No 2)* sets this out, were a series of very specific assurances all answered from the United States government, backed by independent evidence both of the treating clinician, so the mental health specialist who would have care of Mr Aswat, and two independent members I think of the New York Bar, explaining that yes, this would be done and could be relied upon, and that was

all done in a matter of I think seven or eight weeks and it was all done unequivocally, as I say, factually, comprehensively. What we have here are a series of missing answers, partial answers, in some respects problematic answers, so the risks are still there.

Already touched on 5.3.

I've said, and the references are in the record, there are two or three points in the appellant's appendix where counsel say, well, these things don't really matter, they aren't such a problem. For example, it doesn't matter that there is no assurance. The judicial committee won't consult other people because it's clear from the information provided by China that the judicial committee makes the decision in the hearing. I think that's at 39 but I won't go to it, given time.

There are a couple of problems with that and I'll break at this point, if your Honours don't mind, just cover off the last two after the break, but a couple of problems with that. One, all the evidence we have, and this is again going to the earlier material about how the judicial committee works which the Minister had and the expert opinions of Professor Pils and her colleagues and Professors Clarke and Cohen, it is the function of judicial committees to consult. This is what they do. They produce party-acceptable outcomes in sensitive cases.

So the only evidence we have is that this is what the committee does, and we also have evidence, explicit from those experts and in the commentary, that consultation and party engagement happens by a whole variety of means. Informal contact with the Chair of the adjudication committee, the fact that adjudication committee members themselves are party members often, telephone justice as it's described by Professors Clarke and Cohen, all of these happen through consultation. That is what the Court was looking to guard against. When it asked about consultation, it didn't get an answer from China and my learned friends can't wish that away by legal submission. There is also the problem that the Minister hadn't addressed it anyway.

If I can stop at that point and come back briefly after the break on 5.5 and 5.6 and also anything I've brushed through, that might be most convenient, Ma'am.

GLAZEBROOK J:
Thank you. We'll take the adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.52 AM

MR KEITH:
May it please the Court. I'll just start very quickly again for the benefit of the two judges who I think have just joined us. I said I have three quick points, two very shorts point and one that I wanted to spend a couple of minutes on.

The very quick points, paragraph 20 of the respondent's appendix, the first line beginning, "The answers given," also did address underlying issues. There is a missing "not" after the word "did".

Second quick point, the appellant's submission that I was referring to about the judicial committee consultation, I think the lack of an assurance not mattering is at paragraph 46. I'll just let your Honours to read that, but the simple point is it's not correct, it's not consistent with the evidence and it's certainly not grounded in the Minister's own assessment.

So those were the two very quick points. The three short points that I hadn't covered. One is at page 8 of the respondent's appendix, and this is explaining why, in our submission, it was not sufficient simply to have what China said about its law, or what it said its law said, there needed to be some objective evidence, and its set out at 7.1, 7.2, 7.3 why that is so, but the short point is that when one has a series of statements from the Chinese government and relies upon those, one needs the objective corroboration too. In particular, and one point your Honours will have seen from the table, there were a number of questions from the Court about what happened in practice under various law,

but when one looks at the Chinese government response, very large parts of it simply replicate the relevant statutory provisions and we know, and this is the point at 7.1, that there are a number of provisions of Chinese law that are not applied as they are set out, for example, cross-examination and in practice the prohibition against torture. So evidence was required. We provided some. The Minister had nothing else and the Minister's only comment on that is that he had his own experts, he had the Minister of Foreign Affairs, but the Minister of Foreign Affairs is not an expert on Chinese law. But there was nothing put forward anyway. That point is repeated, or made more fully at 10.3 over the page on page 9.

The second quick point, and this has come from something that was said before the break, page 12, paragraph 13.2 – 13 actually, pointed to the need for China to address the – or pointed to the failure by China to address these questions, but also to the point that that omission is, say the five experts, not any sort of accident, it is an expression of China's view of its – or China's international policy concerning, for example, what a trial should look like, and I won't go through that in detail, but it's set out at 13.1, 13.2 and 13.3.

The last point that I wanted to, which I wanted to take slightly more time, I have made some reference to – sorry, last substantive point and then I'll come to the question of disposition. I've made quite a lot of reference to Professors Cohen, Clarke, Pils, Associate Professor Burnay and Dr Kaiser. I'm also conscious of the Court's concern in the 16 December memorandum that those expert opinions might be seeking to relitigate matters. Certainly they are not intended to be taken that way. We very much ask the experts to concentrate on the specific queries that the Court had put, and on the answers that China provided. So all new material – and on changes of circumstances so far as we haven't covered them already.

If I can go quickly through the two most recent expert reports. There was the first one by Professor Pils and her colleagues in July, which for reasons of time I'll leave your Honours to go through, but the first of the reports is at page 68 of

appendix 5, annexure 5 I think it is properly, to the joint report. So page 68 of annex 5.

GLAZEBROOK J:
Can you just give me a second please, mainly because I'm scrolling through electronically.

MR KEITH:
If your Honour can bring up bookmarks on the side of the screen, there are bookmarks through the report, so there should be one for, I'll give your Honour the number sorry, 5.3

GLAZEBROOK J:
It won't take me long, it's just if you give me a second. So appendix 5, and what page are we looking at?

MR KEITH:
Page 68 Ma'am.

GLAZEBROOK J:
Page 68, thank you.

MR KEITH:
Ma'am, so I just wanted to touch on a few key points, they're mostly points I have referred to already, but to give your Honours the detail of them and the timing, particularly the significance of their content too. So your Honours as a first point about this, and about the second Pils' opinion, both of these were provided in accordance with the appellant's timetable after we had the response from China, and so that was sent on the 1st of September but given to us, I think, on the 6th, and the Foreign Minister's first advice to the Minister of Justice, and I think that's dated about the 6th or 7th of October, but we, for some reason, didn't get it for about a week. Then we put these submissions together in the fortnight after that, including the expert evidence commenting on both the China response and the Minister's answer. But in any case, the critical passages

really start, other than setting out the expertise of these people which I hope won't be impugned, but at page 4 and following we have examples in Professor Clarke and Cohen of China having particular obligations, or having given particular commitments to allow, for example, consular monitoring, and then just breaching them and holding out that it is entitled to breach them. So, for example, under paragraph 14 at page 4, Professors Clarke and Cohen set out an earlier comment, and I'll come to the more current ones, of China saying: "Well, we are not required to comply with the Chinese-Australian Agreement on Consular Relations." That was 10 years ago but there was a second such instance, so the new material, paragraph 16 on page 5, same breach of obligations and demands by other countries, and I think this included New Zealand in this case, for consular access were "gross interference" said the Chinese Foreign Minister.

GLAZEBROOK J:
Sorry, what paragraph were you referring to there?

MR KEITH:
16 on page 5, Ma'am, and further down that same page we have the very prominent – or we've put in evidence about it but your Honours will have seen – very prominent case of Michael Kovrig and Michael Spavor in Canada, and once again outright breach of consular access provisions, and as – one critical thing, and it applies in the Australian case too, these were specific finding at international law agreements that specifically excluded any right of the parties to apply its domestic law to deny consular access, that's Article 8(7) set out at paragraph 17, and China said: "No," and this was last year.

Now the Foreign Minister does comment on the case of the two Canadians and says that this is part of a wider dispute between Canada and China, but, as we come to and as Professors Clarke and Cohen go on to say, problem with the Minister's position is twofold. First, as we set out in the joint report, there is a process problem. The Foreign Minister didn't comment on this advice, wasn't asked to. So when the Justice Minister in the letter that I've taken your Honours to says that he prefers to accept his own expert, well, his own expert didn't

address these matters. The only request specific to the material in the appendix was a request for comment on the three NGO submissions. So the Foreign Minister –

GLAZEBROOK J:
I don't quite understand the submission in terms of – so what's – sorry, perhaps repeat the submission.

MR KEITH:
I'll back up and I'll try not to be quite so quick. I'm sorry, Ma'am. The Justice Minister's letter that you've seen says that he chooses to prefer the evidence of his own expert, the Foreign Minister. The sequence of events was that in June there was a very general request from the Minister of Justice and the request is one of the appendices to the report, annexes to the report. It was a very general request for anything about the reliability of assurances and China-New Zealand relations. There was then a reply to that provided to us in mid-October and about 10 or so days after that we provided all of this material to the Minister. The Minister of Justice did send, and it's in the chronology that we included with the hand-up, the Minister of Justice did make a last-minute request for some further advice from his Foreign Minister colleague but it was only about the NGO submissions. So why I say this is a process problem, had the Minister wanted advice on what these eminent experts said, he needed to ask for it and needed to get it and he didn't. So it's not a question of preferment. It is a failure to consider and also an attempt to then rely on a bias that wasn't there.

ELLEN FRANCE J:
Well, that presumably would matter if the Minister of Foreign Affairs hadn't addressed the underlying concern which she appears to have done.

MR KEITH:
Well, I think that's true in some respects and not quite right in others, Ma'am. As a general proposition, the Foreign Minister has said at the present time she believes that China would comply with its assurances. What the Minister hasn't

had, and hasn't had an opportunity to express, for example, and to pick up on points made by Professors Clarke and Cohen and by Professor Pils, one of the points that they pointed to, and one point was in fact raised earlier, was that in these disputes there is both the problem of non-compliance but there is also the problem of no timely resolution of disputes. So in the Canadian case there were diplomatic representations for more than three years before the problem was resolved. The Foreign Minister, in her advice to the Minister of Justice, has not dealt with any question about whether there would be timely resolution of any disputes. So that is one point.

The second point, and this is where the Foreign Minister's advice, or Foreign Minister providing further advice, would have been a good thing but it didn't happen, if your Honours look at, for example, page 7 of Clarke and Cohen, and this is page 74 of the appendix, the Minister has made the assessment and given the advice that the Chinese government will comply out of concern for reputational damage and the Minister has also, and this is footnote 17 and paragraph 26, the Minister has said, well, if the assurances are breached they could be made public. What the Foreign Minister hasn't commented on because he didn't have this, wasn't asked to comment on it, was Clarke and Cohen's point that China has had a whole lot of very public breaches of binding commitments in the sphere of international criminal co-operation and in their expert view has suffered nothing from it. So we really needed a reply to that. That was the point of our making the submission and the Crown has not addressed it.

GLAZEBROOK J:
You're saying the Foreign Minister would have been unaware of the fact that there'd been public comment on these and the experts would have brought that to her attention? That just doesn't seem a particularly likely scenario.

MR KEITH:
No, Ma'am. It's more complex than that. The Foreign Minister was acting as an adviser to the decision-maker here. The Court had directed that the Minister of Justice would receive submissions from us. We provided these submissions.

We provided expert evidence on these submissions. The Foreign Minister's only input was at the earlier stage where she did not have the benefit of this perspective but more to the point, and why I say it's process point 2, what we have is a decision-maker with relevant material not able to address it because the Foreign Minister has not asked for advice. So we have the Foreign Minister putting up a proposition, that proposition being addressed by experts before the Minister and nothing more happening. We don't know whether the Foreign Minister was aware of all of these things or had them all in mind. Also say in the joint report in the meantime Human Rights Watch had, in particular, put up another 10 or so examples of non-compliance by China with assurances of this kind or other breaches of similar obligation, but when one reads the Foreign Minister's October note it's very specific. It says, for example, we don't need to worry about the Canadian instance because that was part of a wider bilateral dispute. But there's no comment on this wider pattern and particularly, to go back to the prior point I made, no comment on, no explanation at all, no evidence at all, about how quickly or whether disputes would be resolved, simply that there are processes for resolving disputes and one of those is to make things public.

The Foreign Minister made no comment on how, in the context of assurances around Mr Kim, how or when things would be resolved and that was critical in our view, and the reason for that I think is self-evident, that if there is a dispute about how Mr Kim is being treated or how his trial is proceeding we need to know that any dispute about the assurances would be resolved in a timely and effective way. We have nothing for the Minister to rely on to suggest that they would be. We have all this evidence saying that they won't. So the Foreign Minister's general point, to pick up on, I think, Justice France's earlier point, the general assurance or general confidence, doesn't answer those particular problems.

I'll just mention, and I won't go into the second part of Clarke and Cohen, speak specifically about what China has and hasn't answered in terms of exculpatory evidence and consultation by the judicial committee, and that's covering quite a range of material. On page 12 we have comment on how the

judicial committee and how party influence works. Yes, from 2005 at the start of that page through to 2018 and going on. And last there is a discussion of the Canadian case, paragraph 50, and again this point I think is self-evident. The Foreign Minister has said, well, the Canadian dispute arose because of wider considerations. There was a wider dispute. It was actually China trying to block one of its own nationals from being prosecuted in the United States. That's not an issue I think but Clarke and Cohen's point is, well, if you have a criminal justice system that can be directed in that way, one does not have an independent court system, and one's rather, in Mr Kim's case, a hostage to fortune. There may not be a dispute today, if there is one tomorrow, or next year, then what happened for Canada can happen here and there is, again, no answer to that, the Foreign Minister talks about the present day only.

I'd like to just touch in the same brief way, on aspects of Professor Pils and her colleagues second expert report. This is immediately following. It begins at page 84 of appendix 5. So if you scroll through the last couple of pages of Clarke and Cohen you get it, and I won't get to it because I am using the Court's time. But at annex 5.13, page 199, there is a further report by Professor Pils. This was the one given in July. It's cross-referenced here and I won't go to the detail of it, but the first point I wanted to make about the second Pils/Burnay/Kaiser opinion was, or expert report, it is very much directed not at relitigating anything but at what China didn't answer, the answers China did give, and this is at paragraph 5 and paragraph 6, and consistency of those answers with the ICCPR, and then the Foreign Minister's letter.

Again, just to touch on very short points, at pages 3 to 4 of Pils' paper, there's the comment on why relying on placement in Shanghai now, because of changes in circumstance, doesn't resolve the risk of torture of Mr Kim, set out why that is. They set out in the answer about non-members attending the judicial committee and why that is a problem, and again make the point I've already made, this is at page 5, paragraph 7(b)(ii) about consultation being part of the function of the judicial committee and at (c) another of the answers given by China about submissions by the procuratorate and essentially explaining

that procurators can exert influence, this is half way down the page at (c)(ii), so the protection of making submissions is not a protection.

Over at page 6, this is 9(b), this is commenting on the lack of an answer from China about meetings to suppress evidence, and as they say about 10 lines down, the answer given by China sets out the Criminal Procedure Law provisions to verify evidence, doesn't answer concerns about well-known practices, and they also make the point, and again this is to do with Mr Kim no longer being an ordinary case, the last five lines of that paragraph, this case will be intensively managed to avoid criticism including anything to do with evidence. That is to do with any adverse appearance because of disclosed evidence, for example.

One theme, and it is more strongly made in the first Pils report, is the incentive is to, and China's practice, is to create trials that it can present as fair, that have the appearance of fair, without fairness, not of substance.

Next passage in Pils and co –

O'REGAN J:
I think we have read this material, Mr Keith.

MR KEITH:
Sorry, Sir. All right, I'll just jump to – I've already touched on, at pages 8 to 10, the Foreign Minister points, and I think that's all that I have to say about Professor Pils and her colleagues.

That leaves me one last point from the outline which is to do with the questions of disposition, and this is as summarised at Roman numerals (i) and following at the bottom of the page. The straightforward point, in our submission, what we've sought to do here, and this is echoing the Court's own attempt and the requirements of the Committee Against Torture and the Full Court of the European Court, is that this decision about our client and about the dangers that he faces or does not face must be made in a rigorous and informed way.

I've already touched on why objective information is so important here, and that is what we have sought to do here. That is why we have provided these expert statements and the empirical material and the official statements and so on, and on the Court's test, what the Court said about assessing risks in its judgment, the Minister needed to go through that with that same rigour, needed to seek objective information, needed to engage with the detail, needed, for example, to look to what the Chinese government had not answered in its answers or why particular answers were problematic or not, but that hasn't happened.

So the Court and we are a whole lot better informed than we were two years ago thanks to the Court's process. The Court sent us off to look into these issues and we have done. But what that has largely done, two things, first, it has confirmed some of the risks to Mr Kim. The second is that it has shown that other risks are unaddressed. So if we have no answer from China about consultation by the judicial committee, that risk to fair trial is still there. Mr Kim cannot be extradited because his trial would be unfair as a result. That is what the Court said in June.

Similarly, the equality of arms problems and the other things that we have pointed to have just not been addressed, and that's Roman numeral (ii).

Roman numeral (iii), and Dr Ellis has already touched on this, it's a reference to the *Philippines* case but it's also evident from the evidence Mr Kim himself has been harmed. The medical evidence is that the stress of these proceedings has caused a great deal of damage and the prospect of having a fair trial 10 years or more after the events in issue has been further harmed by this.

GLAZEBROOK J:

Can I – that submission does sound like a submission that there should be a statute of limitations for murder. We don't have a statute of limitations in New Zealand and no one would suggest, apart from specific instances of stay, which we haven't had argument on in this case, in fact, this is a new submission.

MR KEITH:

No, Ma'am, it's – my only point is as to the terms of relief, and this is to pick up on the last couple of pages of our appendix to the report, what we want to ensure is that if the Minister is to reconsider this and we say must be remitted, and the appeal must be denied and must be remitted for the reasons we've already given, it must also convey or what we are asking the Court to convey to the Minister is that any re-evaluation does, as the Court itself said, any re-evaluation does proceed from this rigorous factual inquiry and one now inescapable part of that inquiry is what happens to trial fairness, what can be done, if anything, about trial fairness in China because of the passage of all this time? That is all I'm saying. I'm not saying, we are not today making any submissions that this can't go ahead or that there is a statute of limitations now. It is simply that if the Minister is to try again, and it would be a third time, after I think eight years, the Minister is to try again, the Minister needs to take account of what that eight years has done to the fairness of trial, what it has done to Mr Kim. That's all. The problem for the Minister has become harder and so these are matters that if the case is remitted the Minister ought to be required to consider.

That's the only submission I'm making Ma'am. Dr Ellis has already touched on the costs point, so I won't speak to that. I'm very happy to answer any questions that the Court might have. I've been most grateful for those that I have had, but if not, those are my submissions.

GLAZEBROOK J:

Thank you Mr Keith. Madam Solicitor?

SOLICITOR-GENERAL:

Thank you your Honour. Your Honours I thought I would spend my time with you addressing the two points that the Court has said with oral argument, which is whether or not the assurances and further enquiries addressed the matters the Court identified, and changed circumstances, but do your Honours wish me to rest on any particular part, or would you wish I went anywhere else with that?

I'm just very conscious of time and I'm satisfied that I'll be able to make my oral submissions in the time.

GLAZEBROOK J:
For my part that is what we were expecting, and if anything else arises, or any of the judges have any comments, perhaps we could do so at the end of your submissions and ask you to address them then. But for myself that was what I was expecting from the hearing.

ELLEN FRANCE J:
Can I just add, Justice Glazebrook, for my part I'd also be interested, and it may be covered by the points you're making in terms of changed circumstances, in how you see what's occurred here fitting in with the approach in *Aswat*.

SOLICITOR-GENERAL:
Yes, thank you your Honour. So just to begin your Honours. I won't spend time on this, but despite my friend's submission that Mr Kim's case doesn't seek to undermine the Court's findings, we day that's the very essence of Mr Kim's case. I'll give you one example only, although I do invite the Court to judgement. I'll give one example, and it was very clearly put to the Minister by Mr Kim's counsel, and it's at page 3 of annex 5 to the joint report, where Mr Kim's counsel said to the Minister, one of his jobs was to make his own decision on a number of matters on which the Court's interim judgment reached findings that were not open to it.

To the contrary the Minister's assessment of what he was to do was to see the Court's judgment as leaving the Minister of Justice's decision intact and largely upheld but for the discrete matters the Court has identified, and as your Honours observed last year, these discrete points were relatively limited and they shouldn't be difficult or time consuming to resolve. Perhaps we haven't met your objective there of being time-consuming but they were discrete issues that needed attention. The Minister didn't understand his job to be to do a fresh review of everything, even in sort of broad categories, but rather some very surgical and specific matters to be resolved, as they related to Mr Kim.

The Minister's function was to consider whether or not he was satisfied with those responses, but the Court also gave the Minister the opportunity to seek that the matter is returned to him, remitted to him to resolve – sorry, to make the decision again, and I'll come to that, but in my submission that's where the new circumstances become relevant.

So the Minister took that approach. He thought, if I'm satisfied with the discrete matters dealt with, then I give that back to the Court. I mean of course this is not a first instance challenge to what the Minister just did, although my friend's submissions get close to that several times, nor of course a challenge to the process of how the Minister's advice from his colleague Minister Mahuta, Minister of Foreign Affairs, was sought and received. But rather the purpose of the adjournment was for the Court to retain its oversight and to determine the appeal once we'd come back to you. Here we are, then, of course coming back to you with what we say is a resolution of the outstanding matters such that the Court can conclude that there are no substantial grounds for believing that Mr Kim is in danger of being subject to an act of torture, and that in all of the circumstances, I'm actually referring there with these words to the Court's judgment at 422, the Court can now say, in all of the circumstances there is not a real risk that Mr Kim will not receive a trial that meets international minimum standards. So that is why we're here. It is for your Honours, of course, and so I would like to then address those outstanding matters and how they have been responded to and what the appellants say about them, and then I will come to what was understood to be the relevance of new relevant circumstances.

So your Honours have got before you both the questions and the answers. Questions by this New Zealand Government, answers from the PRC, and you'll see a pattern there emerging. The questions are asked in a way to say can you confirm these points will be how Mr Kim will be treated and, if not, can you give an assurance that in this particular case a certain thing will or will not happen, and we'll go through those but it is important, in my submission, to observe that pattern.

So I'll start with the risk of torture. Of course the Court has already found that but for two outstanding issues relating to where Mr Kim is to be tried and detained, and relating to visits, the regulatory of visits, there would be no substantial grounds for believing that Mr Kim would be at risk of torture. The Court at 264, at 446 and 471 made that finding. So the outstanding assurances have been given precisely as the Court would want. It's at annex 2 of the joint report. The first assurance, if extradited to the PRC Mr Kim – sorry, beg your pardon: "After extradition to the PRC Mr Kim will be detained pending trial and tried in Shanghai and will serve any sentence of imprisonment in Shanghai." We say that outstanding issue has been met.

On the second question about the regulatory of visits, the second assurance: "During the investigation phase New Zealand diplomatic or consular representatives are permitted to visit Mr Kim once every 48 hours and more than once in a 48 hour period if he requests additional visit or visits."

The matters that my friends have raised, both to the Minister and today to the Court, questioning the efficacy of consular monitoring, questioning the underlying bases, really do go back into questioning the Court's findings. So we say, and I will finish on this point, that both of the assurances relating to the risk of torture that this court saw were outstanding, have been met such that the Court can now conclude there is no substantial ground for believing Mr Kim will be at risk of torture.

So I will say one more thing, I think the Court in its exchange with my friend is already live to this. The Court has already observed many of the points raised in new, new in that they are freshly prepared, evidence from Mr Kim's experts but not new points being made. The Court noted already many times through the judgment that torture is hard to detect. It noted the reference to underhand methods of torture, the white torture, the tiger chairs, as being things that are practised in the PRC, and, of course, the question is not what is the general state of affairs in the PRC but what is the risk to Mr Kim and we say on the risk of torture the outstanding matters the Court put are resolved.

I'll move to fair trial unless your Honours have anything on torture.

GLAZEBROOK J:
I think you can take no, no more.

SOLICITOR-GENERAL:
Similarly, the Court found that but for discrete outstanding issues, I'll summarise them, as relating to quality of arms and outside influence in respect of the judicial committee and disclosure of the case against Mr Kim, the Court found that in all of the circumstances there was no real risk that Mr Kim wouldn't receive a trial that overall meets minimum international standards, because, of course, the Court found, as the Court will know, please give me this indulgence, that PRC domestic law, if followed, would accord Mr Kim a fair trial. The Court found that at 423 and at 471 after going through, with respect to your Honours, a detailed analysis of the fair trial issues that were raised and that emerged, and, of course, the judicial committee was one of the matters that Minister Adams hadn't addressed. There was a process that we went through of further submissions before the Court determined this point. But critical for the Crown's case is that at 454 the Court found: "If the process before the judicial committee is as described in the 2019 Opinions and these are the applicable Opinions, we consider that the Minister could have reasonably concluded that, even if Mr Kim's case were referred to a judicial committee, the trial would still meet minimum international standards for judicial independence and impartiality, subject to the issue of equality of arms and outside influence."

I'm not sure whether Justice France is still connected? She's back. Justice France, did you want me to go back anywhere?

ELLEN FRANCE J:
No, I'm fine, thanks.

SOLICITOR-GENERAL:
So the Court asked the Minister, or said that the Minister would have to check whether the procedure followed in practice accords with 2019 Opinions and

whether they were the right Opinions and in particular whether the judicial committee would have access to all of the trial materials in Mr Kim's case, whether Mr Kim would have full opportunity to make submissions on relevant points to the collegial panel and that they are in the report to the judicial committee, and that no other party nor the prosecutor would have any additional right to make submissions to the judicial committee without Mr Kim being given an opportunity to respond and that no other person would attend a judicial committee hearing in Mr Kim's case, and my friend raised the point earlier that, as I understood the argument, that the Court's reference to if the process before the committee or if the process that we've described (**glitch** 12:34:14) process to be followed, you know, that's often what the Court's findings relied on, and my friend seems to say that required the Minister to undertake an entirely fresh and evidence-based assessment of what the general practice is, but the Crown's understanding of the judgment has been that what the Court wanted to be resolved was not what happens in the PRC writ large but in respect of these issues what will happen for Mr Kim, and taking the judgment as a whole the Court is content to rely on assurances, provided that they meet the risk to Mr Kim and that there is a reasonable basis, that there is a basis on which a Minister could reasonably conclude that they were, what's the right word, reliable. So these questions about the judicial committee don't start, as my friend's do, from a proposition that the judicial committee process itself is a fair trial problem, but rather in respect of some discrete aspects of it, further information and perhaps assurances was to be sought.

So, if I can turn then to how the questions were dealt with, and I've already mentioned the pattern of detailed questions if these are not, if this is not how it will go, we need an assurance. I'll start with the issue or the question as to whether there would be any other people attending the judicial committee hearing. The way that China has dealt with the answers is that they have given three discrete assurances, and then further information about confirming that PRC domestic law is as set out and is as your Honours had thought it to be. Bearing in mind that one of the assurances from 2015 is that China will follow its domestic law in relation to Mr Kim. So this question is dealt with on the second page of the note verbale and China asserts that its criminal justice

system will protect Mr Kim but notwithstanding that, they deal with a question that we know from practice is not against the law for other people to attend the judicial committee. They might be politically interested, they might be interested for other reasons, they might not be interested in the case but they sit in and attend, and this court was concerned about that, this court said, actually no one else should be attending the judicial committee. And because that isn't the law in China, they have given it an express assurance, that something different will happen to Mr Kim, and so they say if the collegial panel that hears the case refers it to the judicial committee, no one other than members of the collegial panel or the judicial committee will be invited to attend, and if the procuratorate is given additional opportunities to make submissions, Mr Kim will have equal opportunities to make submissions and responses. And I need to deal with my friend's criticism of this, and I will, but on its face that is an assurance that no one else will be invited, and if the procurator is given additional opportunity to make submissions, or to prosecute matters in this case, Mr Kim will be given equal opportunity.

My friend's say something different about this, and to that end I need to ask your Honours to turn to the very bottom of page 3 and page 4 of the PRC response, and this is (**inaudible** 12:38:38) pattern, this is where they describe participation – they describe the law and how it would run if the procedure ran according to law, which they wished will happen, so here they say that because (**inaudible** 12:38:52) judicial committee meetings and the protection of a defendant's rights in judicial proceedings, and in particular whether the defendant has the same rights. So they address Articles 18 and 19. They say the chief procurator or deputy may sit on a judicial committee meeting. They don't have to, it's not mandatory, and they do not act as prosecutors of the case in the meeting. Now this wasn't troubled by the presence necessarily of the chief procurator at the judicial committee, rather the concern is will they be able to advance and prosecute the case, make submissions without Mr Kim being able to do the same. Then the PRC goes on to say, the judicial committee may invite deputies of people's congresses, members of the Chinese People's Political Consultative Conference experts and scholars, among others, to sit in at the meetings and provide opinions with the consent of the Chair. They're not

government officials or political representatives referred to by New Zealand. The People's Court has agreed to assure – and they go back to the assurance that I've already taken your Honours to which was a few pages earlier – if the collegial panel refers it to the judicial committee, no one other than the members of the collegial panel and the committee will be invited. If the procuratorate is given additional opportunities, Mr Kim will have equal to make responses.

Now my friends say this is not just a – well, they say this is a deliberate obfuscation of the point. They say because, at the top of that page, the chief procurator may attend, he isn't or they aren't subject to an invitation and therefore this assurance doesn't say that the procurator will not be there, and we say what the content of this assurance is is the only people that will be at any judicial committee hearing of Mr Kim's case if it is referred are the collegial panel and the committee.

It is dancing on the head of a pin, in my submission, to say, they use the word "invite", and the procurator doesn't have to be invited, and so they'll just have that person there and they will make submission – you know, that's a risk to Mr Kim's entitlements. But they go on to that to say if the procurator is able to make additional submissions, we assure that Mr Kim will have equal opportunity, and in some ways it depends on the lens that you take to this matter. Of course, the Minister's approach is to say that, both in 2015 and now, the assurances are reliable and that there are powerful incentives for the PRC to rely on them, and these assurances haven't just been plucked out of thin air. Your Honours may recall that the 2015 assurances were developed over a considerably long period of time and at times a face-to-face personal, high-level negotiation between the states, between the state parties, to understand the issues, to understand the perspectives. John Adank's affidavit – I won't take your Honours to it, it's in the material – sets out in quite a lot of detail the process and the formality and the seniority with which these arrangements are made. So it is a very cynical lens to bring to page 3, 4, of this assurance to say, well, obviously, as Mr Kim's experts do, they don't mean it. They will just say: "Well, we didn't say the procurator wouldn't be there. We wouldn't invite them." "They don't have to be invited," says Mr Kim's experts, and this is a very small point

but you'll see the language that they say here the only ones invited will be the judicial committee. There's not much we can read into the language of "invite". Of course the judicial committee doesn't get invited to the judicial committee, nor does the collegial panel. If the collegial panel refers it, they are there, they are present, and so I think, with respect, my friends read too much into the language. To the contrary, and I understand why he takes a different view, but to the contrary the Minister says this is a significant and senior arrangement over many, many years that has been negotiated very carefully through all of these issues on the issues to which this Court found, for the most part, Minister Adam's decision was sound, so entirely sound, missing a few matters to be resolved.

But in any event, it seems to me that these assurances do make it plain that the PRC understands this Court's concern because later on, and this is on the same point of who will be there and does Mr Kim risk not being entitled to comment when matters are being made about his case – excuse me, your Honours, I just have misplaced the point where they make it quite clear that they know what the concern is. Sorry, it's in the introduction to that point at paragraph 5. Yes, they haven't answered, this is my first criticism, they haven't answered all of the questions, but you can see the way they have put together their responses. They understand that participation in judicial committee meetings is about making sure that Mr Kim has rights the same as the procuratorate at that committee if it occurs to make submissions. So our submission is that this point has been attended to. That no other person, other than the committee and the judicial panel, will attend and if the procurator is invited, Mr Kim will be given equal opportunity to make responses or submissions.

GLAZEBROOK J:

I think Mr Keith made the point that there wasn't an assurance on, I can't remember exactly how he put it, but in terms of influence, and that isn't how he put it, and there also wasn't an assurance in respect of being able to make submissions on material that the judicial committee asked for of its own motion, which I can see why that might be the case, because I don't think we had actually asked for assurances on that point.

SOLICITOR-GENERAL:

No –

GLAZEBROOK J:

But do you have a comment on both of those points is what I was really asking, and I'm sorry I didn't put the first one quite as Mr Keith put it I think.

SOLICITOR-GENERAL:

No, I understand your Honour. In part it requires us to go back, and I'll do that lightly, into what this court has already found, because it was already clear to the Court, well as your Honour I think said in exchange with my friend, that the judicial committee sits in private, and it issues a judgment to which Mr Kim has appeal rights. The Chinese government has assured that it will follow its domestic law, but in respect of Mr Kim it is saying many times through this material that, for example at page 7: "Mr Kim and his lawyer will be able to access all evidence disclosed to the Court by Chinese public security (**glitch** 12:47:30) and procuratorates. His right can be effectively protected under Chinese law and regulations. So your Honour was asking about outside influence, about whether there would be the risk of somebody other than being in the meeting room I think was Mr Keith's point, about somebody could simply –

GLAZEBROOK J:

I apprehended that was his point, yes.

SOLICITOR-GENERAL:

The answer that we would put to that is that here the assurances are saying the decision will be taken in accordance with what is in the material. I'll answer your second point in a moment your Honour. We get the whole material, everything that has been discovered is provided, the Court examines that, the trial Court, and send it up to the judicial committee. The Court – sorry, the PRC government has also said, is very conscious of the fact that it needs to, and it is assuring in a very serious diplomatic engagement to treat Mr Kim fairly. As this court has found, if he was to – well this, sorry, slides back into a torture

point, but if he was to confess now there would be serious grounds to concern oneself with that, and that's not just an after the fact point, as the Court points out at 261 of the judgment, but it's part of the incentives that go towards making sure that Mr Kim's rights will be met.

Your other point, sorry, the Court also found that the Minister was entitled to find that the risk of political interference was low for all of the reasons that are set out in paragraphs 339 of the judgment, 451, that monitoring would detect a verdict that didn't accord with the evidence, I've just touched on that point. I've managed now to forget the second point which was about –

GLAZEBROOK J:
The –

SOLICITOR-GENERAL:
It was the part, yes, sorry, that the committee can go back to the trial court and ask questions that weren't before the trial court from the parties, and in some measure that goes to the Court's findings that inquisitorial legal systems and standards do and must be allowed to operate differently and that the Court, the judicial committee might come back to the panel and ask questions that then don't go back out to the parties. That's not necessarily, in my submission, a breach of minimum standards but it might be the judicial inquiry process. But I think the answer I must give to that is that Mr Kim hasn't pointed out any trial strategy or prejudice that would be impeded by that occurring, and this is a matter that your Honours made at – I think it's a footnote, 459. He knows the prima facie case against him. The District Court found that. Your Honours record that at 404, and that the only or exculpatory evidence that Mr Kim has put to the New Zealand Courts was said by this Court, the suggestion that his girlfriend was the killer, as something of a "long stretch". I think, sorry, without looking at 406, that that was also a reference to the District Court's finding.

And so yes, there is a reference to – it is possible that the judicial committee can refer and speak back to the collegial panel. That might be a simple element of the inquisitorial process as opposed to adversarial, but again I come back to

these most recent assurances which also say that Mr Kim will have all of the material that the prosecutor has, all of the evidence that is made available to the court file will be disclosed to Mr Kim.

So that is how I answer those two questions, your Honour.

GLAZEBROOK J:
Thank you. So is the submission that because he will have had all this material, and I think this might be actually in their answer, he will already have had an opportunity to make any submissions in respect of the whole of the evidence that was put before, including maybe evidence that was not put before the actual trial panel and therefore will already have had that opportunity to comment?

SOLICITOR-GENERAL:
That is the sum of what this says, yes, because they say he's had ample opportunities to make his submissions to the collegial panel. He will have all of the information that is on the file in relation to the matter and have been able to deal with the collegial panel on that, and, the judicial committee says, if the procuratorate is invited to make any submissions about Mr Kim' case, he will I be given an equal opportunity in front of the judicial committee. Well, they don't say "in front", just before the judicial committee.

GLAZEBROOK J:
So it is just in respect of own-motion material asked for but the answer to that that the Chinese authorities give is that he will have all that material, he will have had ample opportunity to the extent it was relevant to make submissions on that to the trial Court, if we put it that way.

SOLICITOR-GENERAL:
If – yes, that is what they say. So I accept what my friends submitted that New Zealand asks questions that aren't answered in the way, you know, that there is not like one-for-one question and answer but in my submission the questions are answered. The outstanding issues of inequality of arms which

were about – and independence, and disclosure of material, those were the three outstanding issues and in my submission they have been resolved actually by the totality of the assurances, and I think I may have already submitted that I do urge on the Court to read them in their completeness with the 2015 assurances and other material that the Court is well aware of as to PRC's attitude and approach.

So I would move on to new circumstances and how the Minister dealt with those. Excuse me I'll just check with my colleague off screen. Your Honours, our written submissions, the appendix to the joint report does cover more detail of those, disclosure and exchange of material points that, or other, and the assurances already determined by the Court and I don't intend to go through that further.

So I would like to come to new relevant circumstances. I see the time. Are your Honours happy with me starting this point? I'll keep going unless I'm stopped.

GLAZEBROOK J:
We may as well get started. Yes, we'll get started.

SOLICITOR-GENERAL:
I'll come to new relevant circumstances. So the Court found, or concluded, this judgment at 473 and 474 by saying relevance, I don't need to read out to your Honours what you said, in those paragraphs the Minister understood his primary task was to check for these additional matters, but also the Court was offering him this invitation that actually you might want to do something quite different. You might want to request that it comes back to you, or that you might see another way through resolving the concerns that we've raised, and that's where relevant changes in circumstances is raised for the first time, and the way the Crown has taken that is to say that the Court was emphasising that the Minister of Justice was not required to adopt his predecessor Minister of Justice's decision, and it was open to him to seek remission of the senior decision to himself, and that point is emphasised in the footnote in

paragraph 474 asking the parties to come back with a proposed disposition in light of the enquires and any other relevant circumstances, the emphasis being made, disposition includes remitting to a Minister. So there hasn't been an invitation, as my friends seem to take it to have been, to conduct an entirely fresh consideration of material that was before the Court but not found to pose the requisite risk to Mr Kim, and to update it to make sure that everything was still as it had been. That is not the function of the Minister as the Minister understood it, and he wasn't –

GLAZEBROOK J:
Sorry, I understand the submission it's not redoing the whole thing, but I would have thought that meant the Minister, at least considering whether the new circumstances vitiate any part of the previous Minister's decision.

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:
Is that how the Crown understood it?

SOLICITOR-GENERAL:
Yes, there might be – yes, in that there might be new circumstances that were of such a character that made a material difference to the Court's findings, of the Minister's findings, that's the same thing really in my submission, the Minister of Justice, Minister Adams' assessment, upheld by the Court. If there was material that was materially different to that material which was either before the Minister, or before the Supreme Court before it decided the matter, that –

GLAZEBROOK J:
And just to finish that, the Minister may decide there was material differences to what was decided, but nevertheless decide this was in the range of possibilities, nevertheless decide that he will still uphold the Minister's decision because it doesn't, that they are answered in some way that doesn't affect that

decision, or could say, well actually these new circumstances mean that I would decide not to remit so I'd actually depart from the Minister's decision, or presumably say, well, these are so serious I think it should all be remitted to me so I can look at it as a whole. Is that the – there may well be other nuances in terms of what decision could be made, but those seem to me the three main possibilities.

SOLICITOR-GENERAL:

Yes, and as the Court has already put to my friend in exchange, that torture is endemic. Is not new. That fair trial rights are not always in practice delivered is not new, and the Minister did address one aspect and test that, which I'll come to, which was the question about the PRC's motivation to honour the assurances because, in my submission, he was entitled to accept this court's judgment that it is not at issue that Mr Kim, absent assurances, would be unable to be surrendered. So the real question is are assurances, as this court has found, are they sufficient to meet the risk, and are they reliable. Can I come back to that point then after the break?

GLAZEBROOK J:

Thank you, and I think the submission of your friends generally was that the circumstances had changed to the extent to that the risk was much greater, and that the Minister needed to consider that in terms of the changed circumstances, as I understand the submission, as well as whether the assurances were sufficient to meet that risk, and whether they would be, in fact, acted upon or kept. So they say that the Minister needed to look at all three of those in respect of the changed circumstances, so if after the break you're addressing that, if you could address those three points and then I think Justice France's point as well, in terms of *Aswat* and the...

SOLICITOR-GENERAL:

Yes, indeed.

GLAZEBROOK J:

We'll take the adjournment now.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.04 PM

SOLICITOR-GENERAL:

Just before the break there were two issues raised and I'll deal with them and then I think they bring me pretty much to the end of the oral address, subject to any questions. Your Honour, Justice France's, question about how does this fit with what happened in *Aswat* and, in my submission, what the Court was doing was like in *Aswat*, adjourning the matter in order that some discrete issues are returned to the Court for determination of the appeal, and yes, sure, there are differences in timeframe and some of the specificity of the issues but critically, in my submission, what this Court has done as in *Aswat* was not to invite a fresh decision-making process from the Minister such that is, can be and is being challenged in sort of a first-instance challenged process by my friends but rather inviting the Minister to take another step in the proceedings which was to go and see if these discrete issues could be resolved, and so it is like – it fits with what the Court had thought in *Aswat* of this adjournment process to deal with a specific issue.

So the Minister wasn't required, in my submission, to go back to those three steps that the Court has set out at paragraph 132 about what is the risk to Mr Kim, what is the quality of the assurances such that if they are met are the risks ameliorated and what is the strength or the reliability of the assurances, subject to, in my submission, some reason that the Minister might want to say no, hang on a minute, for reasons, it might be changed circumstances but actually also I interpreted the Court's approach to being somewhat deferential to the fact that the Minister of Justice was no longer the same deciding minister and indeed a Minister of Justice from a different administration of the Executive, it was quite proper for him then to think: "Is there any reason why I should have this remitted so I can take it again," otherwise, as in *Aswat*, the Court was inviting a simple adjournment for some specific matters to be resolved.

Then thinking about those three steps again, this Court was quite clear that yes, the risk to Mr Kim as compared to the general situation and the general risks that might confront him, that's the thing to focus in on, but also the Court was

quite open to the idea that this is a relative risk assessment and can I just draw your Honours attention, with respect, because you'll remember it for yourselves, but at 210 and 211 of the judgment the Court was saying the Minister, Minister Adams, somewhat misunderestimated Mr Kim's relative risk given that he's a murder suspect and that's not diminished by the other factors that the Minister had identified, that he was not a member of a minority group, was not a political prisoner, and so on, but the Court goes on to say, actually, just because the relative level of risk may have been underestimated doesn't mean that the decision is invalidated, rather that parts 2 and 3 of that three-stage test, being the quality of the assurances and their reliability, become all the more important, and so to that end I say to my friends' challenge that actually what the Minister had was new information that told him that Mr Kim was still at risk absent comprehensive and reliable assurances of torture or at risk of an unfair trial and he didn't need to do anything more to examine that or to assess where precisely on a continuum of risk Mr Kim might be because, as I say, as in *Aswat's* adjournment process, we're in the middle of a proceeding, it is actually for the Court to determine how to complete the appeal, and that would bring me logically to a point to say that if there is material information that is different for the Court, my submission is that it needs to be something that is so materially different that it vitiates the decision, either the Court's or the Minister's. I think I may have already been on this point just before lunch to say that the change in circumstance or the difference that the Court needs to see in order to say: "No, I'm going to remit," it's a high threshold, material difference, vitiate the decision below, because in my submission we're at the point where the Crown's submission for the Court is to say the Court is now in a position to allow the appeal and for the surrender decision to stand.

It would be again a high threshold if even though a 2016 decision as completed by the step in the process the Minister of Justice has just completed was upheld by the Court, it must be that a new circumstance might arise where the Court still has a concern about leaving the matter at that point, but that would be a very high threshold, in my submission, as I say, something so significant that it knocks out the basis on which the conclusions were made in the first place.

So we say that there is nothing of that character. Mr Kim's case has always been that he is at risk of torture, that the PRC's assurances cannot be relied on to protect him, and the same position is taken now with experts saying the same thing. That is not a change and the Court in this case has said the Minister can rely on assurances and in this case has said that it was reasonable to conclude that they would be met by the PRC. That's at paragraph 445.

The Minister did look at two new issues, however, and again I come back to the Crown's submission that the reason for the Court making that point in 473 and 474, that it was up to the Minister to do this process, consider any new circumstances, was to offer him the opportunity instead of saying: "Come back to the Court," just to simply say to the Court: "I want it remitted to myself." That isn't the three-stage process being run again, in my submission, but rather the Minister identifying anything in particular that troubled him because the matter is still before this Court, obviously, and that's where remittal should now be determined in light of the parties' stances on that point.

So the Minister thought about two things and in my submission it was proper for him to (**glitch** 14:12:38) testing the issue of reliability because the reliability issue of assurances is critical, and this Court at 445 sets out five factors on which it concluded that it was reasonable for the Minister, Adams, that she was entitled to consider the assurances would be kept.

There are five factors there: the fact that Mr Kim is not a member of a high-risk ethnic or political group; the assurances that were provided by senior PRC officials with the authority to bind the state; central authorities who gave the assurances who have power over local authorities; (d) the PRC's motivation to honour the assurances is significant, and (e) a robust monitoring regime. None of those things has changed and really none of those things are capable of changing actually. No, I've put that too high, sorry, your Honours. If those things were to change, for example, if it turned out that the assurances were not able to bind the PRC, if the officials who gave those assurances turned out to not be the senior officials who could bind the PRC, that would be a change. Those things haven't changed, but the Minister was just testing that bilateral

relationship because that might well be something that over the few years since Minister Adams made that assessment might be either subject to change or a changed perspective from the Executive.

So that is a new matter that the Minister did assure himself of, that there was no change to that factor, and, as your Honours know from the material, the Minister of Foreign Affairs' assessment was, remains, that the PRC's incentive in keeping the assurances continued.

I just make a slight interpolation there to the point that my friends have rested I think on the expert evidence that the thing that was incentivising the PRC was not wanting to be criticised and not meeting obligations.

But that's not actually what the Minister of Foreign Affairs concluded either then or now, nor what the Court said. What the Court is saying here is more importantly it is the PRC's incentive in keeping the assurances in order to have other alleged criminals return to the PRC from other countries, and the Minister of Foreign Affairs is very clear on that. There is no other evidence to my – I think I'm right to say that. There is no other evidence, I am right, that addresses this point. She says it is critical for China to co-operate and to be seen to be co-operating in international law enforcement so that China can get what China wants in relation to its international law enforcement co-operation from other countries. That is the strong incentive. It's not that it doesn't want to be seen to be criticised in public and it also doesn't matter, in my submission, that Mr Kim's experts say his personal risk has increased because this is no longer an ordinary case. In fact, that cuts the other way, in my submission, the fact that this is a case of – the thing that the PRC is highly motivated to maintain, international law enforcement co-operation, suggests that it increases rather than decreases that incentive. So the Minister did look at that.

The material is all before your Honours for your own assessment of whether this is a circumstance that is so materially different that it vitiates the decision made and, in my submission, it doesn't.

The other thing that the Minister looked at because it was put to him by Mr Kim was some information about Mr Kim's health, and I make a distinction between his physical health and his mental health because, as your Honours know, the mental health material isn't before the Minister but also in my submission is not relevant because it has been dealt with before as our written submissions and the appendix say.

But the Minister, the question I think still for the Minister was was there anything there that would make him think: "Oh, I need to look at this again. I do want this resumed or remitted to me so I can look at it," and in fact, in my submission, there was nothing that is materially different from Minister Adams had anticipated, that Mr Kim might well have medical needs. There's an assurance from 2015 that his medical – that he could have access and have medical attention. Chinese law provides him with medical treatment. There's an assurance there about examination by professionals of his choice. That position hasn't – there is nothing new in that to say that it was of such a matter that the Minister was required to stop and say: "Please remit this matter to me."

If I may just confer with Ms Todd briefly because I think that actually, subject to any questions from the Court, really takes us to the end of what we wanted to say, the rest, of course, being in our written submission.

Just one final rebuttal of my friend's submission about delay when that, of course, has been dealt by this Court in dismissing the cross-appeal. That was one of the bases on which Mr Kim sought a stay or somehow otherwise bringing an end to this matter and it's already been dealt with by the Court.

So unless your Honours have any further questions, those are the Crown's oral submissions.

GLAZEBROOK J:
Thank you, Madam Solicitor.

ELLEN FRANCE J:
Could I just check, just very briefly, did you want to say anything about costs?

SOLICITOR-GENERAL:
Your Honour, I beg your pardon, but I'm not in a position to actually say what the cost position is. I'd be inclined to –

ELLEN FRANCE J:
That's fine, thank you.

SOLICITOR-GENERAL:
– follow the usual way but I can see that we might need to have a think about that. May I come back on that, depending on how this turns out?

GLAZEBROOK J:
We will call for additional submissions on costs when we put out our decision because I think your friend also said that he wished to make submissions on costs, so that seems to be the fairest position.

SOLICITOR-GENERAL:
May it please the Court.

GLAZEBROOK J:
Thank you, Madam Solicitor. Mr Ellis or Mr Keith, who's doing the reply? I'm happy if you want to split it between you.

MR KEITH:
I think I'm – Dr Ellis, Mr Ellis, may follow me but I think we just have a very few specific points arising from my learned friend and obviously any questions the Court may have for us arising from that too.

The first and most specific, and my learned friend, the Solicitor, has usefully clarified the position, is whether or not the Minister's assessment in this process of these risks which the former Minister did not ever address is subject to usual

judicial review standards. There was a suggestion that we were seeking to apply at first instance judicial review principles to what the Minister had done as if that were a wrong thing to do, and it's a choice for the Court between our positions and my submission is very clear.

As I said earlier, in our view, had the Minister considered these things at first before the judicial review in 2016, so had the Minister actually looked at the judicial committee and what assurances might be needed about that, that would be subject to normal judicial review principles. It would be reviewable on all the same grounds as anything else. My learned friends are suggesting that somehow because that question wasn't addressed by the Minister it has been raised by the Court in this *Aswat* procedure at last instance. The Minister's decision on these points is subject to a less exacting standard. We cannot apply the same principles, and I can't see how that could possibly be right. If the Minister had done it properly in the first place, a review Court at first instance would look at that. This Court should apply no less stringent a standard and, as I said before, probably a higher standard because we are doing this for the first time in an abbreviated procedure at last instance in this Court.

GLAZEBROOK J:

Mr Keith, I think you might have misapprehended, or maybe I have, this submission of the Crown. I think in this instance the submission was rather that this Court had given quite specific matters that had to be dealt with. Those were dealt with comprehensively and therefore that's the end of the matter unless the Minister himself, which I think Madam Solicitor said was left open by the Court, decided that in fact he wanted the whole thing remitted. So the submission was those have been dealt with, they've been dealt with comprehensively. I know that's not your submission, or your submission is contrary to that, but I don't think it was it was lesser standards. It was in fact there were specific matters and they were dealt with comprehensively.

MR KEITH:

The submission made by the Solicitor from my note was that this was not a first instance challenge to the Minister's decision and the Minister's process on

these points. I take the point that your Honour is making about the specificity of the issues raised. The submission that I'm answering, and as made in the words I've quoted, is the suggestion that when the Minister looks at, for example, whether the risk to Mr Kim from the judicial committee is, to use your Honour's word, comprehensively addressed, we are saying that the Court can scrutinise that and the process followed for that in the same way that the Court could do so or a first instance judicial review Court could do so because that's what should have happened.

FRENCH J:
Does this relate to the three tests A, B and C at para 437 of the judgment that you're talking about, the assessment of the quality of the assurances?

MR KEITH:
Well, there are two related points there, Justice French. So the first is yes, we do say that when it comes to looking at, for example, the aspects of the judicial committee process that the Court has raised, so for example, will the judicial committee, and I'll come to this specific point because my learned friend raised it. Will the judicial committee consult anyone else? That was a question put by the Court. The Minister needed to be satisfied that they would not consult anyone. The Minister didn't actually say anything about the point at all. The Minister's counsel is now saying, well, the Minister is satisfied that that was comprehensively addressed.

I say (**glitch** 14:25:33) so first up I agree, yes, the submission as to risk and assurances is exactly that the Court must apply the same three-step test: have we understood the risk, does the assurance, if there is one, address content of that risk, and, third, is it reliable? So I agree, our submission is that the Court take (**glitch** 14:25:57) the Minister and then the Court must run through all three of those points, and you can see why that would be. There's previously unconsidered risk, not considered by the Minister, we'd raised it but not considered by the Minister. We need to understand what that risk is. We need to look at any assurances to answer it, then we need to look at whether the assurance is reliable. So one does have to take all those three steps.

The related point which I was answering from my learned friend is also as to the quality of or the extent to which the Minister's decision must withstand scrutiny. I am saying that because this is a Minister's decision we must have a merits assessment of the point from the decision-maker. That decision is open to the same scrutiny as any other decisions subjected to judicial review, and my learned friend's reference to not being a first instance challenge is, in my submission, not correct.

I think the first half of that answered your Honour's question but do correct me if it didn't.

FRENCH J:
No, thank you.

MR KEITH:
Ma'am, thank you. The one point of some detail is just to – my learned friend talked about the answers given by China and she very properly conceded, or accepted, that some of the answers, some of the questions as asked were not answered, but then went on to say that taken as a whole they satisfactorily resolved the position, and if I can refer your Honours back though to the table at the end of our report which is the breakdown of these things – so this is after page 33 of the respondent's appendix, and your Honour, Justice Glazebrook, was asking about was it influence that I referred to – the particular point, and I'll just use this as an example, is at 2.6 on page 11 of that table, and so we have in the first column what the Court wanted the Minister to determine and the particular point is 2.6(b): "The Minister would need to be satisfied that such persons will not…otherwise be consulted." So that's why I've used the term "consultation", and the question, and if your Honours go back to page 11, the preceding page, coming off the back of what the Court had said at 353, at our footnote 112 on the previous page, this is what the New Zealand government asked its Chinese counterpart and there are three questions: is the judicial committee able to consult any other person; second, is the defendant able to be informed of, and respond to, the views of any person consulted; and, third,

if any person can be consulted, New Zealand seeks an assurance that they will not be.

Our point is very a simple one. It doesn't involve cynicism or anything else as my learned friend at one point suggested. There is no answer to that question. The question goes unmentioned in the PRC response. There's nothing at all, and as the experts go on to say, there are two good reasons for that: one, it can't be a mistake, they say, because this would've been very carefully prepared and, two, they say that the consultation role of the committee is integral to its function, and we've given the references.

My wider point in terms of reply is that the Court had very carefully identified nine discrete areas of risk or difficulties with assurances or safeguards that the Minister had not addressed. I've already said the standard that the Minister was obliged to meet but this is an even simpler point. One can't say, well, we got answers to some of them and we can speculate that perhaps the spirit is willing in others because we only got answers to some of them. The Minister doesn't have the factual basis that this process was intended to provide. The New Zealand government, for good reason and in accordance with the Court's decision, asked these questions. It did not get answers or, in other respects, it got answers that were adverse to the risk really for Mr Kim.

On one specific point, 2.3, this question of whether or not a judicial committee can send for new evidence and so on. They said specifically the judicial committee may require supplementary facts, evidence and legal opinions, but not asking for submissions. The submission from my learned friend was, well, where is the prejudice to Mr Kim in that? It's true that the Court at other points said: "Well, we would need to know what the problem would be," but this isn't of that nature. The premise here is that the judicial committee can, unbeknownst to Mr Kim, without submissions, seek further evidence or further legal arguments and decide the case on those, and that is not a fair or public hearing. It is no hearing at all. So this is a new problem. It arises from the Court's specific inquiries which are set out at page 8 of that table about whether

or not Mr Kim had, in the words of 455, “had full opportunity to make submissions on the relevant points”. The point –

GLAZEBROOK J:
Can I just check because there is a specific assurance that a further legal argument is sought from the procurator that Mr Kim will have the ability to answer that.

MR KEITH:
Yes.

GLAZEBROOK J:
My understanding of the further evidence is that what happens is that the trial Court to say, to put it that way, prepares a dossier but that the further evidence is evidence that had actually been in the trial but was not in the dossier.

MR KEITH:
We have no – well, sorry, on your Honour’s first point about submissions by the procurator, there is another issue about that which your Honours can deal with in terms of the table and I won’t take your time unless you wish me to. But this is about the collegial panel providing additional evidence or additional – it says supplementary facts, evidence and legal opinions. We don’t have – so that’s a separate process from whether the procurator makes submissions, whether Mr Kim would get an opportunity. This is the trial Court doing the work. There’s no recourse back to the prosecutor or defence counsel and it doesn’t come in through the procurator. It doesn’t get – in terms of the assurance to which your Honours adverted, it doesn’t trigger the submissions from Mr Kim. So that’s the first point.

The other, it is possible, I suppose, that the supplementary facts and evidence come from the dossier put at hearing but we don’t know that.

GLAZEBROOK J:

Where else is it going to from and, if it does, hasn't – isn't that covered, as Madam Solicitor argues, from the fact that everything has been disclosed to Mr Kim?

MR KEITH:

I think the two difficulties in that point, Ma'am, are, first, we don't have this. We don't actually know the nature of the further information, and I think it is reasonable, for example, taking I think the model of inquisitorial justice which your Honour knows a great deal about more than me, if the collegial panel is treated as an investigating magistrate then it may say it may go out at the bidding of the judicial committee and seek such further information as it sees fit from wherever. It doesn't mean that it has to come from what's already been disclosed, because they do, in fact, say that the issue was not considered by the collegial panel. So it wasn't in the case at trial. It doesn't necessarily follow it was anywhere else either. The (**glitch** 14:35:16) is quite broad.

GLAZEBROOK J:

My understanding is that the investigating part of this is done by the procuratorate. It's not done by the trial panel itself. So in that sense it's not – well, possibly it is the same as the two-stage process and inquisitorial justice where you, first of all, have the Judge that's the investigating Judge and then the Judge that's the deciding Judge. But I didn't think the trial panel itself is the investigator. It acts upon what has been provided to it by the procuratorate and it can go back to the procuracy and ask for further information to be gathered, as far as I remember, but it itself does not do that.

MR KEITH:

I know and I think, if I can, this is where I get into the point that we've made more generally, that the operation of Chinese criminal procedure, both in terms of the relevant law and in terms of practice, really does need to be a matter of expert evidence and we've sought to provide that where we can.

But the point I think in terms of your Honour's question, or what answer I can give in terms of your Honour's question, we have been told, and the commentary provides this and so on, that the process of evidence gathering is first and foremost with the police or paramilitary police or whatever body it is, Public Security Bureau and the like. So that is a first step and they are the ones who actually go out and gather things. We also know that the three organs, the Court, the procurator and the prosecutor, do collaborate. They are described as having a common function or common responsibility.

We don't know in concrete terms what the collegial panel, what the Judges themselves do in terms of that relationship if the adjudication committee says: "We need more on this or more on that or legal argument on this." We don't know what they do. The only thing we do know is that that happens without notice to the defence or to the prosecution. That's all we know. So it may be entirely new evidence or may be evidence that was on the file but hasn't been addressed by either party, and one can't really say I think that that's fair enough because the defence counsel could have addressed it. Even if it were in the dossier, if it hasn't come up at trial, hasn't been relied upon by the prosecutor at trial, how could a defence counsel answer it, and they don't get an opportunity to do so here. I think that's as far as we can take it on the record we have.

I hope that addresses your Honour's question.

GLAZEBROOK J:
No, thank you.

MR KEITH:
Now on this question of change in circumstance, my learned friend I think accepts that if there were a material difference, something that vitiated the decision, then we would have to remit and the Minister would have to look at that, but my learned friend says there wasn't anything of that kind.

There are a couple of problems, though, there and two short points I wanted to make. One is we have no assessment by the Minister other than these two

narrow categories about health and about the diplomatic relationship, no assessment by the Minister that this information or that information is not a material change. The Minister hasn't said: "I don't accept this is that different." So that is the first problem. The Minister needed to make that assessment and did not. It was done at a formal level saying that the Minister would not look at the gravity of the risks, to come back to, I think, your Honour's question just after the lunch adjournment.

GLAZEBROOK J:
Can you give it some – you say they didn't make that assessment, you say didn't look at the gravity of the risk. What else was not looked at?

MR KEITH:
So I say the Court set up this three-part standard for looking at risks. The first –

GLAZEBROOK J:
No, no, I understand that. I just want a list of what you say wasn't considered. I don't want a repeat of your submissions. I just want the list.

MR KEITH:
Certainly, Ma'am. So the list is the table to which I have referred the Court and I'll give your Honour the reference. This was in our submission to the Minister and I will just bring up the page. The page is pages 32 and following of appendix 5. So that is the list.

The other difficulty, if I was going to give one example, is the experts say one difference since 2016 particular to Mr Kim is that he is no longer an ordinary suspect and that has the risks to him that I've already outlined. He's more likely to be tortured to produce a public confession, more likely to be tortured generally, more likely to be denied medical treatment in prison, more likely to have a staged trial, more likely to have political direction of that trial result.

The ordinariness of Mr Kim was a significant factor in Minister Adam's decision and this Court has upheld that finding on the 2016 record though with some

reservations, as my learned friend mentioned, about having disregarded evidence that murder accused were at certain risk. But what we have now is a whole lot more. We have a very specific indication directly concerning Mr Kim that because of these proceedings, because he has resisted extradition, so on, he is no longer ordinary. He is at all those very personal risks and there is no consideration by that, of that, by the Minister, no answer to it.

That was my second point about the vitiating or material difference. I am also not sure that "vitiating" is the right term. If your Honours look at the – or as your Honours have set out in some considerable detail in the 4 June decision, there were a lot of components in the Minister's assessment and then in the Court's assessment of the risk to Mr Kim. If those have changed in any noticeable way, any material way, then it is incumbent on the Minister to assess at least whether that change is material and, if it is, to reconsider.

The last point I wanted to touch on, sorry, two last points, Your Honour, Justice France's, question about changed circumstances and *Aswat*. As I understood it, and please do correct me if I've misunderstood it, but it seems to me that the necessary point is the same in terms of the Court's process. If in this rather swift process before this Court we cannot conclusively resolve these points then the consequence is that the decision is remitted and if the Minister wishes to can try again, because the *Aswat* process, I think, and I think this is a reasonable submission, can only be right for things that can be clearly and swiftly resolved, and that is partly a matter of good judicial process and good ministerial process but it is also, when one looks at particular instants in *Aswat*, the concern was extremely narrow and the answer by the United States – and I was just looking at *Aswat (No 2)* which your Honours have in our bundle on remission, so that's from August, at tab 3, but I will just give you the reference. At paragraphs 12, 13 and 14 and 15 there is repeated reference by the Court to the express and unequivocal assurance given by the United States in answer to these things. So it was a very much question asked/question answered exercise. That, in my submission, is what was needed here and we do not have it. We have gaps and we have ambivalence and we have some outright adverse statements, and so I think that is the – what we have as a result of the

Aswat process here instead is confirmation that no, these risks cannot be simply and conclusively addressed.

I think I've covered everything that I had thought to cover. Just one point of clarification in terms of the delay and my learned friend, the Solicitor, mentioned this. We are not saying in this proceeding, in this hearing, at any rate, that there should be a stay. All you're saying is that there has been all this delay, much of it occasioned by the Minister's first decision being set aside, then by this appeal. That is a factor that the Minister would have to consider in any remitted decision. So that is what we are saying there. Does that delay, deny a fair trial, make it impossible (**inaudible** 14:46:20) new matter that the Minister would have to consider relative to 2016?

But unless your Honours have any questions, and I've been grateful for the ones that I have had, those are the reply submissions. I'm most grateful to the Court for the hearing and for the additional time.

GLAZEBROOK J:
Thank you, counsel.

MR ELLIS:
I have something, Ma'am. I did give some instructions to my learned friend about points that I wanted to make but as you offered us two he's not put the issue and it's only going to take less than five minutes. I had wanted to emphasise that we are now saying in accordance with *Cagas v The Philippines* that New Zealand has breached, in conjunction if necessary with China, Articles 9(1), 9(3), 14(1), 14(2) and 14(3) of the Covenant and its New Zealand domestic equivalents, and we also say the Court should note that in *Miller & Carroll v New Zealand* the Human Rights Committee said that the remedy of judicial review was inadequate because you couldn't review the case on the merits.

And my learned friend in her final words in her reply, which I haven't had an opportunity to discuss with Mr Keith, dealt with undue delay and health. Now

in terms of undue delay inasmuch as it affects the *Cagas* argument, we now say that there had been such a delay independent of the Chinese fair trial argument you can't get a fair trial because too long has passed in accordance with the decision in *Cagas* and then my learned friend said, well, you've already discussed and dismissed a claim of unfair delay in the cross-appeal, which is quite correct, but what you haven't done because you couldn't possibly have done is have a submission that there has been further undue delay in this Court, and now whether one wants to characterise that as the Minister not doing her and his job properly throughout the whole process and getting the right assurances or whether you want to characterise it as systemic delay or both, I mean it is, at the very least, would not be surprising if a submission was made that making a decision after 16 months asking for more information is delay, as the – for an international law point it doesn't matter if it's the Crown or the Court causing the delay, it is still delay, but you haven't heard that argument because it hasn't arisen, so you couldn't possibly have heard it. So it remains unargued substantially.

Then in relation to the health issue and the more wider argument about has there been any changes, well, I considered that having a brain tumour and needing, possibility of, serious possibility, 50% chance of a kidney transplant by the time of 60 was such a change of circumstances that I made a new application to the Minister. It couldn't be anything but new circumstances. He didn't have a brain tumour and he didn't need a new liver. So that's now with the Minister pending and if the Minister makes a decision that is unfavourable the law takes its course and we judicially review it. I wasn't really expecting you to determine it because this only went to the Minister on the 16th of December and he's not engaged with the issue.

So those, your Honours, are the submissions of Mr Kim. So unless there are any questions, we close again.

GLAZEBROOK J:

Any questions? No. Thank you, counsel. We will take time to consider our decision and deliver it when it is ready to be delivered. Thank you, counsel, and we'll now retire.

COURT ADJOURNS: 2.51 PM