NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF APPLICANT REMAINS IN FORCE UNTIL FURTHER ORDER OF THIS COURT.

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 O AOTEAROA

SC 22/2025
[2025] NZSC Trans 18

BETWEEN **BW**
Appellant

AND **COMMONWEALTH OF AUSTRALIA**
Respondent

Hearing: 4 November 2025

Court: Winkelmann CJ
Glazebrook J
Ellen France J
Williams J
Miller J

Counsel: T Epati KC, M K Mahuika and M D N Harris for the Appellant
M J Lillico and N N A El-Sanjak for the Respondent

CRIMINAL APPEAL

MS EPATI KC:

Tēnā koutou e te Kōti. Ko Epati taku ingoa. Kei kōnei mātou ko Mahuika me Harris. He rōia mō te kaipīra. May it please the Court, I appear together with Mr Mahuika and Mr Harris.

WINKELMANN CJ:

Tēnā koutou.

MR LILLICO:

E Ngā Kaiwhakawā tēnā koutou. Ko Lillico tōku ingoa. Kei kōnei māua ko El Sanjak, mō Ahitereiria. May it please the Court, Lillico and El Sanjak for the Commonwealth of Australia.

WINKELMANN CJ:

Tēnā kōrua. Ms Epati.

MS EPATI KC:

May it please the Court. The appellant brings this appeal on the basis that the Court of Appeal erred in three overlapping ways: first, by superimposing the principle of comity onto the section 8 test in the Extradition Act 1999 and in doing so tipping a finely balanced case towards surrender; secondly, by relying on observations in international cases dealing with fugitive delay to buttress the conclusion that the public interest favoured surrender; and third, by failing to properly analyse and engage in the profoundly changed personal circumstances of the appellant which entailed primary consideration of best interests of the child in this case and cultural reconnection.

I provided a four-page road map to this Court and I am going to take the points a little bit out of order by actually beginning with the delay as a way of scene-setting and the best illustration of what happened in this case is actually in Judge Cathcart's *Commonwealth of Australia v [BW]* [2023] NZDC 5941

decision, so if we go to his judgment which will come up on ClickShare and it's at page 58, there we go. So if we look, sorry, and it looks at 19, we've got a table of what was essentially an accepted chronology of events as between BW and the Commonwealth. So if we begin with the first series of events, the alleged incident occurring in November 2014, incident reported to police.

WINKELMANN CJ:

You've just moved away from your microphone there, Ms Epati.

MS EPATI KC:

Right, move it forward.

In effect, there's just only about seven months where we have a series of incidents, a series of processes being complied with up until 17 June 2025, so far so good. Between 17 – sorry, between 25 June and then 13 June 2016, effectively nothing happens and as Judge Cathcart would go on to find in paragraph 33 the: "... 12 months to review and approve by the District Office. Questions surrounding that delay were asked with 'no clarity' forthcoming." So unexplained for that period of time, 12 months.

Then from 13 June to 24 February 2020, we have an "amalgam of excuses" that is provided by the Commonwealth and that's summarised in paragraph 34 of his judgment. A variety of reasons why it took that long for the approval to finally be given for the extradition request and so Judge Cathcart finally concludes and this is over on paragraph 36 –

GLAZEBROOK J:

Can I just ask you, what that is about the criminal visa and extradition, do you know what that means?

MS EPATI KC:

I'm not quite sure what it means.

GLAZEBROOK J:

It's not explained anywhere, as far as I know?

MS EPATI KC:

So the explanations for what you see in paragraph 34 are provided in an affidavit –

GLAZEBROOK J:

I think they just say there's that issue, but who know what it is?

MS EPATI KC:

It allows the extradited person to actually enter Australia, yes, that is what Mr Lillico is explaining to me.

GLAZEBROOK J:

Well, that is what I assumed, but how, I couldn't, how it can delay matters –

MS EPATI KC:

Hold things up.

GLAZEBROOK J:

– I have no absolutely no idea.

MS EPATI KC:

Yes, yes. I think for the most part, what it appears to come down to is the –

GLAZEBROOK J:

It sat on someone's desk?

MS EPATI KC:

Pretty much.

GLAZEBROOK J:

Under a pile of papers, yes.

MS EPATI KC:

Yes, workload pressures, previously allocated the request, oversight and attending, then reallocated to another prosecutor. Uncannily similar to the delay that is described by the Commonwealth in *Curtis v Commonwealth of Australia* [2018] NZCA 603, [2019] 2 NZLR 621 which we will get to a bit later, really similar overworked person, then moved along, but effectively the short point is that Judge Cathcart in conclusion says at 36: "I do not accept Commonwealth contention that the prosecutorial delay here has been 'adequately' answered. To the contrary. The delay by the Australian authorities was 'inexcusably dilatory', to borrow the language of Lord Edmund-Davies in *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 (HL)."

He then goes on to say: "And as *Commonwealth of Australia v Mercer* [2016] NZCA 503 makes clear, such dilatory inaction may in some cases make the extradition oppressive." And that is obviously a relevant factor to weigh under the oppression text and I will return to that shortly.

He then goes on to talk about BW's personal circumstances and importantly at paragraph 38 he makes the finding that when BW first left Australia, he had no idea that he was a wanted suspect. That's quite an important starting point. He then goes on to detail all the trips back and forth between New Zealand and Australia, because he came home and then went back. Went on a trip to Vietnam for a holiday, came back, and that he was only stopped at the border once in Australia and been questioned about something to do with fines, but nothing more.

Judge Cathcart then goes on to set out, obviously which is unchallenged, all of the personal circumstances which have arisen as a result of this some eight years of delay. The reason why we walk through the particular delay in this case is because what makes this case a little bit unusual and different from a number of cases that have come before the Court of Appeal and the Supreme Court, and indeed international cases, is that there is no conduct upon which you could charge BW with, in relation to the delay. There's nothing particularly complicated about the fact that for the most part the Commonwealth

were inexcusably dilatory. There is nothing, there's no magic or complexity for this Court to resolve. It's a straight case of somebody who left for different reasons, had some memory of an event, but not with any clarity, to the extent that he may have suspected that he was involved, that must have been put to rest on his multiple trips back and forth to Australia over an eight-year period.

Of course in that eight-year period he has quite clearly turned his life around, settled on his tūrangawaewae, become an integral part of his community, reconnected to culture and identity, found a life partner, and the planned birth of a son who will be turning three in December.

So with that scene set I do want to now talk about the principles relating to non-fugitive delay.

GLAZEBROOK J:

Can we assume there's been no relevant change in circumstances, or we would have had updating information, or do you not know?

MS EPATI KC:

I do know but I'm not able to put that before the Court because the Extradition Act puts a bar on placing any further evidence before this Court that wasn't before the District Court. So that's a challenge.

WINKELMANN CJ:

What section of the Extradition Act is that?

MS EPATI KC:

Section 72, it's mentioned in the Court of Appeal judgment, Mr Harris will find it. I think it's section 72(5). Can I put it this way. There's nothing that, as my obligation as counsel, that I need to raise with this Court that would dramatically change the nature of the evidence that was originally filed, and what I mean is this. It's not as if he's separated from his partner now, or no longer lives at – that would be something that I'd almost be obliged to raise with you that is now

no longer the case. I'm not doing that. Obviously we can infer that the baby is older.

WINKELMANN CJ:

Two and a half?

MS EPATI KC:

Two and a half, will turn three in December. The partner is no longer on maternity leave, we can readily infer that, that doesn't need updating evidence.

WILLIAMS J:

And he's still mowing the Whakatō Marae lawns.

MS EPATI KC:

And he's still working, and he still sits on the pā and does all those things, yes. But none of that's changed. They still live in [REDACTED]. Still live with Mum. Still maintains the house. It's remained pretty consistent. Section 72(2) is the provision in the Extradition Act that prevents any evidence coming forward.

WILLIAMS J:

Even updating evidence, that's extraordinary.

MS EPATI KC:

Yes, yes.

MILLER J:

Do you know what's the rationale for that provision? It must have been a legislative policy choice. It's very unusual.

MS EPATI KC:

It is unusual, and I don't know off the top of my head what the rationale is.

GLAZEBROOK J:

It may well not really relate to this ground but to – I mean I don't know, I haven't looked at it actually – but to grounds in relation to prima facie case because

obviously it's much wider. The Extradition Act is much wider than it is in cases where it's virtually automatic.

MS EPATI KC:

I think if you read the surrounding provisions, or the provision itself, it does refer back to section 45, which is why we took it as –

GLAZEBROOK J:

Yes, I understand.

MS EPATI KC:

Yes, yes, and I mean part of that could be, I don't know where the backed warrant would come into this, but that we stay away from enquiring too much into A, the actual evidence concerned, obviously there's a bar on that, but once you file your evidence in the originating court that's the end of it. It's probably also why a lot of cases get referred back to the District Court as well. But in any event, that is the reason why I haven't put forward, you know, I can't, but I'm also saying there's nothing that I need, or that I'm obliged to tell you about that would change the very nature of what you're hearing. What you do have, obviously, is a letter from Australia, because one of the first questions the Court of Appeal had when we were before them was, are Australia still even interested. Will he get bail backed to [REDACTED] while he awaits his trial and how long will that trial take, or how far away is it. Now the time that that letter came from the DPP two or three months ago, estimated trial time at that stage was end of 2026/2027. Likelihood of bail back to [REDACTED] while he awaited trial, highly unlikely, and yes we still believe it's in the public interests to prosecute.

MILLER J:

Has there been any consideration of the possibility that the Minister might make his extradition conditional upon a prompt trial, having regard to the inexcusable delay that's happened already?

MS EPATI KC:

I don't know the answer to that question. All I know is that the questions that the Court of Appeal were effectively deferring to the Minister to be answered, have been answered.

MILLER J:

Right.

MS EPATI KC:

Yes. With obviously the caveat that he could seek undertakings if he so wished. It's an interesting referral because it's a general referral, it's not a…

MILLER J:

I did wonder why, what the Minister was expected to do with it.

MS EPATI KC:

I don't, put it this way, I don't know that there's much more that the Minister will have by way of information that you don't already have now. Because the critical part of the referral was what does Australia say about these particular questions. There was a lot of discussion in the Court of Appeal about the possibility of being bailed back to [REDACTED], and how that might mitigate the concerns that we have in this case, hence the referral. But that's almost a zero chance of that happening.

WILLIAMS J:

I don't think the detective said there was no chance. He just said that would be novel, or something along those lines, right?

MS EPATI KC:

Yes, I read that as pretty much zero, but I maybe jaundiced with my 26 years of criminal practice. Anyway, we digress. If I could just talk about the *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 case, because Lady Hale's, obviously her speech was noted at various points of the Court of Appeal judgment as lifting the paramountcy of comity, and indeed the

ever-present public interest, and reference to safe havens. That's throughout this entire case, and indeed it comes up again when we get to *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597, the word "safe haven" is used several times there. So I think we need to unpack what was meant by "safe haven" and the kind of case that was being dealt with in *H(H)*.

1020

Obviously it was two cases concerning three parents who were all fugitives, one who had run from modest criminal offending and had children, two of whom were very young, three and eight, and in another case concerning two parents who had engaged in some pretty sustained, quite serious drug smuggling across borders and they also had older children but also younger children and the speech of Baroness Hale is often cited, (a) because it talks a lot about the best interests of the children should be engaged with by a court, the proper way to do so, but also she talks about principles in extradition cases.

But we have to be careful with that because and if we go to paragraph 8 please, so there: "We can, therefore, draw the following conclusions from *Norris v Government of the United Sates of America (No 2*) [2010] UKSC 9, [2010] 2 AC 487: (1) There may be a closer analogy between extradition and the domestic criminal process ... (2) There is no test of exceptionality in either context. (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition. (4)" – this is one which the Commonwealth really highlight – "There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United" –

WINKELMANN CJ:

What paragraph are you at?

MILLER J:

Eight.

WINKELMANN CJ:

Sorry to interrupt.

MS EPATI KC:

That's all right. So this is where Lady Hale's now – she's analysed *Norris* and she's saying, "well, this is – at least we can take this from *Norris*". And number (4) is a particular principle the Commonwealth rely on in this case that: "There is a constant and weighty public interest in extradition: that people accused of crimes ... that the United Kingdom should honour its treaty obligations to other countries; and that there should be no 'safe havens' to which either can flee in the belief that they will not be sent back."

And the point I make is that the use of the word "safe havens" is tied to the context of the cases that they are considering, which is people who flee prosecution and hide in another country: "... flee in the belief that they will not be sent back." So quite intentional.

She goes on: "(5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved." Remembering that as part of the section 21 analysis that the Crown has to engage with does direct the Court to consider seriousness of the offending expressly.

And then (6) she says importantly for BW: "The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life." So it's a caveat, in my submission, on (4).

What is in the public interest will vary according to the circumstances of each case and where you have delay, of which BW has no fault or culpability in, that is a weighty factor.

If we can then go to paragraph 34 please. This is where and I will come back to this later, but this is where Lady Hale talks in quite a lot of detail about the

way the best interests of the child is to be approached as a primary consideration and she says: "It is not enough to dismiss these cases in a simple way – by accepting that the children's interests will always be harmed by separation from their sole or primary carer but also accepting that the public interest in extradition is almost always strong enough to outweigh it."

And then at 46, she talks about the particular case before them and she says: "The delay in this case has been considerable." And she describes what that delay was despite –

WINKELMANN CJ:

So can I just ask you, how does that, how does her statement at paragraph 8, "the public interest", paragraph 8 where she says: "It is likely that the public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe." Is the point that she's not including the interests of the child there, or is there a conflict here?

MS EPATI KC:

No, that's a different point, and I'm sorry, I'm conflating the points. The point here is that when she is annunciating those principles she is doing it in the context of two cases that do not qualify –

WINKELMANN CJ:

Oh no, I understood that point.

MS EPATI KC:

Yes.

WINKELMANN CJ:

I'm asking you how her statement about family life and her statement at 34 fit, which is about the interests of the child? Because she seems to be saying, in terms of family life generally at 8, generally speaking, family life gives way to the extradition interests.

MS EPATI KC:

Yes and then she says there has to have some exceptional feature about it.

WINKELMANN CJ:

Yes.

MS EPATI KC:

But remembering that she's talking about the weighing of –

WINKELMANN CJ:

So you're saying it has to be limited, that statement is to be limited to fugitive cases?

MS EPATI KC:

Yes and also remembering that they are undertaking a section 21 Extradition Act 2003 (UK) analysis which is Article 8, it's interference with the Article 8 right which the language of which is far more permissive for interference, if that makes sense.

WINKELMANN CJ:

Yes.

MS EPATI KC:

So Article 8 itself says there can be no interference unless it's proportionate, safety, it actually stipulates all of it, whereas section 8 directs us, particularly oppression, simply to the personal circumstances of the BW given the passage of time. It's not a weighing of different rights and public interests so much as saying "what has changed in his personal circumstances and does it meet the level of oppression".

WINKELMANN CJ:

So the interests of the child is not subsumed in the Article 8 right and the earlier paragraph in *H(H)* has to be read as being covered by the fact she's discussing fugitives.

MS EPATI KC:

Correct. Particularly the reference to “safe haven” because that gets quoted a lot and it's when we get to *Tukaki* it's what I will be encouraging your Honour Chief Justice to be saying is what you meant when you used the word “safe haven”. But we’ll get to that.

Sorry, I just want to finish off the “safe haven” commentary, or sorry, finish *H(H).* If we go to paragraph 46, so this is where Lady Hale is considering the individual cases and she talks about the delay being considerable despite fugitive contribution because then there was some institutional delay on top and what she says is: “Whatever the reasons [for the delay], it does not suggest any urgency about bringing the appellant to justice, which is also some indication of the importance attached to her offending.” And that’s something that is picked up on the non-fugitive cases which I have cited in my submissions and they are all in the bundle.

Finally, we will go to paragraph 92 please which is Lord Hope’s speech. They all agree with Lady Hale with the exception of the extradition of PH, so they agree that resisting extradition in relation to the mother of the first case should be declined but the majority decide that both parents should be extradited in relation to the second case. But Lord Hope at 92, when he is talking about PH and HH, talks about the offences of which they are convicted: “We are dealing with serious professional cross-border crime involving trading in narcotic drugs which there is an international obligation to suppress. As Lord Judge says ... there are very strong reasons of public policy that persons who are accused or found guilty of such crimes and who break their bail conditions abroad should not be permitted to find a safe haven in this country.” And then he says: “I agree with Lady Hale [about] the part the mother HH played ... is clearly outweighed ... So I too would dismiss her appeal.” So I again, I am just underlining the way in which the word “safe haven” has been used in *H(H)*. It is clearly tied to a very specific type of case in context.

1030

MILLER J:

You can't suggest there's anything, and this is an allegation of very serious violence, you can't suggest that there's anything trivial about this.

MS EPATI KC:

I don't, I certainly wouldn't say it's trivial, but can we just discuss the seriousness of the offending, and we may need to put our *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 hats on to look at it.

MILLER J:

Yes.

MS EPATI KC:

But you have obviously a kick through a window unprovoked out of nowhere. The victim alights from the vehicle, comes out to approach the person. He's then punched to the ground unconscious, so it's the punch that renders the victim unconscious, and then it's a kick to the head while unconscious, which strikes at the very heart of what courts have said in *Taueki*, and then it's two kicks to the right shoulder. Now the injuries which required surgery, from my reading of the affidavit evidence, was to the scapula and the clavicle. So that's the shoulder blade and the collarbone. The injury to the head was a haematoma to the right temple. So I wholeheartedly accept that it is a concerning feature that there was a kick to the head of an unconscious man. But when we look at the injuries which required surgery, which would otherwise have caused permanent injury, it is the ones to the shoulder that attracted the most concern, and in fact –

WINKELMANN CJ:

So it's serious offending but it's not very serious offending.

MS EPATI KC:

Well GBH, as we all know, has a bit spectrum within it. It can go all the way from permanent injury with weapons with others, home invasion, all the features that this does not have. So I certainly wouldn't say it's trifling. I accept that

there's a concerning feature about it but if we put it in its proper context, and in the spectrum of GBH, and we looked at *Taueki* off the top of my head, maybe three to four as a starting point.

MILLER J:

I did wonder about that because it seemed to me that given what has happened to him since, he would have reasonable prospect of a community-based sentence in New Zealand.

MS EPATI KC:

In New Zealand.

MILLER J:

Whether we're in a position to know what his position would be in Australia.

MS EPATI KC:

We looked at it up and we couldn't see that they had an equivalent of a young adults list that we have in Gisborne, which is where he would've been had he been prosecuted with some alacrity at the time at home. Obviously the young adults list is set up to specifically recognise the neurological differences. He was only 22, 23, at the time, so he would've been dealt with in that list.

MILLER J:

Yes, but supposing he's sentenced now, the facts are what they are, and besides, they're in his favour. He hasn't offended since.

MS EPATI KC:

That's right.

MILLER J:

He's turned his life around.

MS EPATI KC:

The cultural reconnection would be paid attention to.

MILLER J:

All that stuff, yes.

WINKELMANN CJ:

So I think you need to move along. I mean I get your point about "safe havens", but I don't see it as a large feature of your case, I think.

MS EPATI KC:

Well, let me move on to –

GLAZEBROOK J:

I think you were just making the point that the "safe haven" reference was in relation to people who had deliberately and knowingly…

WINKELMANN CJ:

Fugitives, we've got that.

GLAZEBROOK J:

Yes.

MS EPATI KC:

Yes, all right. I do then just want to talk about *Mercer* and *Curtis*, because the Commonwealth draw really the principles about delay from *Mercer*, and I think we just need to be careful about that because *Mercer* was not an institutional delay case. *Mercer* was a case where effectively you had a delay in the complainant for historical sex abuse, delaying for some years coming to police, and police not being able to do anything about it until then.

WINKELMANN CJ:

Nevertheless, it's a little bit helpful for you, isn't it, because doesn't it say there that while the cause of delay is usually for the requesting state to assess because they'll normally be in a better position to work out why it is. "Prosecutorial delay may in borderline cases tip the balance in favour of a

finding of oppression," this is at paragraph 53, "but it should not be overemphasised."

MS EPATI KC:

Yes, what I'm saying is that to the extent, and this is the way Judge Cathcart then applied it, because despite finding an excusable dilatory delay, he then said, but I can't pay too much attention to it because *Mercer* says I can't, and that the remedy for BW, for whatever that delay has caused in his personal circumstances, can be taken up with Australia. The short point is, (a) *Mercer* is not an institutional delay case, the cases that *Mercer* relies on to say that are fugitive cases, (b) it's not a sufficient remedy for personal circumstances, right, not trial prejudice, to take it up with Australia.

WINKELMANN CJ:

There must be something true about it though, mustn't there, because it's not really for us to be disciplining the requesting state by refusing to extradite where we otherwise would because of their blameworthiness. I mean obviously it is part of the mix in terms of when you look at the notion of oppression as is said in *Mercer*, the fact that there's delay and there's no excuse for it. But it can't be overemphasised because that would tend to suggest we're disciplining them, sanctioning them in some way.

MS EPATI KC:

I think the point about *Mercer*, and it maybe that the way it's been interpreted is too strict, is that it's not to be taken into account really at all unless it's at the margin. That was certainly the way Judge Cathcart treated it. I can't really take it into account, it's best left for Australia to deal with, and it would only be in marginal cases.

WINKELMANN CJ:

The reason for delay is not to be taken into account unless it's at the margins, is what it's saying.

MS EPATI KC:

Culpable delay, yes.

WINKELMANN CJ:

Culpable?

MS EPATI KC:

Yes.

WINKELMANN CJ:

So the fact it's, you know, so an investigation, the culpability, notion of sloppiness, carelessness, neglect, is not to be taken into account to sort of supercharge the significance of the delay. But it's still, the extent of delay is still very much very material.

MS EPATI KC:

Not supercharged but the point that I'm making is it's not at the margin. In these types of cases it should be taken into account as a relevant factor full stop. Not to be parked and then only applied in the margin cases, and in *Curtis*, which is a different Court of Appeal –

WINKELMANN CJ:

So that's culpability. So delay is clearly relevant. You're saying the culpability, sort of the notion that it's an excusable delay, that's also solidly in the mix, not in the margins?

MS EPATI KC:

When you look through the England and Wales cases that I've collected in the bundle and in the submissions, more recently in the non-fugitive type of case there is a moving towards treating culpable delay as a stand-alone factor. On top of the length in and of itself, and on top of a sense of security one develops, and what I'm saying is to the extent that lower courts are interpreting *Mercer* as not allowing any kind of examination or taking into account of that type of institutional delay, where it's cleanly there, because in a lot of cases it

isn't, there'll be some contribution by the extraditee like in *Kakis*, or in *Mercer* it was a delay in the complainant making a complaint, and then there was middling delay by the prosecuting authority. So it wasn't the right case to make a definitive statement about the extent to which New Zealand should be looking at –

WINKELMANN CJ:

So are you going to take us to those cases now or are you coming back to them later?

WILLIAMS J:

Isn't it your submission really that this is relevant, there's a fairness assessment in oppression. Isn't that your point?

MS EPATI KC:

Yes, and there's also, there's a bit of an asymmetry if we say –

WILLIAMS J:

Otherwise it becomes sanction, which of course is not appropriate at all.

MS EPATI KC:

Yes, yes.

WILLIAMS J:

So it's a question of fairness to the extraditee, right?

MS EPATI KC:

Correct, yes.

WINKELMANN CJ:

Are you going to take us to the cases?

MS EPATI KC:

To the UK cases?

WINKELMANN CJ:

Yes. Or are you going to do that later?

MS EPATI KC:

No, I can do that…

GLAZEBROOK J:

I thought you were going to take – oh okay.

MS EPATI KC:

Let's just go to *Curtis*, and then we'll go the UK cases. So if we can go to *Curtis*, which was a case of what they called institutional delay, with no contribution from Mr Curtis. I'll just find it myself.

1040

So, at paragraph 47 and they start talking about delay: "Significant delay by the prosecuting authority is of a different type to delay by the complainant in the context of sexual allegations." So this is talking about why *Mercer* isn't binding in this particular case: "Delay by a complainant who has suffered sexual assault is understandable and indeed common. Delay by the prosecuting authority is undesirable and to be discouraged."

WINKELMANN CJ:

So *Mercer* was a case of complainant delay?

MS EPATI KC:

Correct. So there was strong public interest in not taking it into account or underlining it too much.

So at paragraph 51: "This case is not about the delay between the offending and the complaint (which as we have indicated is often the case in child sex offending), but the delay that has followed the request for prosecution by the family in February 2011, and the ultimate service of extradition papers in

May 2016. This delay can be described as institutional delay, the institution being the Australian police and prosecuting authorities."

They go on to say at the end of paragraph 52: "But it must be recognised that the delay here was undue. We review relevant extradition cases where there has been delay later in this judgment."

But so ultimately the fact of institutional delay, they said was quite important. More specifically, because it led Mr Curtis to develop a sense of security that he could get on with his life and that's exactly what he did.

MILLER J:

Is this case different in another respect, in that Australia here accepts that it was at fault, there's no need for a New Zealand court to pass judgment on conduct of the prosecuting authority. In other words, there's not a – the comity issue, in a sense, doesn't really arise because it's common ground that the delay was inexcusable? It would be different if Australia were saying, "hold on a minute, there was nothing wrong here", and we're being asked to assess their processes.

MS EPATI KC:

I don't see the Commonwealth saying that in this case.

MILLER J:

No, they're not.

WINKELMANN CJ:

But Justice Miller's point is that in *Mercer* the Court was concerned that they were being asked to basically look at the conduct and make their own assessment, effectively kind of conducted this mini-disciplinary hearing.

MS EPATI KC:

Correct, yes.

WINKELMANN CJ:

And Justice Miller's point is that this is a very straight-forward case where it is accepted by the Australian authorities that it was, it's inexcusable delay.

MS EPATI KC:

Yes and that's what I'm saying, this case now is actually quite a simple straight-forward case of the Commonwealth effectively they just unfortunately just did nothing, they haven't proffered any particular reason for it and BW had no idea and to the extent that he thought he may have been involved in something that was – that would have been put to rest by his multiple trips to Australia and got on with his life.

WINKELMANN CJ:

Did the Court in *Curtis* say, make, discuss in any way how this, the inexcusable delay was to be weighed, the institutional delay was to be weighed?

MS EPATI KC:

I'm just looking at – they do a roundup of, yes, so the factors are that they say indicate oppression are at 129: "(a)" There was at least five years of delay, which must be attributed to the Australian authorities and errors in the extradition process, and which were not the fault of Mr Curtis." They then make the point that he was not complicit in the delay and he has been induced into a sense of security, (c) they talk about the effect of depriving him of the opportunity from being dealt with as a young youth, and then: "Since leaving Australia, Mr Curtis has gone from being a child to an adult. He has gone through the whole formative process of qualifying himself and establishing a career ... (e) This oppression would not be remedied if there was a stay hearing in Australia. There is nothing before us to indicate that a stay would be granted, and the Australian prosecutor will strongly oppose ie. Indeed, the affidavits filed by the Commonwealth of Australia say that bail will be opposed and that the delay will have a neutral effect on sentencing."

Apart from (c), which is the depriving of an opportunity to be dealt with as a child, the appellant says that there are lots of similarities to this case.

WINKELMANN CJ:

Although you could say in this case that he is really – he's, because he was prompt, he's removed himself from Australia where he would have had community and he's come to New Zealand because of the delay, as a consequence of the delay, what was the timeframe between the offending and his departure from Australia?

MS EPATI KC:

It was not long after the –

WINKELMANN CJ:

Events.

MS EPATI KC:

– because there was a delay in the victim –

WINKELMANN CJ:

Sorry, the alleged offending, yes.

MS EPATI KC:

There was a delay in the victim going to the police of about three or four months.

WINKELMANN CJ:

Okay.

MS EPATI KC:

He left before that happened, as I understand it.

WINKELMANN CJ:

Okay, because one of the fact here is that he's got no connection in Australia, so a community base it seems is difficult for him.

MS EPATI KC:

February 2015 he left Australia and the incident occurred in November.

WINKELMANN CJ:

So the English cases?

MS EPATI KC:

English cases, so let's start with *Geleziunas v Prosecutor General's Office, Republic of Lithuania* [2016] EWHC 16 (Admin) – I'm going to struggle with the names that I've never had to say out loud. So quite clearly, a non-fugitive, so paragraph 35, go to paragraph 35 please. Sorry, go back to 14, that's where they summarise the – right, so this is where they're looking at "the passage of time" which has similar wording: "... it would be unjust or oppressive to extradite him by reason of the passage of time." *Kakis* still is obviously authoritative on what that means. And then "against that background" at 14 listed: "(1) The central issue in the case was delay, with the key points being that the Appellant was not a fugitive; his unchallenged evidence that, at all material times, he had been registered with the Home Office ... revealed the Appellant's presence and thus avoided a culpable delay of two years. (2) The period of time that had elapsed ... i.e. in excess of four years ... not trivial, was not of the utmost seriousness" – the offending concerned – "(3) There was a substantial period of unexplained delay by the Judicial Authority ... (4) There was clearly culpable delay on the part of the NCA, in that (against the background that the Appellant was living openly in this country) ... " And then: "(5) The decision of Blake J in *Oreszczynsi v Krakow District Court, Poland* [2014] EWHC 4346 (Admin) ... as to the potential effect of unjustifiable delay," and it talks about not taking reasonable steps and then that: "... become disproportionate where the lengthy culpable delay on the part of the executing authorities, because delay frequently leads to the deeper entrenchment of the Appellant's family life."

And then some reliance placed on other cases, if you could just turn the page, Mr Harris. It talks about his children, obviously his personal circumstances, the youngest –

WINKELMANN CJ:

On the previous page, there's a discussion of a case where there it was a fugitive and culpable delay was still taken into account to refuse extradition.

MS EPATI KC:

Are you talking about *Gomes v Government of the Republic of Trinidad and Tobago* [2009] UKHL 21, [2009] 1 WLR 1038?

WINKELMANN CJ:

No, I'm talking about *Oreszczynsi v Krakow District Court, Poland.*

MS EPATI KC:

Yes. But what happens in paragraphs 35, 37 and 38 is then the application of those particular factors so not a fugitive, culpable delay of three years, during that time appellant and wife have put down roots in this country, deeper entrenchment of family life and therefore oppressive to extradite.

Then we'll go to *Gomulka v Poland* [2024] EWHC 460 (Admin). Actually, this case just really talks about the significance of "fugitivity" at 19(c) [*sic*]. I'm just trying to find some of the other cases that talk about the...

GLAZEBROOK J:

Sorry, what paragraph did you refer to?

WINKELMANN CJ:

Was it 14(c)?

MS EPATI KC:

19(c) of *Gomulka.*

WINKELMANN CJ:

19(c) – 19(3)?

MS EPATI KC:

19(3), sorry.

WINKELMANN CJ:

Can we look at the next –

MS EPATI KC:

Sorry, we'll go to *Loncar v County Court in Vukovar (Croatia)* [2015] EWHC 548 (Admin) then. Sorry, Chief Justice?

1050

WINKELMANN CJ:

It doesn't matter. I was just going to kill time by looking at the next page of that judgment.

MS EPATI KC:

So helpfully *Loncar* is the case that actually summarises the whole series of principles in relation to non-fugitive cases, and that's at 29. So following her principles relevant to section 14, which is the passage of time, obviously all the usual cases are cited there. Length of time is important in and of itself. "Where the delay is not brought about by the requested person" it is a relevant factor. "… if the delay has engendered in the requested person ... Where the delay is not brought about by the requested person himself, the culpability … may contribute to establishing oppressiveness … may be decisive." Obviously they borrow the words from *Kakis* and *La Torre* v *The Republic of Italy* [2007] EWHC 1370 (Admin) in what is otherwise a marginal case.

I think I need to wrap up fugitive delay and move on, but the short point is what I've outlined in the road map, which is that when you apply the appropriate principles that relate to a significant non-fugitive institutional delay, then that's quite pivotal to the context, because using words like "safe haven" have no place in this particular type of case, and in fact a court can take a good hard look at the cause of the delay, which is very simple and not complicated and doesn't require any particular enquiry or look into Australian authorities.

WINKELMANN CJ:

I mean again what *Loncar* says may be decisive in otherwise a marginal case, and I don't – you discount that. I mean, I understand your point that there are other cases that suggest that it's very significant, but that would be enough for you in this case, wouldn't it, because the Court of Appeal said it was a marginal

case, or do you say they had already taken – weighed in the fact that there was culpable delay?

MS EPATI KC:

Well, the first point is that I don't, I say this is not a marginal case.

WINKELMANN CJ:

No.

MS EPATI KC:

I mean that's probably my first starting point.

WINKELMANN CJ:

I understand that point.

MS EPATI KC:

But if it is –

WINKELMANN CJ:

Yes, what did the Court of Appeal do with this though, the lack, the culpable delay, what did they do with it?

MS EPATI KC:

Nothing.

WINKELMANN CJ:

Well, there you are. So that's your submission, that they even failed to give it that weight.

MS EPATI KC:

Correct. But more than that, used statements from *H(H)* about the public interest and not creating "safe havens" as a way to counterbalance all of the profound changes in BW's personal circumstances.

Which brings us to comity, the double-counting of comity. None of the cases relied on by the Court of Appeal support this idea of superimposing comity on top of an intensely factual assessment under section 8(1)(c). We're not here on "unjust", we're here on "oppression" only, and as we know Lord Diplock says that's a different enquiry, although they can overlap. The bottom line is that comity doesn't really have a place when one is asking oneself, "due to the passage of time, is it now oppressive"? Comity is already taken into account by the backed warrant –

WINKELMANN CJ:

It's threaded in the statutory scheme but your submission is that it can't displace that statutory scheme.

MS EPATI KC:

Yes. I'm also saying it's already accounted for fully.

WINKELMANN CJ:

No, that's what I'm saying. It's reflected already in the statutory scheme, you don't then add it in on top.

MS EPATI KC:

Correct. You don't double-count it. It doesn't become the trump card every time you get to a finely balanced case, otherwise it's just never going to succeed.

MILLER J:

Well, that's a different submission. That's a submission that you shouldn't be too deferential, which is what comity comes down to. I find it hard to see that it's irrelevant to the Court's assessment.

MS EPATI KC:

Well, let's unpack that. Oppression is directed at the changes in the personal circumstances, we're backward looking in terms of what has the delay caused in this person's life that would now make it oppressive. The question is, what

role does comity have, given that we're already through the backed warrant process to get to that point in that assessment?

MILLER J:

Well, I'm not sure that the backed warrant process plays any particular part. I think, for instance, one might ask, "what will the Australian court do with him at sentencing, will it give him a prompt trial"? These things might come into it, and to some extent you might defer to what we are told about Australian processes. One might even make an assumption that he will get a – he'll be dealt with fairly, promptly, according to the court's processes.

MS EPATI KC:

For the fact that there has been delay and his personal circumstances have changed dramatically.

MILLER J:

The oppression must be a consequence of him being returned to Australia, tried, and sentenced there, if he's found guilty.

MS EPATI KC:

Yes.

MILLER J:

So one looks at all of that, surely, and to some extent that involves an assessment of what the Australian courts will do with him when he is put on a plane and sent back there.

MS EPATI KC:

Yes, and I suppose to some extent it's a predictive assessment that has some –

MILLER J:

I'm just asking does comity really have no role to play in that? It strikes me as a bit odd.

MS EPATI KC:

And the answer that I would give to that is, no, because the test for oppression is specific to the person and their personal circumstances that have come about as a result of the delay, and whether or not they meet the test of oppression. Can I put it this way –

WINKELMANN CJ:

It's dealt with in *Tukaki*, isn't it, the whole thing about comity, about the place it sits in the scheme.

MS EPATI KC:

But it's built into the fact that the test is oppression, which is a high test in and of itself.

WINKELMANN CJ:

And isn't that dealt with in *Tukaki*?

MS EPATI KC:

It is, yes you did say it in *Tukaki*.

WINKELMANN CJ:

Yes. Okay, so, I'm sorry, did I interrupt an answer to Justice Miller?

MS EPATI KC:

I don't know.

MILLER J:

Carry on.

WINKELMANN CJ:

I mean, your simple point is that the Court of Appeal's approach was wrong on this.

MS EPATI KC:

Yes.

WINKELMANN CJ:

I mean comity is infused with the scheme, et cetera.

MS EPATI KC:

Correct.

WINKELMANN CJ:

But the question is what the Court of Appeal did when they looked at comity, so perhaps if you can take us to that.

MS EPATI KC:

Well, they used it as the beginning and the end of this case. They started with comity and they ended with comity. So in their analysis, which begins at 53, they begin: "The principle of comity weighs heavily in favour of allowing the appeal. Comity is conceptualised broadly as the respect of one state for another. In *Tukaki v Commonwealth of Australia*, this Court commented that comity means 'the reciprocal international obligations involved in extradition whereby a person alleged to have offended is returned … There are two aspects to comity in this context." And that's all correct but it's half, it's not the entire part of the ledger, and the issue I suppose I'm taking for BW is the inclusion of "… the appropriateness of allowing Australia's courts to assess the impacts of the delays within the Office … and what, if any, remedy should be granted."

The question that I ask is, well, if what we're dealing with is personal circumstances that have changed, to what extent can a stay application in the Australian courts remedy that? Because in this country, bringing a stay without some sort of fair trial prejudice is incredibly difficult, if not impossible. So I take issue with that being an appropriate remedy for oppression, but also the Court is empowered to make that assessment themselves in section 8.

GLAZEBROOK J:

Well, what you're really saying is that if you were relying on fair trial considerations, then comity might say, they can be dealt with in Australia with

much more knowledge of what those fair trial circumstances might be, given that we haven't got any of the evidence in front of us.

1100

MS EPATI KC:

Yes, so to the extent, Justice Miller, that you think I'm saying comity has no place in section 8, I'm not saying that. I'm just saying its role when it comes to the oppression limb is virtually nil because the assessment and enquiry for the Court as undertaken is very different. That is why Justice Kós in *Mercer* said for most extradition requests under Part 4, the backed warrant process, most people will have better success under the oppression limb, because comity will more than likely be powerful in a case where you're saying, "well, I'm going to suffer fair trial prejudice". Well, that can be adequately dealt with in Perth.

What I say can't be adequately dealt with in Perth is a stay that's based purely on a change in my personal circumstances, because you would have to meet the very high threshold of an abuse of process. Traditionally, a stay application that does not touch on trial prejudice is incredibly difficult to succeed and mount.

WINKELMANN CJ:

And the simple point you make is that comity doesn't displace the statutory test, and yet they haven't really started with the statutory test here, they started with comity?

MS EPATI KC:

That's right, and they end with comity.

WILLIAMS J:

I wonder how much this is counting angels on a pinhead really, because the orthodoxy is that you apply the words of a statute by reference to its purposes and its context clearly the extradition animal itself is about comity, above all else, otherwise you wouldn't have it. We agree to co-operate in respect of your criminal processes and you're going to co-operate with us when we have

criminal processes which we want to extradite for, right, it's the whole point in the legislation. So whether it's double-counting or not may just be a matter of the angle with which you look at it, because in applying the oppression provision, you must always bear in mind the purpose of the legislation. They may have overcooked it, but it's wrong to say you ignore comity since that is the point in the statute.

MS EPATI KC:

That's not the only point in the statute. There are dual purposes of the statute.

WILLIAMS J:

Well, it's the entire basis for the statute. It is an expression of comity.

MS EPATI KC:

Yes, but it is also –

WILLIAMS J:

So we have to work with that, then ask what does oppression mean in that context.

WINKELMANN CJ:

Your submission is that's why the threshold is set so high, is oppression.

MS EPATI KC:

Yes, that comity is already built into the fact that it's oppression.

WILLIAMS J:

Yes, I just wonder whether it's the right way of putting that, is that you ignore comity. It maybe that – because you run into the Legislation Act which says don't do that.

MS EPATI KC:

But there is a dual purpose act.

WILLIAMS J:

Sure.

MS EPATI KC:

And the other is to protect individual rights.

WILLIAMS J:

There you go.

MS EPATI KC:

Which is where section 8 comes in, and I'm going to use –

WILLIAMS J:

So it's not a fight about comity, that's the point.

WINKELMANN CJ:

But the word "comity" is not actually used in the legislation is it?

MS EPATI KC:

That's right.

WINKELMANN CJ:

And I think, not that I'm obsessed about *Tukaki*, but it does seem your submission seems to be encapsulated in *Tukaki* that, yes, sure, comity is relevant for the interpretation of the statute, because it really is the – it's the entire context but you still need to apply the statutory tests.

MS EPATI KC:

Yes, and I'm going to use your words from *Tukaki* at paragraph 45, comity does not displace the fact-specific inquiry.

WILLIAMS J:

Well, it's just, isn't it, that the fact-specific inquiry is the caveat on total comity, right, that's the condition in the statute.

MS EPATI KC:

That's the check, yes.

WILLIAMS J:

Exactly. I just wonder how difficult this is, really. It's pretty straightforward.

MS EPATI KC:

Okay.

WINKELMANN CJ:

I think Ms Epati has made her submission.

MS EPATI KC:

Yes, I thought it was straightforward in the Court of Appeal too though Sir, so I just don't trust myself these days.

WILLIAMS J:

Fair, you assume nothing.

MS EPATI KC:

Yes, that's right, and obviously it finishes, conclusion at 65: "By the narrowest of margins, we are satisfied that the principle of comity and the seriousness of BW's alleged offending outweigh the factors we have [put forward]."

WINKELMANN CJ:

No, no, it's the intervening paragraphs, between 57 or 58 and 65, they go through the reasons that are relied on by BW.

MS EPATI KC:

BW, all the countervailing factors.

WINKELMANN CJ:

But not the culpability of delay. Culpable delay?

MS EPATI KC:

No. So I think we've done comity and double-counting. So I will move on to best interests of the child and cultural reconnection and they'll merge, so do not fear, I won't take too long.

The short point with best interests of the child is that contrary to what the Court of Appeal said in *Radhi v District Court at Manukau* [2017] NZCA 157, [2017] NZAR 692 which has been relied upon by the Commonwealth in this case, too, the extradition of a parent is an action concerning children that triggers under the United Nations Convention, the best interests of the child, so we say that is not a correct way of framing how extradition impacts children. *Radhi* obviously was a very different statutory context. They were dealing with section 48(4)(a)(ii), which is the Minister's referral compelling an extraordinary circumstance. So a very different type of case where they were considering what place of the family in relation to circumstances to a person.

In fact the appellant says that the Court of Appeal made no real genuine and realistic assessment of BW's child's interest, which is what is required, certainly when you read *H(H)*, Lady Hale's beautiful judgment on how one unpacks best interests of the child, looking at the specific needs. Here we have a two, almost three-year-old child. BW is the financial main breadwinner. He is obviously a primary parent. He provides support for the child's mother. He is, and this is where we merge into the cultural reconnection factor, he is the connection to whakapapa and whanaungatanga for his child. He is the one from Rongowhakaata, not the mother.

I do just want to quickly refer to the *United Nations Committee on the Rights of the Children, General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1),* UN Doc CRC/C/GC/14, 29 May 2013. That's in our bundle, it's the Committee on the Rights of the Children. This is authoritative guidance on how one approaches the Convention, how one determines best interests of the children, that it should be a primary consideration. But of interest to this Court, as we move into whakapapa and whanaungatanga, is that at paragraph 55 when

talking about the elements to be taken into account when assessing the child's best interests, it includes the child's identity: "Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality." It goes on to talk about universal needs, which includes cultural aspects: "The right of the child to preserve his or her identity." And then: "… due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background …".

The short point with best interests of the child area is that the Court of Appeal just really made no real analysis, no reference to how young he is, which is obviously incredibly weighty, in age.

WINKELMANN CJ:

Also if the parent is not to stand trial until 2027, which is probably a fair assumption now given the time that's elapsed, at the least the child would be apart from the child's parent for a year and a half, say. That's the best case scenario.

MS EPATI KC:

Best case scenario.

WINKELMANN CJ:

At a critical developmental stage.

MS EPATI KC:

Yes.

WINKELMANN CJ:

What do you say about the significance of the culpable delay in that context?

MS EPATI KC:

I suppose in the same way in the cases they talk about culpable delay creating a sense of security in the person, where you now have a complicating feature of another person who is completely innocent in all of this who is now affected by that culpable delay.

1110

WINKELMANN CJ:

Well, they wouldn't, the evidence is, that they would not have had a child if they had known.

MS EPATI KC:

If he had known that he was suspect, because it was a planned birth, they would never have had a baby, they would never had put at risk the possibility that he would not be without a father.

Which segues us into the importance of whanaungatanga and tikanga and I want to begin with the fact that as you did, Chief Justice, in *Tukaki* recognise this is not an unusual concept for New Zealand. It is internationally recognised. The family unit is, the importance of the family unit, is internationally recognised and the extent to which a requested person has laid down family roots and become deeply entrenched in their home will be of particular relevance and I have cited *Geleziunas* and *Loncar* which highlight that point.

We can also look at this Court's decision in *Helu v Immigration Protection and Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 for the importance of a family unit, particularly the judgment of then Chief Justice Sian Elias about the public interest shifting depending on the context of the case.

So whakapapa and whanaungatanga are beyond argument. They are central concepts in the Māori world and at a practical level they are expressed through connection with culture, heritage and community. Unlike *Tukaki*, there is evidence before the Court which shows reconnection here which is meaningful. Just in, I think, there was some suggestion in the lead submissions or the

respondent's submissions substantively about, well, for volunteering and doing lawns, and the reality is in an oral culture that is how whanaungatanga can be experienced. We all start in the kitchen with a tea towel, we all start with the firewood and the chopping and we all eventually at some stage move to the pae, but that's how – that's where the stories are told, that's where the connections are made, that is how we experience whakapapa through the daily things. It is also a sense of obligation, we talk about "volun-telling" to do things for elders, do their lawns and chop firewood and all the rest of it, but all of this is the expression and experience of whanaungatanga and whakapapa.

And I think it's really important to clarify what it is that we are saying here, and this is in response to the Commonwealth's submission, because we're not saying that whanaungatanga and whakapapa must prevail in all cases and that obviously it didn't in *Tukaki*, the argument here is that BW's reconnection with his whakapapa, his lived re-expression of his whanaungatanga during the period of what we say is unjustifiably long delay, has been significant.

Not only for him, remembering that he had attempted suicide when he was in Perth at the age of 22, 23, mental health declined, he came home, tried to go back again to Sydney to make it work, it didn't work, he realised he had to come all the way home, to [REDACTED], to go back to his ancestral roots. So it's not just a matter of "I'm merely living in accordance with tikanga with my people", it's more profound than that. It has, he uses the words "got my life back on track", but I would take it further and say, it is and his son is what has saved him.

It has been the biggest supporter of the change in his life and that situation is exacerbated because he has now had a son who he is bringing up in [REDACTED], his son's whakapapa and whanaungatanga connections are being expressed and developed through BW who is the connection to Rongowhakaata.

Any factor applied in a blanket fashion risks causing a safe haven and I just – I'm sorry to labour it, but in the respondent's leave submissions the words

"cultural preference" was used and I just want to make sure we're clear, we're not saying that. Effectively, as your Honour said in *Tukaki*, family will mean different things in different cultures. Family is everything in the Māori world and so all we're doing is really highlighting a universal principle that if you deepen your family roots, through no fault of your own, that is a weighty factor. That is whakapapa and that is whanaungatanga and yes, it is prominent, because the test that we're dealing with is oppression.

We accept that tikanga is an integrated set of principles. That their weight and relevance will depend on the context. So references to mana, hara, utu, muru and ea, the submission is that they're already reflected in the Act. This is because the Act promotes resolution for a wrong, hara by providing the tradition to stand trial and if guilty being held to account, but because of the section 8 test, whanaungatanga and whakapapa, because they are matters that are personal to BW, do take more prominence and that is why they have more meaning and more paramountcy in this particular type of case.

I am always nervous when there is no questions or interruptions, particularly from Justice Williams.

WINKELMANN CJ:

Well, we understand your submission.

MS EPATI KC:

Thank you. So then I'll just draw all the threads together.

GLAZEBROOK J:

Can I just, in terms of the criticism of the High Court judgment, I'm just wondering if comity is being used by the Court of Appeal to say not quite in the way that we would think about it but more in terms of saying that the public interest in people being tried for serious crimes was not taken into account or at least overtly by the High Court and that that was the error, so it's not so much comity in the way we would think about it, but more in terms of not putting the

proper weight on or even in fact and I've just had a quick flick through and there doesn't even seem to be necessarily mentioned –

MS EPATI KC:

It's not.

GLAZEBROOK J:

– that public interest in making sure that people are tried for serious crimes.

MS EPATI KC:

Yes, yes, and I mean, I want to be defensive of Justice Ellis, because she was responding to Judge Cathcart –

GLAZEBROOK J:

Oh, no, I understand, I'm just –

MS EPATI KC:

Yes, I think the concern was that she obviously leaned right into the personal circumstances of BW, which we say is totally appropriate and an impressive analysis, but then and I – even though when you look at section 8(1)(c) and you think, well, the seriousness of the offending really caught by the delay there, does it – I think it's impossible to say that it's –

GLAZEBROOK J:

Well, it's – well, I think Lady Hale does say something in *H(H)* doesn't she, that the significance of the seriousness will be diminished by the length of time, or can be diminished by the length of time.

MS EPATI KC:

The public interest, correct, correct.

WINKELMANN CJ:

Well, she says that the delay might show a lack of interest in the part of the prosecuting authority house, yes.

MS EPATI KC:

She did. She did and that's been repeated in the subsequent English decisions that you'll find in the bundle, where they carry that through.

So can I – if we just, if we do the analysis now then.

WILLIAMS J:

Just before you do.

MS EPATI KC:

Yes.

WILLIAMS J:

I did, remembering my reading, there was reference to a Canadian decision, *United States v Leonard* 2012 ONCA 622, (2012) 112 OR (3d) 496 maybe?

MS EPATI KC:

Yes.

WILLIAMS J:

Which I think dealt with similar issues of in the case of Canadian First Nations cultural retention as an important issue in extradition. I think I'm right in recalling that, or something like that.

MS EPATI KC:

Yes, there was, there was some – that was –

WILLIAMS J:

And I expect there'll be other cases in settler states, are you aware of them, can you point –

MS EPATI KC:

Not that I know of, I'm sorry. No, yes.

WILLIAMS J:

I'd be interested to see how other judges are grappling with this obligation of the State to its first peoples being something different to the obligation of the State to protect the rights of children or the cohesion of the family generally.

MS EPATI KC:

Yes, there were pretty stark facts in *Leonard* which also kind of overtook the analysis.

WILLIAMS J:

Right.

1120

MS EPATI KC:

It's not on all fours. There was a child that would otherwise end up in foster care if he had been…

WILLIAMS J:

Yes, I know. I'm more interested in how the judges are articulating the conceptual framework by which they deal with the issue. Is this seen in Canada as a reconciliation question, as a Charter question, in the way that we might see it as a Treaty question, in addition to the public good of just keeping families together if you possibly can, particularly if they're doing well.

MS EPATI KC:

Yes.

WILLIAMS J:

Any of that you're aware of?

MS EPATI KC:

Not that I'm aware of, I'm sorry.

WILLIAMS J:

Okay, thank you.

MS EPATI KC:

So then if we draw all the threads together we have on the one hand the public interest in suspects facing allegations, which are obviously not trivial, and what I say is moderately serious offending on one hand, but then on the other hand we have the extraordinary institutional delay of eight years, which reduces the public interest in both extradition and arguably demonstrates a lack of urgency to the allegations. So I borrow from Lady Hale's comments. We have BW who had no idea, having had some memory of an incident, would have developed a sense of security that he was not a suspect, so not just mere passage of time, he went back and forth to Australia for years living openly. Maturing of a young 23-year-old to a now 32-year-old man who has completely transformed his life, and overcome issues with alcohol and mental health. For eight years led a blameless and law-abiding life of constant and consistent full-time employment. Formed a strong relationship with a life partner, and became a support for his mother, who had lost her own mother. The planned birth of his son, and the cultural reconnection to iwi and hapū and community which has then deepened the routes that he has laid down to home for both him and his son. The appellant says that taken together extradition would be oppressive.

Those are the submissions for the appellant.

WINKELMANN CJ:

Thank you Ms Epati. Mr Lillico.

MR LILLICO:

May it please the Court. I will address the bulk of the reply for the Commonwealth, and Ms El Sanjak will address the security concern point, which hasn't assumed great prominence, but there are some things to be said for the Commonwealth in relation to that.

The first point to be dealt with perhaps is the interpretation of "oppression" and the Commonwealth position on how that interpretation is affected by the public interests. So the public interests are comity and reciprocity, serious offending, and also in general the scheme internationally of international cooperation in

criminal matters, and perhaps I don't need to go any further than, because in this case the controversy is the application of the test, the oppression test to the facts, and we might not need to go any further than *Tukaki* because *Tukaki* sets out what the Commonwealth position is in relation to the oppression test, remembering that *Mercer*, driving from *Kakis* and the authorities behind *Kakis* and afterwards, give us the bare words, or bare synonyms for oppression, "harsh" and "cruel", and then somewhat uselessly "oppressing". But if we say harsh and cruel are the useful synonyms, and we jettison the circular one, that's all we have in one sense. That's all the assistance we give an extradition judge in detecting what oppression means.

So, the Commonwealth simply say one needs to reflect in that test and remind oneself as a deciding judicial officer in an extradition case, what lies behind that high test, otherwise those lonely words "harsh" and "cruel" become somewhat meaningless.

So, to cut to the chase, *Tukaki* says, it explains the threshold, and that is why it is important to refer to those public interests. Comity has received a lot of attention from us, but also international cooperation, reciprocity, and serious offending, and that reflects, as Justice Williams says, the text and purpose which we must turn our minds to when interpreting statute.

WINKELMANN CJ:

The notion of "cruelty" in that is interesting, isn't it, because in that concept "oppression", if you think about the word oppression itself, has in it an assessment about what the person who is causing this to occur, what their role in it is. So the notion of "cruelty" or "oppression" might be said to leave plenty of room for notions of culpable delay, inexcusable delay to be weighed.

MR LILLICO:

Yes, not –

WINKELMANN CJ:

More “cruel” if you’ve caused the circumstance to come about, and you won’t allow it be taken into account for instance.

MR LILLICO:

Well, I'll come to the place that delay plays later perhaps.

WINKELMANN CJ:

That’s fine.

MR LILLICO:

“Without delay”, which has not been the lot of the Commonwealth, we don’t take issue with the fact. There was an attempt in the District Court to mither away and offer up, I think my friend says, an “amalgam of excuses”, but they don’t wash. It’s inexcusably dilatory or slack. So, the Court of Appeal were quite right to refer to comity, to the seriousness of the offending when reminding itself of the high threshold that had to be met, because otherwise those words are somewhat meaningless, and we have to look to text and purpose, context. That’s consistent with the weight of the authority in the area, and so we have a constant and weighty public interest in the extradition. It doesn’t matter that, that’s from *H(H)*, we’ve already dwelt on that quote. It’s dealt with at paragraph 25 of the Crown submissions and my friend points out, “well *H(H)*, a fugitive case”, but the weight remains in non-fugitive cases as well.

MM v Minister of Justice Canada on behalf of the United States of America 2015 SCC 62, [2015] 3 SCR 973, which is dealt with at 27 of the Crown submissions, not a fugitive case. But nonetheless the Court said extradition directly concerns important bilateral international obligations and the viability of international mutual assistance, so mutual assistance in criminal matters. So it’s not, probably doesn’t bear belabouring, because as I say the controversy probably in this case is the application of the oppression test, but comity and those other public interests have a useful role to play here when turning our minds to what oppression means.

GLAZEBROOK J:

Can I just check, what do you say comity means? Because, well, just cutting to the chase in respect of that, it can't do much in respect of changes in personal circumstances because, like in New Zealand, I'd imagine that that's a bit "too bad". So the fact, apart from in sentencing where it would be here taken into account, but in terms of whether you could get a stay or not, it would not feature. So comity, are you using it more in the sense of serious offending, public interest and serious offenders being brought to trial –

1130

MR LILLICO:

Yes.

GLAZEBROOK J:

– even if ultimately found not guilty, the trial itself is important?

MR LILLICO:

Yes.

GLAZEBROOK J:

And international cooperation.

MR LILLICO:

Yes.

GLAZEBROOK J:

Rather than we can rely on the Australian courts doing everything they can to make sure the person has a fair trial?

MR LILLICO:

Yes, I think, well, in my submission, the Commonwealth can't say "comity, off you go". New Zealand's trust in Australia is sufficient to meet all the circumstances which are said to be oppressing here. So Australia and the *Bannister v New Zealand* [1999] FCA 362, (1999) 86 FCR 417 case illustrates

this, *Bannister* gives us some, we don't need to prove foreign law, but *Bannister* says, and I think this is what your Honour perhaps is getting to, we can cope, we can recognise the effect on children at sentence, and in *Bannister* it was the other way around, we trust New Zealand to do the same, which of course is the case in *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 this Court said. But we don't say that comity solves all problems, that we just – New Zealand courts can simply cite comity and that is enough, that the Australian courts and the Australian system will cope with all incidents of oppression. They can't do anything about the separation, the physical separation of BW from his son. That can't happen. So the other public interests then receive some importance. Reciprocity, we expect Australia to give up our defendants, we expect New Zealand to be able to pursue serious crime, so –

WINKELMANN CJ:

And we also expect Australia to act promptly when they request people's extradition.

MR LILLICO:

Yes, "inexcusably dilatory" and I will need to address after the break your Honour's point about delay.

WINKELMANN CJ:

And that's a good point of the break, right.

WILLIAMS J:

Subtle but effective, Mr Lillico.

MR LILLICO:

That's never been said about me before.

WINKELMANN CJ:

We will take the morning tea adjournment.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MR LILLICO:

So I promise to come to the delay point and what the Commonwealth would like to start with in relation to delay is, just for context it's not controlling law, but just for context what would happen in a domestic prosecution in relation to delay and the causes of it, and the short point from this Court's decision in *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465, you'll recall that the principles for judges who are dealing with stay applications and domestic prosecutions on the basis of delay was summarised at paragraph 32, and historically in the past delay cases were dealt with by forensic examinations of who did what when, and who took what steps, and where the delay lay. That was rather, the need for that, was rather obviated by the time that *CT* was decided because the principle taken by this Court was that perceived adequacy of reason for delay is not a reason for a stay in a serious case. Now, that is not to say that in extradition delay by a requesting country is irrelevant, but that does provide important context, in my submission.

Moving on to the extradition context and what we would say about delay and the place of it under section 8 of the Extradition Act, is that delay is largely, whatever the reason, and in a fugitive case it will be very difficult for the door to be opened pointing to delay, because the delay is on the head of the defendant.

WINKELMANN CJ:

I don't understand your sentence. Can you just have a go at that again? Delay is largely what?

MR LILLICO:

Delay is a gateway to looking at oppression. If there's no delay then oppressing circumstances can't be evaluated. So the point of saying that really, your Honour, is that delay is not a stand-alone ground, which is really the point that is being urged upon you.

WINKELMANN CJ:

I don't know that that's so. I think what's being urged upon us is that the fact it's inexcusable delay is more than something that's relevant at the margins. I mean, it's accepted – I mean, there's very clear authority that it's relevant in finely balanced cases, and what Ms Epati was arguing was that it's more than that.

MR LILLICO:

Yes, and the reason I say on behalf of –

WINKELMANN CJ:

Inexcusable delay, that is.

MR LILLICO:

Yes, inexcusable delay, and I say on behalf of the Commonwealth that the case law which says that it's only relevant at the margins, to use the term in *Mercer* which is derived from *Kakis,* are borderline cases. The reason that is explicable, is because of the structure where delay allows consideration in non-fugitive cases of circumstances which may be oppressing.

ELLEN FRANCE J:

Sorry, could you just explain that again?

MR LILLICO:

Yes, your Honour. Delay is the reason that oppression becomes available as an argument for restricting surrender. It then allows us to look at the circumstances of the case.

MILLER J:

So but for delay it would not matter how oppressive it was.

MR LILLICO:

Thank you, yes.

WINKELMANN CJ:

But don't you have a problem with that argument which is that it's clearly relevant when it's a fugitive who's caused the delay, clearly relevant to the assessment, so why isn't it relevant when it's the institution that's caused the delay?

MR LILLICO:

It's not irrelevant, but it's only so in marginal cases. So –

WINKELMANN CJ:

Would it not be better to say that its relevance may depend upon – how much weight it's given might depend upon the circumstances? I mean, it isn't hard for us to look ahead to all the variety of circumstances and…

MR LILLICO:

Yes, *Mercer* didn't put any hard and fast boundaries around what oppression meant for that very reason, because there'll need to be the factual analysis that *Tukaki* referred to. Whatever the threshold set by oppression, there needs then to be a factual analysis.

ELLEN FRANCE J:

Sorry, could I just check. In *Loncar* what the Court said is, at the paragraph we were referred to, 29 I think it is, (8): "Where the delay is not brought about by the requested person himself, the culpability of the delay by the judicial authority may contribute to establishing the oppressiveness of making an order for his return, and may be decisive in what is otherwise a marginal case." Well, are you disputing "may contribute to establishing the oppressiveness of making an order for his return"?

MR LILLICO:

No, thank you, your Honour, I'm disputing whether it's decisive. Because –

MILLER J:

Well, can I just test that, because we seem to be talking about a causal connection here. Section 8 says: "A discretionary restriction on surrender exists, if, because of" delay it would be oppressive. So there is clearly a causal connection between delay and oppression.

MR LILLICO:

Yes.

MILLER J:

And is your point that we're then looking at particular species of oppression, it's not necessarily the case that everything that might otherwise be considered unfair or oppressive gets taken into account. Is that the point you're making?

MR LILLICO:

It has to have arisen, the phrase that was used, they have to be paraphrasing. They have to be circumstances that wouldn't have taken place if the trial had taken place with ordinary promptitude is the wording in *Kakis*.

MILLER J:

Right.

MR LILLICO:

So it is causative, but sorry your Honour.

WINKELMANN CJ:

Carry on, finish off your answer.

MR LILLICO:

So they have to be causative, but not in a strict sense, yes. So they can't be circumstances that might have happened even if the trial court had – sorry, even if the requested country had got its act into gear swiftly, they can't be those sorts of cases. So we have had cases, haven't we, where a medical condition that existed at the time that the offence was committed, was sought to be relied

upon as an oppressing circumstance. They said, “no, because even if we had brought the trial swiftly, you would have still suffered from whatever that medical condition was”.

WINKELMANN CJ:

Can I take you back to the use of the word. Like “oppressive” in the context it’s used is really a reference to oppressive use of compulsive state authority, isn't it, I think, because oppression has the concept of a person who is perpetrating the oppression. It’s not a thing which is a free-standing thing, it’s an oppressive use of state authority to extradite the person.

MR LILLICO:

Well, I agree that that kind of action would be covered, but I wouldn’t say, I wouldn’t try to limit –

WINKELMANN CJ:

No, I mean I'm saying in the words of the section, oppression is always – it’s conduct from one party towards another, and in this case it’s the requesting authority. It would be oppressive to return the person in response to the requesting authority’s request.

MR LILLICO:

That is one way to look it.

WINKELMANN CJ:

And what do you say to the concept I opened up earlier with you, which is that the notion itself of oppression or harshness or cruelty, brings with it the notion of that agent’s own conduct?

MR LILLICO:

Yes, I agree, and that’s what it has to be relevant as I think I clarified with Justice France. But what I would say, and what I was going to go on to say, is that if we look at the circumstances that pull BW back to New Zealand, or are said to pull BW back to New Zealand, whanaungatanga, his child, to a lesser

extent the security interest, his reconnection with culture, then the theme I'm going to develop, those things are ordinary.

GLAZEBROOK J:

Well, not the fact that you wouldn't have had the child had you known about this. That doesn't seem very ordinary consequences at all.

MR LILLICO:

Well, inevitably over seven years, I think, I don't disagree because of the length of time. What I was going to say is the length of time is not ordinary and over the course of seven years then one is going to expect that people's lives will change and, here, they have changed dramatically and there's no issue that he hasn't reoffended and that he's re-established himself back in New Zealand, he's reconnected with his culture, he's reconnected with his family.

1200

So what I was going to say, your Honour, is that if we take the delay, then that is lengthy and inexcusable, because whatever the "amalgam of excuses" that were put forward it's bureaucratic fumbling. Although, crucially, no fault on the part of the victim who identified BW some four months after the offending.

And the reason I say that the delay doesn't hold great weight in this case is because there are not other circumstances, there are not other oppressive circumstances that delay can add to and if –

GLAZEBROOK J:

Well, what do you say about the child? And one doesn't want to wish away a child, obviously, because the child is now here, but it was accepted in the courts below that they would not have had that child had they known that this was a possibility.

MR LILLICO:

So we say it doesn't take you much further because it gives rise to an oppressive circumstance, an argument for one –

GLAZEBROOK J:

I don’t see how it can't take you any further? It seems to me to be, I mean, if you wouldn't have had a child.

MR LILLICO:

Yes.

GLAZEBROOK J:

If you’d know this was happening.

MR LILLICO:

Yes.

GLAZEBROOK J:

How can it not be a consequence of the delay that that child –

MR LILLICO:

It is a consequence, your Honour.

GLAZEBROOK J:

Okay.

MR LILLICO:

Yes and it's –

GLAZEBROOK J:

What, so no weight, you say?

MR LILLICO:

And the Commonwealth don’t wish to be understood to be saying anything other than that is a hardship, it must be a hardship.

WINKELMANN CJ:

Why is not oppression?

MR LILLICO:

That's the – once I've dealt with delay, I'll certainly address the Court about that.

WINKELMANN CJ:

Okay, we're going to come back at it.

MR LILLICO:

Yes. But the broad – the difficulty, if I can speak frankly for the Commonwealth, is the delay and the broad submission is that these other circumstances, the child, whanaungatanga, reconnection, are ordinary. So that is the broad submission which I will –

GLAZEBROOK J:

Are ordinary?

MR LILLICO:

Sorry?

MILLER J:

So are you asking us to posit for – so, suppose he had a child when he was in Australia, he came home with this child and then he is extradited a month later and he's facing several years' imprisonment in Australia, the impact on the child simply would not enter into it, is that your point?

MR LILLICO:

Yes, it would enter into it. It could be weighed but it wouldn't reach the level of oppression.

WINKELMANN CJ:

But that's not a test exists in the domestic context, is it?

MILLER J:

No.

WINKELMANN CJ:

When you're seeking a stay, you don't get to say "well, look, I've had a child in the interim", but you do get to point your personal – you can go and get your points, your personal circumstances in the context of a stay. But you do, in the context of extradition, because it's recognition, isn't it, this is something quite unusual to be – not just to be taken out of your community, out of your immediate community, but actually to be taken out of your nation is quite a different thing?

MR LILLICO:

Yes and that and that's why I said that the domestic regime is only contextual because the statutory test does allow you to look at that.

WILLIAMS J:

So basically, you say that lengthy inexcusable delay will not result in cruelty or hardship because the loss of connection with a child intentionally conceived, cultural, the cultural growth, the reconnection to whānau, the personal redemption – he seems to have given up drinking for a start.

MR LILLICO:

Yes, he does, yes.

WILLIAMS J:

And then you use the word "security", I wasn't quite sure what you meant by that, but anyway security, all of these factors are ordinary consequences and so cannot amount to cruelty or harshness?

MR LILLICO:

Yes Sir, that's –

WILLIAMS J:

What would?

MR LILLICO:

Well, *Curtis* is probably an example. Mostly because of the security concern which Ms El Sanjak will address. So when I mean "the security concern" I mean the argument that was really put before you in terms of him returning to Australia and it's suggested to you that I suppose the extreme facts in that kind of security of case is *Kakis* where the Cypriot government said, "there's an amnesty, you can come back", he goes back.

WILLIAMS J:

So it's got to be at that extreme level.

MR LILLICO:

Yes, your Honour, and it's an extreme word for the reasons that we discussed before the break. So and the reason in terms of the case law drawing on that which has been put forward, it's been the suggestion, my understanding, is that the Court isn't too exercised by the distinction between fugitive and non-fugitive, but the cases that we've – many of the cases that we've cited are like this, they're non-fugitive cases, so to –

WINKELMANN CJ:

I mean, we're not exercised, we see its obvious relevance.

MR LILLICO:

Yes.

WINKELMANN CJ:

Because you can't really, I mean, it doesn't seem oppressive, it doesn't seem oppressive to have had things happen in your life and then when you're a fugitive, because you know that you're a fugitive and you might be –

MR LILLICO:

You're running, you're running, yes.

WINKELMANN CJ:

So it's obviously relevant whether it's a fugitive or non-fugitive.

MR LILLICO:

It is relevant but the cases we've put before you including *Minister of Justice for Canada v Hanson* 2005 BCCA 77 which is at 56 of the Crown submissions and *Tukaki* at 39, they weren't – they were cases in which there was similar delay in which the person was not a fugitive. So, *Tukaki* some seven years including four years to make a charging decision, that's at paragraph 4 of the decision, I don't intend to take you there, and what's euphemistically called "procedural complications" which took another three years before the extradition request was made, so again that's at para 4.

WINKELMANN CJ:

Was there evidence that Mr Tukaki didn't understand he was or was – what's the evidence about his state of understanding?

MR LILLICO:

They didn't – there wasn't a security, my recollection is that there wasn't a security interest put forward in that case as there is in this.

WINKELMANN CJ:

What do you mean "security interest put forward", Mr Lillico?

MR LILLICO:

Feeling that you have –

MILLER J:

You're settled in your new life.

MR LILLICO:

Thank you.

WINKELMANN CJ:

Yes, you think there's nothing hanging over your head.

MR LILLICO:

There's nothing, yes, there's no reason for you to be worried about going back to Australia. Five years was the delay, not quite as long as this case, but five years sort of in the ballpark and *Hanson* was two and a half years, so *Hanson* was a request from the US to Canada, two and a half years to indict him after he was identified by fingerprints, it was a bank robbery, that's at para 8 of the judgment, and then a further year and a half to make the request itself, at 9. So in these cases, the delay in itself, the unexcused delay of similar lengths of time, didn't bring the extradition to a close.

WINKELMANN CJ:

But if there's a difference between *Tukaki* and this case it seems to be in the richness of the narrative around connection and place so that it's more tangible than the relatively abstract position in *Tukaki*, as far as I can tell.

MR LILLICO:

Yes, shall I come to that? So *Tukaki* the Court with respect was generous, if I can put it that way, to the defendant. There was a generic flavour to the evidence put forward by him but the Court assumed that he had reconnected with his whānau and that – and assumed that this cultural reconnection was a genuine one and so they – so the Court did engage with that aspect of the argument and so it's not entirely fair to point to that as a distinction.

We do, of course, have evidence about how BW exercised his whanaungatanga obligations and his duties to his whānau but the submission about that, well, the primary submission about whanaungatanga and the operation of that is that it might not be, bearing in mind the integrity of tikanga and the business of lawyers discussing the first law which is not created by the forums that they appear in front of, this might be one of the cases talked about, or it might not be one of the cases talked about in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 where the application of the principle was uncontroversial, I think was the word used, at paragraph 125.

1210

WINKELMANN CJ:

Well, as to that, Ms Epati said in response to your ea, hara, and utu submissions that, really, the Court can look and see that those are the concepts involved in the legislation.

MR LILLICO:

Yes and that is why, that is partly why, I say that this might not be one of those uncontroversial cases. I recognise that –

WINKELMANN CJ:

Because we don't have expertise in the balancing. We don't have expert evidence about the balancing of those considerations.

MR LILLICO:

Yes, look, we don't want to take the argument too far, because *Ellis* lays down the challenge for lawyers and judges to engage and –

WINKELMANN CJ:

What are you saying, though?

MR LILLICO:

– to see what part that they can play in the development of the law. But what I say here is that, as a theory, why doesn't, in terms of the tripartite procedure that Sir Hirini Mead discussed in *Doney v Adlam (No 2)* [2023] NZHC 363, [2023] 2 NZLR 521, or is referred to in *Doney* between utu, take, and ea, for instance, one theory that might be put forward is that those things place a tikanga lens on the ture Pākehā concept of oppression, in that they underline, those three concepts serve to underline that oppression is a high standard, because of course, well, the argument might go that it's the trial in Australia that does that, that achieves that balance, and so that is why –

WINKELMANN CJ:

Is your point that this – is your point what I said to you which is we don't have the expertise to do that tripartite assessment.

MR LILLICO:

Yes, yes, and even if we restrict ourselves to whanaungatanga, which is a primary concept that's been discussed here, from *Ellis* we can see at page 254, whanaungatanga might be in this case a pull back to New Zealand for BW, or it might be a push because whanaungatanga might lead to, might resolve in terms of let's put the problem behind us, or whanaungatanga might resolve to the collective needs to see this resolved, so deploying, narrowing the discussion, as my friends have done, to one or two concepts, my simple submission is that there is still controversy and it's not possible, in my submission, to untangle that on a submissions basis as *Ellis* contemplated in straightforward cases.

WILLIAMS J:

I'm not sure, I think you're complicating it a little. I mean there's no doubt that every society, every community, has means by which wrongs done must be fixed, and in the Māori context it's utu and muru, take, ea, all of those ideas that are discussed in *Ellis*. What might be said to be different is that whanaungatanga speaks much more loudly in that culture than its equivalent does in other nuclear family-based cultures. That's it.

MR LILLICO:

Yes.

WILLIAMS J:

So that the injury to it is greater, it might be said, and the good that comes from connecting to it is greater, and so inches you closer, despite the existence of utu and ea, to the line of harshness and cruelty.

MR LILLICO:

Yes, and so if we are able to deploy whanaungatanga and use it to interpret how the statute falls in this case, and we overcome my objection, my complication of the case to be one that falls outside *Ellis*' conception of cases that can be dealt with by submission, then the argument for Australia is essentially then, we must look at how whanaungatanga was expressed in this

case by BW, and make an inquiry as to whether that places him out of the ordinary into the oppressive category. Out of the ordinary is probably a gloss. All that we're looking at is whether it's oppressive, whether it's harsh, and so –

WILLIAMS J:

It does seem to me a little unfair, I don't say this disrespectfully, having got evidence, relatively good evidence actually, about connections to marae, and playing a formal, sorry, a central role in the economic and social security of that whānau, and in the absence of contrary evidence put in by the Commonwealth to say, "hang on, what about utu", to argue it's more complicated than what the evidence says, without any evidence to explain why it's more complicated.

MR LILLICO:

Yes, and perhaps that could have been done in 2023.

WILLIAMS J:

Yes, is that before Judge Cathcart?

MR LILLICO:

Yes. So I can't seek to excuse it on that basis, because 2023 we knew largely what the landscape was. But what I would say is that because, as you've pointed out, those aspects of the evidence weren't contradicted by Australia, they stand, and the question I pose really is whether they hit oppression. Because the way he expresses it is "work around the marae, to help his mother maintain her house, during COVID he helped an iwi trust". Do the connections in response –

WILLIAMS J:

And he lives in his village.

MR LILLICO:

And he lives in his village and his place –

WINKELMANN CJ:

And his child's connection to his whakapapa.

MR LILLICO:

Sorry your Honour?

WINKELMANN CJ:

His child's connection to the whakapapa. What do you say about that?

MR LILLICO:

Yes and I don't want to be drawn into –

WINKELMANN CJ:

Are you going to come onto the interests of the child next?

MR LILLICO:

Well, I will do, but the only answer that can be offered about that is we don't – is the Crown can offer a theory about whether whakapapa is broken by being in another country, but I don't have any particular evidence about that from someone who can speak to it.

WINKELMANN CJ:

I don't think that's the point that's made. It's the point that he is the cultural connection. So he is the point through which there is the closest connection.

MR LILLICO:

Yes, and my, albeit theoretical, point is that that's not going to be broken, I suggest.

GLAZEBROOK J:

It does sound fairly theoretical actually. I mean if you're away from a very young child for possibly a number of years it seems difficult to say that it's anything – well, it's theoretical that you could keep that connection up, isn't it?

MR LILLICO:

Well, we presume because we're in a relationship of comity with Australia that, like us, they allow, if he does wind up in custody for whatever, whether pre-trial or post, that his rights in terms – I think it's the Mandela rights, isn't it – that he has to have contact with his family will be maintained. But there's no doubt, as I said before, that it will be a hardship for BW's son, I think it's a son, not to be – he won't have the close attention and affection of his father. That's undoubtedly true.

WILLIAMS J:

But also the mother is not from that village. The partner, BW is the reason that she's there, that creates a precarity that ought to be avoided, I would have thought, if possible. Whether that gets you to cruelty and harshness, I don't know, but it is a thing to think about.

MR LILLICO:

Yes, and I can't think we've reached the point at which Australia can theorise about it. In terms of the child himself…

WINKELMANN CJ:

Do you accept, do you have anything to say about Lady Hale's analysis?

MR LILLICO:

Do I accept sorry, what?

WINKELMANN CJ:

Do you have anything to say about Lady Hale's analysis? Do you accept that? 1220

MR LILLICO:

Yes and it's reflected in *Radhi* as well those kinds of sentiments, both in the Court of Appeal and in this Court's judgment in *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480. So in *Radhi*, at least in this Court, just as a broad submission, you will recall that the effect of Mr Radhi's

extradition to Australia on the children was initially the focus of the resistance, the extradition request, but later on it became apparent that Australia's immigration practices were going to leave him in a state of limbo. But in terms of what is relevant to this case and in terms of the children, the Court, this Court in *Radhi* said, this is Justice William Young's judgment at 38: "Removal from home and separation from family are part and parcel of the extradition process. So too is the risk of being subject to imprisonment following trial. But in almost all instances of extradition the extradited person will be free to pick up his or her life either at the end of the trial (if acquitted) or, at worst, at the conclusion of any sentence." It is not and so Justice –

WINKELMANN CJ:

That doesn't sound like Lady Hale's individualised case assessment.

MR LILLICO:

No but that was how it was balanced in the end, remembering that in and this is the point I would like to come to about this case, is that in both *H(H)* and in *Radhi* which is unencumbered by having a different context, the evidence, there was expert evidence, so what I'm, my broad submission to you, is that the Court's analysis in this case was adequate to the occasion because in *Radhi* and this is at paragraph 53 of the Court of Appeal's decision, there was a psychologist who gave evidence in relation to the specific effects on the children and indeed Mr Radhi's wife to say that there would be severe effects on them. "Severe" was the word used. The daughters were psychologically vulnerable and there was a risk to their mental health.

WINKELMANN CJ:

Well, I mean, but –

MR LILLICO:

The son – sorry?

WINKELMANN CJ:

We're human and we understand the impact, a parent taken away from a child at a young age, do we need expert evidence?

MR LILLICO:

Yes but there's a – no, you don't, is the short answer, but the criticism of my friend is that the Court of Appeal's analysis of the effect on the children was, if you like, light-weight and –

WINKELMANN CJ:

Well, what was it?

MR LILLICO:

Sorry, your Honour?

WINKELMANN CJ:

What was the extent of it?

MR LILLICO:

Well, the argument was or the evidence about what would happen to the children was covered when the District Court's decision was discussed at 32 to 34 of the judgment and it is then analysed later at 60 and 63.

GLAZEBROOK J:

Can I just come back to you quoting from *Radhi* and Justice Young, that was his judgment.

MR LILLICO:

Yes.

GLAZEBROOK J:

It doesn't seem to have been endorsed apart from as a background at most in the judgment so I'm not sure whether Justice France or Justice McGrath endorsed that.

MR LILLICO:

No, but my reading of the judgment is that your Honour did along with Justice O'Regan at footnote 47, so that –

GLAZEBROOK J:

Well, we just are going or aren't we just agreeing that with the issue of not being able to come back to New Zealand?

MR LILLICO:

Well, the footnote refers to the whole of the paragraph which –

GLAZEBROOK J:

Well, that, it just says "background" it doesn't say "we agree with the analysis".

MR LILLICO:

Well, your Honour will know what you meant.

GLAZEBROOK J:

Well, I mean, I just – I actually can't remember it, to be honest, but it doesn't seem to me that it's – anyway.

MR LILLICO:

Well, the point is and that in *Radhi* and *H(H)*, despite there being in *H(H)*, I'm paraphrasing, but the effect on the children, because it was both parents who were going in *H(H)*, and Lady Hale disagreed with the other Lords and said, "the father shouldn't go", and that was on the basis of psychological evidence that the father was primarily attached to the children. But the majority of the house agreed that the children, nevertheless, over the – despite this evidence that the children would, effect, "grieve" I think was the word used, grieve the loss of their parents, the extradition was nevertheless ordered and the import of the cases I have tried to cite, *Radhi* and the other cases in our submissions, bring that to bear. It is not an unusual event, if I can put it that way.

WINKELMANN CJ:

So I mean, so 63, this Court of Appeal says, they cite my statement at *Tukaki* in answer to, really, this is the nub of their answer to the best interests of the child, I think: "If the consequences are no more than the inevitable consequences of extradition, then to allow that they meet the threshold of oppression would be to create the "safe havens" referred to in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa*."

Ms Epati would say I am misusing "safe havens" there and I may or may not be, but the point is that that's really not talking about a situation, as is the case here, where something very significant has happened and places an entire other human being's life in the balance that would not be in the balance were it not for the inexcusable delay. But where is that sounding in that analysis?

THE COURT ADDRESSES REGISTRAR – SUN GLARE

WINKELMANN CJ:

So what I was saying, is that this does not really seem to grapple with the case that was being made to the Court in respect of the interests of the child, just saying, "oh, well, you know, children – interests of children are affected by criminal processes, et cetera, extradition", but here that's not the case. The case is that the inexcusable delay of the institution led to this family making a decision that they would not otherwise have made and therefore this child's life is going to be damaged. This child had been brought into being and acquired all the dignity and need for respect and care that each human should enjoy, particularly when a child, and this extradition is going to damage that.

MR LILLICO:

Yes and a submission from that is, about that, is really that it's not the decision to have the child which is oppressive, it's having the child, having that relationship, having that relationship affected and without more the criminal law domestically and internationally is somewhat harsh and so at –

WINKELMANN CJ:

But it doesn't normally operate in a circumstance where because of someone's institutional delay a child has come into the world who then is clothed in all these rights, et cetera. So it's the "but for" aspect of it the Court is not engaging with there.

MILLER J:

Is the point you just made that the counter-factor for the child will be that it didn't exist at all, that can't be taken as a disadvantage. So it's the loss, the child is here, it's the loss of connection.

MR LILLICO:

Yes.

MILLER J:

The parents may have made a different decision.

MR LILLICO:

Yes and it seems to, the substantive point, is that there is a child whose relationship will be undoubtedly affected, not whatever family planning decision-making was made prior to that.

MILLER J:

Yes.

1230

MR LILLICO:

And what I was going to come to is that, just harking back to my submission, that over the long period of time, which is something that we've agreed that BW's case can be hung on because it was too long, children and circumstances come along, connections are made, community engagement is there, "redemption" I think was Justice Williams' word happens and these things in the rather unforgiving world of the criminal law, are not determinative unless they meet oppression, and that's illustrated in the submissions for the Crown at 56

and 57 where we have cited cases in other jurisdictions. Mr Tukaki had children but it wasn't readily relied upon, as I can see, to any great extent.

WILLIAMS J:

I think they were in Australia weren't they?

MR LILLICO:

Yes.

WILLIAMS J:

They probably wouldn't count, just on that argument.

MR LILLICO:

No. Australians do count your Honour.

WILLIAMS J:

Yes, sorry, strike that from the record.

MR LILLICO:

So…

WINKELMANN CJ:

Children are harmed by the criminal law.

MR LILLICO:

Yes, it is hard.

WINKELMANN CJ:

But there's nothing to stop us saying, but this isn't just the criminal law, this is extradition, and extradition allows us to take into account the culpability of the institution causing the delay which is…

MR LILLICO:

Extradition law is somewhat hard-hearted, although the door, the oppression test allows you at least to look at it.

WINKELMANN CJ:

It's a thin door, it's a very small chink of opportunity for people to say it's oppressive.

MR LILLICO:

Yes, and *Carruthers v Canada (Minister of Justice)* 2019 ABCA 490, paragraph 56, *Hanson*, were also, Mr Carruthers had become a stepfather and a father over the four years between the offence and the extradition proceedings. *Bannister* was to the same effect, 20-year delay. So –

WILLIAMS J:

The essence of your argument really is that delay is never going to cut it. You have to have an independent source of harshness or cruelty for you to avoid extradition.

MR LILLICO:

I would like you to do this, but I recognise that it's a difficult argument, but *Mercer* allows you to look at delay in cases that are borderline. So I can't dismiss delay at all.

GLAZEBROOK J:

Well how can it be borderline when it's actually a specific provision in an Act. I mean if it's oppression it's oppression, but it can only be looked at because, oppression that comes about because of delay, but how can it only be in borderline cases, if it's the very basis of the whole exception.

MR LILLICO:

Is it the basis of the exception which then requires, and this is simply harking back to the discussion, the exchange had before with Justice Miller where the circumstances are then generated during the course of the delay. So you can't look at things that would have happened –

GLAZEBROOK J:

No, of course, but…

WINKELMANN CJ:

I'm having difficulty understanding your argument because you say the delay has to cause a thing, but then if it's caused a thing then that's just delay and it doesn't count, you have to have something more than delay. Is that what you're arguing? Because I'm not understanding it.

MR LILLICO:

The delay has to generate circumstances that would amount to oppression, yes.

WINKELMANN CJ:

Yes, and here you say there's just delay, but there isn't just delay. There's the creation of a whole new human being, and parenting obligations.

MR LILLICO:

Yes, and if those circumstances, if this Court finds that those circumstances are within touching distance of being oppressive, then it'll make a difference. I don't wish to be seen as saying anything else.

WINKELMANN CJ:

I can't recall the timeline on those other cases that you referred to, but there is an internationally an increasing understanding of what the best interests of the child are in terms of parenting, and a move in many jurisdictions to give more weight to that in decision-making. Is there anything you want to say about that?

MR LILLICO:

Only at the risk of repeating myself, and I don't want to do that.

WINKELMANN CJ:

No, but in terms of the timeline of those other cases, are any of them recent?

MR LILLICO:

Carruthers is 2019.

WINKELMANN CJ:

Where is that in our authorities?

MR LILLICO:

Footnote 87 and it's discussed at paragraph 56 of the Crown submissions. So that was the one where there was a four-year delay, there was a young man, 24 years of age, and over the delay period he became a father and a stepfather.

WINKELMANN CJ:

That's a Canadian case is it?

MR LILLICO:

Yes your Honour.

WILLIAMS J:

If you had an 80-year-old who, because of some concatenation of events, was alleged to have committed a crime when he was 20, and apart from the fact that this person, let's assume he's a male, is very old, and had created a life, grandchildren et cetera et cetera, you know, the profile?

MR LILLICO:

Yes.

WILLIAMS J:

On your own theory of the case that would never be enough?

MR LILLICO:

Well, if he was 80 and unwell, if the crime was committed when he was 20, I know I'm not altering the facts that you've put to me but just…

WILLIAMS J:

Well you've got *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) at one end of that spectrum. Let's just assume the 80-year-old does not have dementia, and is fit for an 80-year-old.

MR LILLICO:

Yes, hale and hearty. On the Commonwealth's view of the world then none of those factors push to oppression. They're a hardship and –

WILLIAMS J:

That's a tough line to take.

MR LILLICO:

And as long as, like here, there's no argument about injustice. There's no lost evidence that means the trial's unfair.

WILLIAMS J:

Sure.

MR LILLICO:

Then they should be returned to stand trial.

WILLIAMS J:

Okay.

ELLEN FRANCE J:

Can I just ask Mr Lillico, here at paragraph 65 the Court of Appeal says: "By the narrowest of margins, we are satisfied that the principle … outweigh … ". Do you say that doesn't make it a marginal case in the sense we've been discussing?

MR LILLICO:

Yes and it's – what we would say about that is that the way that the judgment has presented is that this is not oppressive. So the way that the judgment is expressed is that the effects on his child are ordinary. The effects on reconnection are somewhat like –

GLAZEBROOK J:

That's not what that says because it's assuming that those factors are weighty and could outweigh.

WINKELMANN CJ:

It does accept that Mr Lillico. Mr Lillico I think what Justice France might be going to drive at next is if you accept that, it's a marginal case, which is how narrowest of margins, which is how the Court of Appeal put it, and then if it's correct that they did not weigh the fact that this was delay caused by, it was culpable delay, inexcusable delay, which we know can tip the balance in marginal cases. Why didn't this tip the balance in this case?

MR LILLICO:

Because, and if we look at the terms of the judgment, as being asked to by Justice France, it is expressed, in my submission, in quite categorical terms that the personal circumstances are not unfair or oppressive, paragraph 65, more importantly: "we are not satisfied that the consequences of extradition are beyond the inevitable and inherent consequences such that extradition would be oppressive."

So the submission, and I realise that this is a good point for my friends, the submission is that the personal circumstances to do with reconnection, to do with whānau, are not approaching more than the inevitable consequences such that delay comes into play, and I recognise that term "narrow margin" is used, but there's no sense that that is referred back to *Mercer*'s use to the term "borderline", such that what was meant here was that this case is pushing at the door and delay now ought allow everyone to go through it.

WINKELMANN CJ:

Well no, they wouldn't be referring back to *Mercer*'s borderline because they obviously didn't know about it.

MR LILLICO:

No, it's cited. It was –

WINKELMANN CJ:

Because if they did have it in their minds, they would have been applying it.

MR LILLICO:

It was certainly cited, yes.

WINKELMANN CJ:

No, but they weren't referring to that principle in *Mercer*, because if they had they would've been applying it.

MR LILLICO:

No, not at that point. What I take it –

MILLER J:

I wondered whether they were talking about something they didn't really articulate, which is that it was marginal in the sense that the delay was inexcusable as opposed to its impact being oppressive.

1240

MR LILLICO:

Perhaps and also this passage immediately precedes a concern that they do have about the extradition request which is a point that occupied us at the beginning which was that there was no updating material about the family, for one thing, and no assurance about Australia's continued interest in all of this. So perhaps, and this is the best I can do, perhaps narrowest margins, not borderline, as a reference to this underlying concern they have which is a concern shared by the Court that there is no updating position about this child, who was unborn at the time of the hearing and is now with us .

WINKELMANN CJ:

So, Mr Lillico, what do you say to Ms Epati's criticism of the Court of Appeal's analysis which you can see most clearly at 64 and 65 where they seem to be reading into the statutory test a notion that you had to balance: "She did not, however, analyse the importance of the principle of comity when making a determination under s 8(1)(c) of the Act, nor did she address the seriousness of the offending."

MR LILLICO:

Yes, so –

WINKELMANN CJ:

And: "we are satisfied that the principle of comity and the seriousness of BW's alleged offending." So "by the narrowest of margins", they are saying that they outweigh the factors, that the personal circumstances, so it's clearly what they're talking about.

MR LILLICO:

Yes.

WINKELMANN CJ:

So they're kind of doing a balancing exercise, the principle, with comity and the seriousness of the offending on one side and the personal circumstances on the other and Ms Epati said that was wrong.

MR LILLICO:

The main answer to that is the answer that I tried to hit upon earlier in the discussion, where comity and the other public interests, seriousness, reciprocity, explain the standard, they inform the standard. In the words of *Tukaki*, they explain the threshold. So the language of balancing doesn't entirely make sense in that if we conceive of the public interest affecting the test in that way or illustrating the test in that way, but it's probably a natural enough description of the judicial exercise, the judicial exercise, looking at all the circumstances, and it is logical enough, I suppose, to talk about that being balancing, if we're going to be –

WINKELMANN CJ:

But it isn't a balancing exercise, because you're saying they're just speaking in rough terms.

MR LILLICO:

In rough terms, yes.

WINKELMANN CJ:

And Justice Glazebrook made the point that they are already reacting against the trial judge's failure to grapple with, well, she put explicitly in her reasons, pay attention to that aspect.

MR LILLICO:

Yes, I think, yes, so the point that Justice Glazebrook was raising at paragraph 7, which is page 36, I don't want to take you there but that's the reference, Justice – the High Court Judge refers to BW being a suspect in a violent incident which is not a sufficient reminder, in Australian submission, about why oppression is a high test.

I'm just going to very quickly take the Court through three points that are really in no particular organised way but they're things that may be able to offer some assistance with or some observations that we – the Court raised with my learned friend why there was no updating evidence and she quite rightly identified the disability of the statute in that respect and my suggestion is that the reason for that bar on no evidence is because appeals are question of law appeals, essentially, and even though there is no bar in, say, an ordinary domestic question of law appeal, certainly an appellant would be asked the question if they tried to offer new evidence when it was a question of law being focused on and I suggest that that's probably one of the reasons for the bar.

The second reason might come out of the – might be a policy reason that's reflected in the *Zaoui v Attorney-General* [2005] NZSC 38, [2006] 1 NZLR 289 litigation. So, you recall the controversy about the security risk certificate in *Zaoui*, when it might be available, when the Minister might make a decision, and it was pointed out in *Zaoui* that it was appropriate for updating information to be made closer. You will recall that Mr Zaoui was going to be returned perhaps to the place that he had proclaimed persecution from and the thrust of *Zaoui* is really, well, the time for updating information is closer to when you might be returned to the place you're either being extradited or deported to because that is the point at which your circumstances will have demonstrated the most change and perhaps that's the policy reason behind that bar on the

evidence at the court stage because the Minister, which is my second point, can seek that information and in the ordinary run of things would seek submission in evidence from the party who is sought to be extradited. So perhaps that is a reason for the bar on it.

The other point I wanted to make is that my learned friend put something of a gloss on the bail, the possibility of bail from the Australian authorities. The letter that we have says that bail is a rare if not novel occurrence. So, it's a possibility. The reticence of the Australian authorities is, of course, because bail from an Australian court will become non-enforceable once the person is back in New Zealand. It has happened and I don't have my hands on it, but there is at least one case where someone has been extradited to Australia and bailed back to New Zealand and I will find the case and – New South Wales, so reminded by my friend it is a New South Wales case, so I will supply that. The reticence about it, of course, is that the because of sovereignty of the states that bail conditions are not enforceable.

WINKELMANN CJ:

Yes, understand the point.

MR LILLICO:

Ms El Sanjak, unless there are any questions for me, Ms El Sanjak –

WINKELMANN CJ:

I thought you had three points, that's only two?

MR LILLICO:

Oh, I folded – it's probably obvious, but the Minister can seek further information.

WINKELMANN CJ:

So it was, okay, right, two points then.

MR LILLICO:

And the practice of the Ministry of Justice is to ask for submissions and further material from if you reach the ministerial stage. But unless there are any further questions?

WINKELMANN CJ:

No, thank you.

MS EL SANJAK:

Thank you. I will briefly touch on the appellant's claim that by BW entering and leaving Australia and not being questioned by the Australian authorities he acquired a false sense of security from prosecution and punishment which is a factor to be taken into account when considering all circumstances relevant to whether surrender would be oppressive.

The respondent's position, however, is that for an induced sense of security to manifest in BW, to then be a factor to make extradition oppressive or may make extradition oppressive, BW must be properly provided with the security. It cannot be assumed.

In any event, BW cannot be provided with a sense of security if he was unaware he was a wanted suspect. BW in his affidavit deposed that it was a complete surprise to him that he was wanted by the police.

In our written submissions, we refer to two cases where authorities made a deliberate decision to not pursue a claim against an offender. In these cases, Mr Curtis and Mr Kakis had been provided with a sense of security.

In *Curtis* the police had received a complaint about Mr Curtis and were contemplating a charge but elected to deal with Mr Curtis, a young person, in an alternative way. He was moved into a youth refuge home and received counselling. Mr Curtis then moved to New Zealand with his family. He had no choice in the decision to leave and after his arrival in New Zealand the complainant's family then asked Australian police to proceed with charges.

WINKELMANN CJ:

So your submission is that this is only a factor to be weighed when the authorities have made some statement or done some action which gives the false sense of security?

MS EL SANJAK:

Yes, your Honour, and Mr Lillico touched on this earlier but a similar circumstance arises in *Kakis* where Mr Kakis has been given permission from the new government and then the government proclaimed amnesty, the amnesty ended and the government sought to extract Mr Kakis.

1250

Unlike Mr Curtis or Mr Kakis, as your Honour pointed out, BW does not have the assent of, or the correspondence of authorities that have provided him with a security.

The concept was helpfully stated by the UK House of Lords in *Gomes* where they said: “only a deliberate decision by the requesting state, communicated to the [accused], not to pursue the case against him or some other circumstance that would [similarly] justify a sense of security on his part,” notwithstanding his own flight from justice, could allow him to properly assert the effects of delay were not of his own choice and making.

WINKELMANN CJ:

But you’re not going so far as to say that delay is not material because there is no representation? Which is the case that you just referred us to, *Gomes*?

MS EL SANJAK:

Gomes v The Government of The Republic of Trinidad and Tobago.

WINKELMANN CJ:

Gomes.

MS EL SANJAK:

My submission is primarily that for the appellant to claim that there is an induced sense of security, it must be on, there must be a knowledge of protection of punishment – sorry, protection from punishment or prosecution, which does not exist in this case. The respondent submits that sense of security is not a factor to be considered whether the threshold for oppression is met. Unless there are any further questions, those are the respondent's submissions

WINKELMANN CJ:

No, thank you.

MS EL SANJAK:

Thank you.

MS EPATI KC:

Just responding quite quickly to that last point. *Kakis* and *Gomes* were both cases where they were initial fugitives. Mr Kakis fled to the mountains for 15 months. Mr Gomes was a fugitive as well. So the importance of an amnesty or a sense of security was highlighted in those cases because it broke the chain of causation as to delay. So they are not helpful to you when it comes and is far too narrow, BW says, to say that that's you need some sort of piece of paper or amnesty or a sense of security before you can rely on developing a sense of security over time.

I want to go back to the general thrust of the discussion with Mr Lillico about the natural and ordinary consequences of oppression, or extradition. The Court of Appeal at paragraph 28 said: "Finally, severe disruption of families is a natural consequence of extradition and by itself is unlikely to constitute oppression." BW argues that's wrong. The cases that are cited to support that are both *Tukaki* and *Radhi*. Chief Justice, you didn't say that in *Tukaki*. You certainly didn't use the word "severe". *Radhi*, both the Court of Appeal and the Supreme Court decision, were concerned with section 48(4)(a)(ii) which is the threshold of compelling and extraordinary circumstances. So to that extent, any

words used around severity of consequences flowing related to that particular provision's context.

When it was asked of Mr Lillico, "well, what case will suffice for oppression", and he said *Curtis*, what's remarkable about *Curtis* is that there was no baby. That's a stark feature of obviously our case that wasn't in the case. So that doesn't work as an analogy in my respectful submission.

In relation to *Tukaki*, that was not a pure non-fugitive case. That was actually a case where the complainant took, on my count, nine years to finally complain to the Australian police, and then there was some prosecution delay before they made decisions about charges and extradition. *Tukaki* was more like *Mercer*, a mixture of a delay in complaint, and then some delay by prosecution authorities.

Just finally, the cases of *Carruthers* and *Hanson*, which are Canadian cases, there is good reason to distinguish both those cases because they were reviews of Ministers' decisions where deferential standards were taken as to whether the Minister's assessment, within a range of reasonable outcomes, was acceptable. So there's good reasons to suggest that those cases are not going to be that helpful to this Court, and that's what the Court of Appeal also said in *Curtis*, that Canada has a completely different system, and the cases of England and Wales are much more helpful.

Finally, Justice Williams talked about the 20-year-old. There is a case in the appellant's bundle, it's called *Haczelski v Poland* [2024] EWHC 459 (Admin).

WILLIAMS J:
Could you spell that.

MS EPATI KC:
H-A-C-Z-E-L-S-K-I, my Polish is not very good.

MILLER J:

Lots of consonants in there.

MS EPATI KC:

Haczelski v Poland, and in the course of making an assessment under an Article 8 analysis, there was several factors as to why, well, they called it a "constellation" of factors weighing against extradition, and one of those stand-alone factors was the fact that the appellant was just aged 20 at the time of the offending, and it was said: "That is a distinct aspect of the nature of the offending which itself reduces the public interest in extradition." They go on –

WILLIAMS J:

How old was he at the application? How old was Haczelski at the…

MS EPATI KC:

Well, 18 and a half years had gone by.

WILLIAMS J:

Right.

MS EPATI KC:

So then they go on to remark: "It is not only old; it is 'ancient'. The delay and passage of time since the crime was committed both (a) diminish the weight to be attached to the public interest, and (b) increase the impact on private and family life: *H(H)* at §8(6). Here, the passage of time is very lengthy, and these effects are both very significant and substantial." Then they go on to talk about the circumstances of that passage of time.

WILLIAMS J:

Can you, setting aside the circumstances of the passage of time, performing family, and so on and so forth, was there anything else that the Court referred to, for example, fair trial rights and so on, that were relevant?

MS EPATI KC:

In this particular case?

WILLIAMS J:

Yes.

MS EPATI KC:

Yes, they talked about the fact that there had been no further offences committed, so he's led a blameless life since coming to the UK: "... 'utter transformation', to living a responsible and law-abiding life. Viewed in terms of [his] adult life, this is 19 years out of 21 ... succeeded in putting the offending behind him. This should weigh strongly in his favour [against] reduce the weight of the public interest in extradition to serve a sentence … has established very strong private and family life ties to the UK … [and now] has contact with his now eight-year-old daughter … strong bonds of the cohabiting relationship with his partner of three years, and her young five-year-old son for whom he is a father figure." And on it goes.

WILLIAMS J:

So no focus on fair trial rights for such an old charge?

MS EPATI KC:

Not that I'm – these are non-fugitive. Oh, not that I'm aware of in this particular case, no.

WILLIAMS J:

So the relevant circumstances, as far as you know, are circumstances that relate to changes that have occurred during the delay period?

MS EPATI KC:

Correct.

WILLIAMS J:

Not anything related to the trial or the offending?

MS EPATI KC:

No, no, they just talk about – they weigh the seriousness of the offence, first up, not near the top of the scale of the criminal offending, but then they go onto the fact that he was just 20 at the time, the passage of time, the circumstances of time, no further offending, strong family life, eight-year-old daughter, and then they talk about the impact that would involve separation and lasting consequences. So those are the only things that I have in reply.

WINKELMANN CJ:

Thank you Ms Epati. Thank you counsel for your very helpful submissions. We will reserve our decision and will now retire.

COURT ADJOURNS: 12.59 PM