IN THE SUPREME COURT OF NEW ZEALAND SC 80/2012

[2012] NZSC Trans 19

BETWEEN **KYUNG YUP KIM**

Appellant

AND **THE PRISON MANAGER,**
MT EDEN CORRECTIONS FACILITY

Respondent

Hearing: 10 December 2012

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: A Ellis and G K Edgeler for the Appellant
M R Heron and D J Perkins for the Respondent

CIVIL APPEAL

MR ELLIS:

May it please Your Honour. Ellis and Edgeler for Mr Kim.

ELIAS CJ:

Thank you Mr Ellis, Mr Edgeler.

MR HERON:

May it please Your Honour, Heron and Mr Perkins for the respondent.

ELIAS CJ:

Thank you Mr Heron, Mr Perkins. Yes Mr Ellis?

MR ELLIS:

Thank you Your Honours. Mr Kim, as you're aware, has been detained, it's actually 18 months today, and you're probably asking yourself, or I suspect somebody is going to ask me, why has it taken so long to get here in that there appear to be, on the face of it, some sort of level of inactivity for about 12 months and I think the simple solution to that question is that originally Mr Foley was counsel and he took what I would describe as a traditional criminal law approach to the matters and was busy investigating the details of the "alleged" crime and he did a couple of mail applications during that 12 months. There was difficulty obtaining sufficient funds for him to continue so he – and he decided he didn't want to work on the legal aid so he handed it over to me. I got some small sum of –

ELIAS CJ:

I don't know that we really need -

MR ELLIS:

Don't need to know that, well –

ELIAS CJ:

– an explanation. We may need an explanation – well, your argument is really a straight legality argument, isn't it, and if you're right then – it's not discretionary –

MR ELLIS:

Absolutely not.

ELIAS CJ:

No.

MR ELLIS:

If you don't want, I'm sorry, the Court of Appeal asked and Justice Kós –

ELIAS CJ:

I don't know. I mean other members of the Court may want a further explanation.

MR ELLIS:

Justice Kós asked and the Court of Appeal asked so I assumed somebody was going to ask.

ELIAS CJ:

We may get into it later but perhaps you could focus on the nub of your argument.

MR ELLIS:

Sure so if we go to page 17 of my submissions then and we say that both there in the High Court of Australia and the *Re Ashman (Note)* [1985] 2 NZLR 224 case there, there are examples of where questions such as this have been used and my learned friend in his submissions says that there's only been two cases where there's been early intervention in extradition and we have also mentioned in our submissions *Mailley*, which is perhaps a good example, that's yellow bundle, tab number 9. So in that case you'll see that was relatively recent in the High Court in Auckland in 2008 and that was a case where I tried to get habeas corpus and succeeded on the basis that the – there were errors on the face of the record which you can see in tab, in page – paragraph 6 where there were errors about the wrong sections of the Act were used and so on and His Honour says at 10, absolutely no evidence in the orders that were made in Court, and then leads to 11, there needs to be serious consideration given to the flaws that are apparent. And this was well before the extradition case proper had started and I can inform, I think safely, that albeit that was 2008, four years ago, the case, as I understand it, I think Mr Cook is amicus for the hearing in the Court of Appeal which is set down for

some date in February so he's still here and the extradition proceedings are still carrying on so what is the harm of doing a habeas in the early stage. None, it's quite proper and the extradition can continue at whatever pace it does and I suppose simply in the case on appeal at tab 1 –

McGRATH J:
Mr Ellis, just before you go there, so you're saying extradition can continue at whatever pace it does. I certainly had understood your submissions were not intended to end the extradition proceedings but is it your – do you also accept that the extradition proceeding in the District Court can continue without being impeded by other proceedings such as habeas corpus and more particularly judicial review proceedings?

MR ELLIS:
Well I, having, we've now filed the judicial review proceedings, which I should have said –

ELIAS CJ:
Have you sought interim relief in those?

MR ELLIS:
Not yet because I'm waiting to see what happens here before and we just had, at half past nine, we just had a callover and we've got a judicial section 10 conference to be arranged as soon as possible in the new year. So we filed that and it should be dated, I'm sorry it's got the 2nd of November on it, I think it's in tab 14 –

McGRATH J:
Yes, we've certainly got it. Is it much – is the final much different to the draft?

MR ELLIS:
It's more extensive, yes. It should be dated the 20th not the 2nd.

McGRATH J:

Can I cut this short by saying that you're, depending on what happens in this Court, you're reserving the possibility of an interim order being brought which would require judicial review proceedings to be resolved ahead of extradition proceedings?

MR ELLIS:

Well I'd really like to have the whole judicial review resolved because they're interlocking matters and maybe I need to think about whether to bring interim relief depending on the result of this case. The way I see it Sir is that the judicial review is more extensive than what can be argued in the District Court on extradition proceedings. For example, there are several claims against the Minister of Justice breaching natural justice and of course I can't litigate those in the District Court so I need to do the judicial review before the extradition hearing because it's a wider attack –

McGRATH J:

And the question was, are you reserving your right, therefore, to seek an interim order so that judicial review can proceed before the extradition proceedings, the substantive proceedings commence?

MR ELLIS:

Yes.

McGRATH J:

Because you would have to do that, wouldn't you?

MR ELLIS:

Yes but I would like the substantive judicial review proceeding to proceed before the extradition proceedings in the District Court, that's what I'd like to happen.

CHAMBERS J:

Is there a date yet for the extradition hearing?

MR ELLIS:

No Sir. We have a callover on Wednesday which I'm trying to adjourn until the following week and I would invite Your Honours to make a decision on this without reasons by the end of the week so we know what we're doing next week if we need to apply for bail before Christmas. But we don't have – I asked for it to be adjourned so I could do the judicial review. But we had delays in the judicial review because of the failure of the Ministry of Justice to make prompt disclosure.

McGRATH J:

Well I don't think we need go down that track.

MR ELLIS:

No.

McGRATH J:

I think we know the course, as you see it, depending on what happens in this Court.

MR ELLIS:

Yes, that's right. So if we go back to the essence, as Her Honour invited me to do the essence of where we're at, so in tab 1 we had the affidavit, which is very brief, on page 123, yes, so Detective Sergeant Colin Rudd –

ELIAS CJ:

Sorry what page?

MR ELLIS:

Two. Detective Sergeant Colin Rudd filed this affidavit essentially attaching a whole raft of documents and he says very little in his affidavit but what we do have attached is on that – on page 4 and 5, is the Interpol red notice and that purports to say that he's wanted for murder on the top of page 5 there, and

the maximum penalty possible is the death penalty. So it hasn't got all the information that the Chinese have, of course, because it's not accurate in that well, we say it isn't murder and according to the Crown's case – I call on the Crown, the death penalty has supposedly been wiped but a little further on, on page 11, we have one of the crucial documents in the case. That is the arrest warrant from the Shanghai Public Security Bureau and you'll see that that says that he is wanted, suspected of intentional homicide so that's where I got the idea that he wasn't actually wanted for homicide. He's only wanted for suspected homicide and the warrant hadn't been the ex –

ELIAS CJ:

Might, of course, simply be the difference in terminology if it – depends what you mean by suspected intentional homicide.

MR ELLIS:

Well that's what – well, I don't suppose it matters what I think it means. The correct test, I suppose, is what did the District Court Judge think it meant and that's the information he had and nobody – I think what puzzles me about this, I think that this is so clearly capable of summary determination it jumps out at you because if somebody filed another affidavit and said, "He's wanted for murder," not "suspicion of murder," or they filed an affidavit – and/or they file an affidavit and say, "All the provisions of article 47," when we've got to have the Supreme Court Ministries – if they file that so that's all been done, I haven't got a leg to stand on. That takes five minutes, it's so ultimately summary to be laughable. But they've been given three months now and not a single shred of paper has come forward to correct that and we all know it's habeas. They can correct the record during the hearings through the Courts. But they haven't produced anything because, in my submission, it doesn't exist. They're stuck with defective paperwork. He is wanted for suspicion of murder and they haven't gone through the correct internal steps. It's that simple. Couldn't be any simpler. So that's what is –

McGRATH J:

So this is the first piece of information and you say it's key information in the key documents?

MR ELLIS:

Well yes. That and the arrest warrant, the provisional arrest warrant, and the detention warrant because that's what Judge Broadmore looks at and he decides that everything is in order and I say he couldn't possibly determine that because you need to have – and I think we're on the same level now. We're on a level playing ground. I think the Crown now agree with me, unless I'm mistaken, that you need to have intensive scrutiny and maybe their position, I'm not quite clear, maybe their position is you don't have intensive scrutiny until you get to the extradition hearing –

ELIAS CJ:

But your argument is about legality. I must say I find it rather difficult to understand where intensive scrutiny comes in because it either is or it isn't lawful. In terms of scrutiny maybe helpful if you're dealing with a *Wednesbury* standard or proportionality or some sort of thing like that but if it's simply, is it lawful, that's something that has to be capable of a correct answer, isn't it?

MR ELLIS:

Yes but I suppose, Ma'am, it's a little bit like a Nelsonian blind eye, isn't it, if you don't look at something and then you arrive at the conclusion –

ELIAS CJ:

Well I understand that argument because you say that there wasn't the material on which you could be reasonably satisfied.

MR ELLIS:

Yes and I subsequently say, because of the Human Rights Committee case, that the Courts should be deemed to know that you can't extradite somebody to China because of the possibility of the death penalty and/or torture.

ELIAS CJ:

But surely that's an issue for the section 24 hearing? All that's in issue here is the provisional arrest, isn't it?

MR ELLIS:

Well I say that, given what the Human Rights Committee is saying, it has to be something taken into consideration at the first step of the proceeding, at the provision warrant.

ELIAS CJ:

But there may or may not be a provisional arrest warrant –

MR ELLIS:

Well there is.

ELIAS CJ:

– but the extradition would still go on.

MR ELLIS:

Yes but there is –

ELIAS CJ:

It's not a necessary part of the extradition determination.

MR ELLIS:

It's a necessary part of this extradition.

ELIAS CJ:

Well it's happened.

MR ELLIS:

Yes so it should have been taken into account.

ELIAS CJ:

Yes but I understand that these proceedings challenge the provisional arrest.

MR ELLIS:

Well yes in – yes. Yes they do and the detention – well let me just follow and then you might see my logic. If you didn't have to consider torture and death at the first proceeding, and you had to only consider it in the extradition hearing, because you've been arrested you now get to be detained, possibly, the detention warrant, and each time there's a detention warrant the Judge needs to be satisfied that you're not arbitrarily detained, which is the remedy we have here for the arbitrary detention behaviours. So at that next stage the Judge has got to look at it and try – well let's make an analogy with bail. If you just do a bail application do you say you can't raise these issues, you've got to wait to the extradition hearing? Well that must be an arbitrary detention and what is the difference between –

ELIAS CJ:

No I'm not cavilling at your challenge to the provisional arrest warrant. I'm simply saying that the provisional arrest can be challenged because the statutory criteria, on your argument, haven't been fulfilled but that's a world away from issues of torture and the death penalty, which are matters which would appropriately be considered, if relevant, at the extradition stage, at the section 24 hearing stage. This man is not at risk under a provisional warrant of being tortured or being executed.

MR ELLIS:

Not under a provisional –

ELIAS CJ:

We are concerned with whether he is lawfully detained as a matter of New Zealand law, that's all, aren't we?

MR ELLIS:

Yes but if the Human Rights Committee says the state authority should be aware that there's a real risk of torture, then that is something that has got to

be taken into account because you would never provisionally arrest anybody on that basis because if we take the situation, we'll have to go to –

ELIAS CJ:

Sorry, that is your argument, is it, that you can't provisionally arrest anybody if there is a question of torture ultimately on extradition or a question of execution ultimately on extradition?

MR ELLIS:

Well a serious risk of torture or a real risk, yes and –

ELIAS CJ:

Okay I understand that argument, thank you.

MR ELLIS:

Yes and we have, I'll just finish that submission, we have the Special Rapporteur on torture in his mission to china in 1995 and in his report he says, I think this is in the judicial review proceedings, he says that in the last official statistics for China, for torture in 1995 and 1996, there was approximately 400 people tortured each year and in one of those years 127 died as a result of torture and the following year 110 died as a result of torture. So even if there wasn't a death penalty you send somebody back to China they're at a real risk of being tortured to death. And, is it 99.1% of people plead guilty. So that's something that the first Judge has got to be aware of. And the entire material that should be put before them in accordance with (inaudible 10.21.42) is the devil's advocate précis, that all we get is the affidavit of the sergeant and a memorandum of counsel, and none of this important material is placed before the Judge, so he can't make a proper decision but he shouldn't be detained. If they want to make – have extradition hearings to carry on, fair enough, but not with the man in detention.

And in terms of *Manuel v Superintendent Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA), which seems to be occupying my friend's attention, as I took it, and one day maybe we might want to challenge *Manuel* but it certainly

isn't today, I was simply trying to live within the *Manuel* decision. It seemed quite appropriate. We had a complex judicial review, took the simple questions that were capable, at least I thought they were capable, of summary determination, took them out and applied for habeas corpus on that and as I said to you I think it's quintessentially summarily determinable because it can be defeated by two affidavit or one affidavit on each question, that's the end of it, wouldn't even bring it. And how do you get locked up on the material that's been presented and that's capable of summary determination but you can't be released by challenging the very same information. That seems to be grossly unfair.

McGRATH J:

It would probably be helpful, Mr Ellis, if you were to take us to the material. I mean you've started, you've made your first point at page 11 but you probably ought to take us to the other material that was submitted to the Judge, shouldn't you, so we can better understand the context in which your submissions are made?

MR ELLIS:

Well the material that was submitted to the Judge was the affidavit of Detective Sergeant Rudd and a memorandum of counsel from the –

McGRATH J:

Yes but you've only started with the exhibits to the affidavit. I mean you're presumably going to take us to the key parts of the statements that were made to the police, for example?

MR ELLIS:

I can do that. Yes. We can go through this entire affidavit. So we've got the –

McGRATH J:

Well just the parts that you see as relevant to the hearing.

MR ELLIS:

Yes I understand what you're saying. The – you'll see at the rear of the affidavit there's my man's criminal record which is –

ELIAS CJ:

Sorry, where do we find that?

MR ELLIS:

In tab, case on appeal, tab 1 –

WILLIAM YOUNG J:

116.

ELIAS CJ:

Thank you.

MR ELLIS:

Yes, at the end of the affidavit, and he's got some fairly – well in relation to murder there's some fairly innocuous minor offences. No, he's not – and then you see on one –

ELIAS CJ:

In relation to flight risk, one would have thought there's something in that – that particular record that might have added to the fact that he left very hurriedly from China in the first place following the death.

MR ELLIS:

Well that's – that, now well I dispute that in the sense that you mean it, Ma'am, when he left China very hurriedly, well that's – well that seems to be assuming he's guilty. He left. He went back to Korea. He stayed in Korea, where he's a Korean national as well as a New Zealand resident, for about 10 months, wasn't rushing off and disappearing, and then he came back to, to

New Zealand where his family is. So this isn't indicative of somebody fleeing justice or the flight risk that is made out.

ELIAS CJ:

Well sorry you were going to take us through –

MR ELLIS:

I was.

ELIAS CJ:

– the relevance of the affidavit. You started at the end.

MR ELLIS:

Yes.

ELIAS CJ:

With the criminal and traffic history and your submission is what, that these are – this is all relatively minor offending, is that it?

MR ELLIS:

Yes. Now just trying to give you a picture of the man and then on 114, I know I'm going backwards – that's why I wanted to go here. Now 114 at the –

ELIAS CJ:

Sorry this is the New Zealand criminal history?

MR ELLIS:

Yes.

ELIAS CJ:

Yes.

MR ELLIS:

Well he's been here, I think, 19 – was it 75? Or was it 80? So his adult life has been in New Zealand. Ah yes, on 114, which is the request for extradition, we see Act 2, bottom of the page where the people "accept the crime the person is extradited for. You shan't conduct a criminal proceeding and shall not extradite unless there's New Zealand permission in advance."

ELIAS CJ:
Sorry, where are you?

MR ELLIS:
I'm on 11 – 114 and 115.

ELIAS CJ:
Oh I see, I – yes, there's another two. I was looking at the two on 114.

MR ELLIS:
Mmm, four – I should be at one actually, sorry, shouldn't I?

McGRATH J:
It's really one.

MR ELLIS:
I've misread, I've misread two –

ELIAS CJ:
I see.

MR ELLIS:
According to the decision of People's Republic of China, the extradition person shall not be sentenced to the death penalty after being extradited from New Zealand. That's what they say but we've not been able to find any decision of the Supreme Court that says this and we know from the other material that was presented to us that unlike your Court, the decision of the People's Supreme Court can be set aside by the politburo which is now down

to seven members and it was suspended on one occasion so that more people could be put to death that year but there's no supporting material that tells us anything whatsoever about the death penalty. And going back to one when –

ELIAS CJ:
So it's not a commitment in this case you're saying? It's a reference to a general decision, is that...

MR ELLIS:
Well that's what appears to be made out by the documentation.

ELIAS CJ:
Yes.

MR ELLIS:
But I can find no material to support that there is a decision because databases of Chinese materials are – there's about a million criminal cases a year.

ELIAS CJ:
Mmm.

MR ELLIS:
And there's about a database of 25,000 decisions of the Supreme Court over all the years it's – it's very hard to find anything. Lots of things are done orally but the request, going back to 112 there –

McGRATH J:
Just before you leave 114 –

MR ELLIS:
Sure.

McGRATH J:

We're going in this way, Mr Ellis. Is it relevant that in paragraph IV, request of assistance, those opening words, "In order to conduct criminal prosecution on Mr Kim." Are those words relevant to the issues that we have to address, in particular whether he's an accused person?

MR ELLIS:

Well that's one of the many alternative descriptions that are used in the various paperwork. There's no continuity of description but of course, that wasn't what was put to Judge Broadmore. His want –

ELIAS CJ:

Sorry, what do you mean it wasn't put to him?

MR ELLIS:

Ah, I say no as in it wasn't put to Judge Broadmore that there were multiple descriptions of what the offence may or may not be. It was just broadly a bundle –

ELIAS CJ:

He had all this material?

MR ELLIS:

Yes plus the memorandum of counsel but remember it's an ex parte application and that should provide a devil's advocate approach which it doesn't. It's just a bald statement, "here is all this," and as I've s – as I showed you with the red notice, it says "murder" and "the death penalty." This one says "criminal prosecution" and "no death penalty" and we've got options in between too. But the Shanghai arrest warrant, which is the principle document, says "suspected of intentional homicide".

McGRATH J:

I understand that, Mr Ellis, but there are a number of straws in the wind, if you like, in this matter but I'm just putting it to you that that is one matter that has some relevance to where the District Court Judge's decision on provisional warrant was lawful.

MR ELLIS:
Well, yes. I tried in the Court of Appeal to go through all the pieces and say, "Here's everything that is plus or minus" –

McGRATH J:
Yes.

MR ELLIS:
– to indicate what it is but the unfortunate part about it is that we don't have a reasoned decision at any time in relation to either the provisional warrant or any of the detention warrants. We've got reasoned bail decisions but we're not in a position to know what the Judge considered or even the length of the hearing but most of that is for challenge in the judicial review. We say it was bad faith and no devil's advocate approach but didn't purport to –

McGRATH J:
I think we can probably move back to page 114 now.

MR ELLIS:
Yes, sure. We don't need to – yes, so in – well I was going to go back to –

ELIAS CJ:
Sorry can you just tell me very quickly what are the documents that are relied on? Just so that I have a map of it. There's the arrest warrant, the request of extradition. What else is there in this affidavit?

MR ELLIS:
Yes, Chinese arrest warrant. The request for extradition, the New Zealand provisional warrant and a detention warrant.

ELIAS CJ:

But those two are what you're challenging and the question is what information was before the Judge on which he could reasonably conclude that the provisional warrant and the subsequent detention warrant –

WILLIAM YOUNG J:

Reasonable grounds to believe.

ELIAS CJ:

Yes, reasonable grounds to believe.

MR ELLIS:

Yes.

ELIAS CJ:

So for that we look only at the Shanghai arrest warrant and the request of extradition do we?

MR ELLIS:

Ah no, we didn't have the request. Yes, yes we do sorry. Yes, yes we do.

McGRATH J:

Page 112 I think?

MR ELLIS:

Yes, 112.

McGRATH J:

We've just been looking at it, yes.

MR ELLIS:

I am still looking at it. Yes, there's a request for extradition and there's a, I think there's a request for surrender too somewhere else but that's in a later stage which we don't have in here so in the request for extradition there's a sort of summary of what the Chinese appear to be saying it happening.

ELIAS CJ:
But the information placed before the District Court Judge effectively was the Shanghai arrest warrant and the request of extradition, is that right?

MR ELLIS:
No, the entire affidavit is –

ELIAS CJ:
Yes.

MR ELLIS:
– is placed before him but –

ELIAS CJ:
I'm just trying to work out what there is in this affidavit that is critical.

MR ELLIS:
Supported?

ELIAS CJ:
Yes.

MR ELLIS:
Yes, well yes. Well, if we look at –

McGRATH J:
There's 50 pages of statements.

WILLIAM YOUNG J:

It's a lot of investigative material largely consisting of statements.

ELIAS CJ:
Yes.

MR ELLIS:
Which is – I mean, when we were trying to do, challenge the extradition, it's going to be impossible in normal circumstances to be able to say there isn't a prima facie case and I'm not trying to pretend that, there's a prima facie case, we're never going to be able to challenge that, but I'm not parting from 112 yet, but I've still got my finger in it, but if we move to tab 2 then for a second –

ELIAS CJ:
So your complaint is really with the form of the, with what was said in the documents – the formal request?

MR ELLIS:
I suppose so or what's not said might be better.

WILLIAM YOUNG J:
The requirement for the Judge was to decide whether there were reasonable grounds for believing that relevantly your client was an extraditable person.

MR ELLIS:
Yes.

WILLIAM YOUNG J:
And that required the Judge to be persuaded there were reasonable grounds for believing that he was a person accused of having committed an extradition offence.

MR ELLIS:
Yes.

WILLIAM YOUNG J:

Now you are saying, I guess, that you challenge the Crown, let's call it the Crown, to show that he is accused of an extraditable offence and – an extradition offence I should say. What's the, is the test reasonable grounds to believe, which is the test for the Judge, or is there to be a decision on your argument as to whether he is an extraditable person. In other words say there were reasonable grounds to believe that he was facing a charge of murder, does it matter, for habeas corpus, if perhaps the Crown has not accepted the invitation to show that that isn't, in fact, the case now?

MR ELLIS:

Well looking at tab 2, because it sets out exactly what we're talking about, I am satisfied that (c) there are reasonable grounds to believe that and what does the Judge say he's got reasonable grounds to believe, that Kim's an extraditable person within section 3 of the Extradition Act. Now I say well on the material before him, particularly the Shanghai warrant, he could not be satisfied of that because he's only suspected –

WILLIAM YOUNG J:

Well it's a subtle issue whether to be satisfied with something isn't the same as being satisfied that there are reasonable grounds to believe something is the case.

MR ELLIS:

Yes I understand –

WILLIAM YOUNG J:

The latter test is a lower one I think.

MR ELLIS:

Yes, I understand what you're saying but I'm saying he couldn't be satisfied of either, particularly if you say, which I do, you have to intensively scrutinise your paperwork whereas this is a rubber stamp job.

GLAZEBROOK J:

Well if you look at the paperwork though, just to be absolutely clear about this, what we have are the statements there, the statements show links with the flat that he was living in and a confession and I think you've agreed that that would be a prima facie case and would be subject, I suppose, to seeing whether anybody else was involved with the murder. I would have thought Mr Kim would have been looking at being arrested here and charged with murder.

MR ELLIS:

Yes I agree with you. He would –

GLAZEBROOK J:

Because – and so the subtleties of language apart, if you have got a request for extradition, and assuming that they're either/or, there seems quite a lot of material here, it's not merely assertion, it's actually putting forward quite strong evidence, I would suggest to you, that Mr Kim is at least somebody that would be charged in New Zealand, or could be charged in New Zealand obviously subject to there being other people in the frame if you like.

MR ELLIS:

Well that's just –

GLAZEBROOK J:

But assuming there's no one else in the frame he'd be, I would suggest to you, standing trial here.

MR ELLIS:

Well that may depend. I mean you say it's a confession. There's certainly a statement against interest, or an admission supposedly made by my client on

the phone to somebody he doesn't know very well. I mean he says, when he gets charged, I didn't say it but what we don't know, or what we do know is there's 99.1% of people plead guilty because there's an incentive to, on the prosecution and the police to get these results. People get tortured. We don't know in what circumstances that statement was made and in New Zealand, of course, we would challenge it wouldn't we but –

ELIAS CJ:
But –

MR ELLIS:
The man's been –

ELIAS CJ:
Mr Ellis, why is not your acceptance that on the material the Judge had, you couldn't say that there wasn't prima face case. Why isn't that sufficient to fulfil the section 20 test?

MR ELLIS:
Well be you – the first thing that has to be – well, we need to go through all of these things on page 123, the provisional warrant, we need to go through those to see what has to be determined but the – I'm not saying that if you're in New Zealand, this would not establish a prima face case in terms of the murder bit. I'm saying there would be. But I'm saying that doesn't mean he can't be arrested under this process unless Judge Broadmore has correctly addressed himself to the legal tests here and I am saying that is not possible.

ELIAS CJ:
Because?

MR ELLIS:
Because he's on the Shanghai warrant. He's a suspected –

ELIAS CJ:

So it's just on the formal wording of the official documents, the request documents?

MR ELLIS:
Yes.

ELIAS CJ:
Yes.

MR ELLIS:
And the process to which to make an application for extradition hasn't been followed. It hasn't had the approval of the Supreme Court of the People's –

ELIAS CJ:
Yes I understand that.

GLAZEBROOK J:
Are you going to deal at some stage with the Act of state doctrine and whether it's up to the New Zealand Courts to enquire into a process behind an extradition request? Outside of the extradition?

MR ELLIS:
Yes, I'm going to touch upon that but what I'm saying is I don't dispute that they've authenticated documents. What is say is that the documents that they've authenticated don't fit the Extradition Act. It doesn't matter about the Act of state doctrine. It's just simply –

GLAZEBROOK J:
No sorry that's just the – because they do fit the – well, can I just understand the point because there's two points you're making. One is suspicion and the other is not a proper process in China –

MR ELLIS:

Yes?

GLAZEBROOK J:

Which seem to me to be two different points?

MR ELLIS:

Well yes in the – in the not the proper process, the Crown present to the Judge the bundle of documents at some stage which includes this – and I didn't find out for 47. It was given to me, "This is what the Chinese law is," so I look at it and I say, "Well, it hasn't been followed." And I say postpone the habeas in the High Court, we come back in a week's time, treat this as a judicial review, and they've got time to correct it if that has – if that process has been followed correctly. They sit on their hands and they don't produce it and then they try and say, "I'm not allowed to challenge it." Well I don't think that can be right. There must be some basic standards that anybody's got to reach before they can use the New Zealand Courts and it seems to get just a little more complicated by what the two Crown counsel tell me this isn't really the People's Republic of China bringing the case. It's really the Government of New Zealand doing it and if that's right, when the Crown Law appear at the provisional warrant stage, in my submission, they have a positive duty under section 8 and 9 of the Bill of Rights to bring to the attention of the Judge the right to life and torture and they've got to do that, now that's a conflict because they're acting for the People's Republic of China who want to do – there's a bit of a conflict.

McGRATH J:

I think, Mr Ellis, if we can get back –

MR ELLIS:

Sure.

McGRATH J:

– we can just cover the facts before we get to submission. Now you have very properly conceded that looked at from a New Zealand perspective there

might be a prima facie case, but on your argument we have to look at whether this, the appellant is an accused person and I think that if you could just take us quickly through, as you started to do, the key passages in the material that was before the Judge, having made the point that there's no reasons given, I think that would be helpful.

MR ELLIS:
Sure Sir. We're still on tab 2. The information provided states that Kim is accused of the following offence. Well he isn't.

McGRATH J:
Well I think if you take us to the – go back into tab 1 and we know that, we'll be better able to make, to understand your submissions on the warrant when you get to that.

MR ELLIS:
Yes, well, okay, 11 in tab 1.

McGRATH J:
Page 11 was it?

MR ELLIS:
Page 11 of tab 1.

McGRATH J:
We've done that then you moved to the back and I think you went to the request for extradition. I don't think you'd quite finished with that?

MR ELLIS:
No I hadn't. No I was taking you through – I paused there because I got asked some more questions. I will go back to that. While I'm on A, let's just stick here because it has a flow, so B on page 123 there, the warrant –

GLAZEBROOK J:

123?

MR ELLIS:

Tab 2 of the case on appeal.

GLAZEBROOK J:

Sorry.

MR ELLIS:

B, first B, "Warrant for arrest was issued." Well, so that's the information that the Judge had. He's got the warrant that we've just looked at, and it does not say what it says in A. "And then I am satisfied that the warrant has been issued in the People's Republic of China by judicial authority." Well that's an *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 point which is too complicated to determine on habeas corpus, so it's wrong, we can't be satisfied of that, but that's a judicial review point. "He's in New Zealand," we don't dispute. "There are reasonable grounds to believe," which we've just done. The offence, in Roman II there, "The offence is an extradition offence." Well it isn't. Suspected homicide is not an extradition offence, end of story.

ELIAS CJ:

But everyone is suspected until they're convicted. That's what the presumption of innocence is and that's why you're asking us to place a huge amount of weight on the reference – on the wording of these requests.

MR ELLIS:

Well if you were in England since about, I think the Royal Commission, I think it was 1985, you could – we all watch the television, I'm arresting you on suspicion of murder. That's not what we do and we must concern ourselves with what the law of New Zealand is. Your practice notes says questioning, you can't hold somebody for questioning. That's what is being sought here. Suspected homicide. That's what it says.

WILLIAM YOUNG J:

I don't actually understand the point. I gather you're not taking the *Assange* argument that a process that involves detention for questioning can't be, render that person an accused person.

MR ELLIS:

No. I might have confused you Sir. The *Assange* point that I'm not currently taking, because I didn't think I could, is that the Chinese bureau 11 in tab 1, the Shanghai Public Security Bureau, is not a judicial authority.

WILLIAM YOUNG J:

Okay.

MR ELLIS:

Or whatever the wording is because it's not a European arrest warrant. These are people who get rewarded for confessions. It's not an independent, an impartial authority, but I'm not taking that –

McGRATH J:

That's not for today.

MR ELLIS:

Until the judicial review.

WILLIAM YOUNG J:

But the point you are taking is the process has not, in China, has not been shown to have reached the point where your client can be said to be accused of an offence?

MR ELLIS:

Yes I'm saying the Shanghai warrant doesn't accuse him of an offence and even if it did the process of getting the five, the People's Republic, the Foreign Affairs, Ministry of Justice, the two police ministries, hasn't been followed, so he can't be accused within the meaning of the Chinese system because there's protections there to stop officials making unauthorised applications and it gets quite plain. If it says you've got to get the approval of the Supreme Court, well where is it? It's not hard and if they could delay that three months to produce it, if it existed, it would have been produced. So I say the Judge could not have been satisfied if he'd looked to the documents properly on this ex parte application and if we look at tab 6 where we see some of the other documents and I'm aware that I haven't been back to tab 1 but the warrant of detentions are attached to Mr Kim's affidavit as is the memorandum of counsel for the ex parte provisional warrant. That's at C, page 153 and the Crown counsel there sets out what she believes is sufficient.

ELIAS CJ:

Sorry what are you referring to now?

MR ELLIS:

I'm referring to the case on appeal, tab 6.

McGRATH J:

Page number would be helpful.

MR ELLIS:

153. Which is the memorandum of counsel in support of the ex parte provisional warrant and I mean if we look at it...

ELIAS CJ:

Well this, too, of course, is material before the Judge?

MR ELLIS:

Judge, yes this is –

ELIAS CJ:

Yes. Information available –

MR ELLIS:

What's in front of them.

ELIAS CJ:

– for the Judge?

MR ELLIS:

Yes that's right but there's this – well they appear to be a mixture of submissions and evidence. Lots of memoranda of counsel and there's no devil's advocate approach which is what's required. So you're getting an unfair hearing for the provisional warrants.

ELIAS CJ:

Can we just try and not have the kitchen sink because I'm losing the architecture of your submission, Mr Ellis.

MR ELLIS:

Sure.

ELIAS CJ:

What we're looking at here is the information that the Judge had available to him for the purposes of the section 20 consideration and this is one of the pieces of information.

MR ELLIS:

This is one of two.

ELIAS CJ:

One of two what?

MR ELLIS:

Pieces of information.

ELIAS CJ:

Yes?

MR ELLIS:

This one and tab 1.

ELIAS CJ:

Yes, I understand that.

MR ELLIS:

Right, so we've got at paragraph 10 an arrest warrant was issued. Rudd affidavit, paragraph 4, and that's one we've already looked at. So both Detective Sergeant Rudd and the Crown are saying, relying upon the Shanghai Municipal Public Safety Warrant which does not say what I've told you and then at 14 and 15, Justice Young we've got –

ELIAS CJ:

Sorry, and you're also saying it doesn't purport to rehearse that the consent of the various agencies mentioned in the Chinese statute have been obtained. Is that also part of –

MR ELLIS:

Yes, it doesn't say that and it also doesn't say – it doesn't not provide a devil's advocate approach, bearing in mind it's ex parte. So it's an unfair process and I know you tell me not to lose but it is part of my track.

ELIAS CJ:

I'm getting confused if you're bringing in all of these things. I'm just trying to see what information he had. He can make a submission for us –

MR ELLIS:

Sure.

ELIAS CJ:

– later perhaps that the process was unfair but I'm more interested in having the information that the Judge had so that we can look at it and this is a critical part of it.

MR ELLIS:

Yes.

ELIAS CJ:

What's your complaint about, this bit of information, or where do you say it's defective?

MR ELLIS:

Well in parts A, at paragraph 19, where it says, "The People's Republic of China waived the death penalty in this case." So you get to page 5, paragraph 19, before you even know that the death penalty is in play and that should be point number 2 in the affidavit. It puts it on – I mean the way it's sold, the affidavit, is look paragraph number 2, he's a flight risk, this should be the sole matter in chambers, to reduce the risk you've alerted, and you hide the death penalty on page 5. In the end you don't say the People's Republic has waived the death penalty in this case, it hasn't. It's a systemic waiver, at least we think it is, and there's no supporting proposition for it.

ELIAS CJ:

Well this is though an assertion. This is part of the information that the Judge had –

MR ELLIS:

Yes.

ELIAS CJ:

– and it's for a provisional warrant.

MR ELLIS:

Yes.

ELIAS CJ:

Why can't this be part of the, satisfied on the basis of the information presented to him?

MR ELLIS:

Well in the same way as –

ELIAS CJ:

If it's relevant and I still have a query as to whether it is or whether it comes in under the section 24 process rather than the provisional warrant.

MR ELLIS:

Yes, I understand that and I think, let me try and tackle that head on because I think you're wrong and the reason I think you're wrong is because, let's take with the Minister of Justice said in his process. He said to his Ministry, "What's this about the death penalty, give me some more information." And I'm saying that's what the Judge should say. You don't have to wait until the extradition hearing. We need a standard of human rights scrutiny that recognises the international authority from the Human Rights Committee that you don't do this and that the judicial authority should be aware of this. So if somebody says this is the death penalty you don't stick a rubber stamp on a provisional arrest warrant, you ask them questions.

ELIAS CJ:

Well that's an assertion you make.

MR ELLIS:

Yes. Because if we've got to wait until the extradition hearing we're waiting two years before this – that can't be right.

CHAMBERS J:

Well why do you say that because the structure of the Act clearly envisages that following an arrest a person will be brought before a Court as soon as possible and it clearly also envisages that the extradition hearing will take place as quickly as possible.

MR ELLIS:

Yes and it also envisages after you've had the provisional arrest warrant issued two things can happen. You've got the come to Court as soon as possible for the judicial process and then you've got the power of the Minister unusually to cancel the judicial warrant and terminate the proceeding. So there's two –

CHAMBERS J:

Yes, no, the part I was –

MR ELLIS:

– there's two safeguards.

CHAMBERS J:

The part I was – well there are lots of safeguards in fact but the part I was challenging was your assertion that Parliament, in passing the Extradition Act, envisaged that extradition hearings might take place two years later and what I was putting to you is the whole structure of the Act is quite to the contrary and extradition hearings are envisaged as taking place extremely quickly.

MR ELLIS:

Yes and I'm saying to you that the first hearing that is not ex parte, where my client has an opportunity to be heard, is when the first detention warrant is applied for and at that stage all his protections under the Bill of Rights must

apply. He cannot be arbitrarily detained and he's entitled to bring up all these matters that I've brought up here at the detention warrant, as he is at the bail hearing, because otherwise it's an arbitrary detention. Parliament hasn't said oh, we're going to have an Extradition Act and you can't exercise your Bill of Rights claims until you get to the extradition hearing.

WILLIAM YOUNG J:
I don't think –

ELIAS CJ:
Their Bill of Rights claims bearing on the provisional arrest warrant. That's the only thing in issue.

MR ELLIS:
No, the detention warrant. At some stage – you've been arrested. You're now brought as an application for a detention warrant. No reasons have ever been given for any detention warrant. None of the matters that I've raised with you this morning have been given.

ELIAS CJ:
Perhaps because they're not relevant to the questions that have to be determined on the conditional arrest warrant. I mean that's what you have to convince us of.

MR ELLIS:
Well no, I don't because there's a two-step process. There's a provisional arrest warrant and then there's the warrant of detention. The warrant of detention – go back to page 143 – and we've got some arrest war – some detention warrants. On the 9th of June the People's Republic made a request for surrender. Judge Broadmore issued a provisional warrant. Mr Kim was arrested under warrant. I determined under section 23 that he was held in custody and then you're to deliver him up so that becomes technically what's a challenge in the habeas corpus and they're all more or less the same but at

that stage, equally, the Crown has a duty to bring it's Bill of Rights hat on and that I don't see how it can if it's representing the People's Republic of China.

CHAMBERS J:
This detention warrant, Mr Ellis, which was made under section 23 is effectively a declining of bail, isn't it, under the Act?

MR ELLIS:
Yes.

CHAMBERS J:
How do you get around the proviso to section 14 of the Habeas Corpus Act which is to the effect that the writ can't be used to challenge –

MR ELLIS:
To challenge, no.

CHAMBERS J:
– a bail decision?

MR ELLIS:
Well it's not actually challenging a bail decision. There's two genuine bail decisions. They're in the bundle when Mr Foley applied first to Judge Gibson and then to Justice Brewer for a real bail application. This is silent, isn't it, if you don't apply for bail you're going to be locked up but presumably at that stage, lawyers are going to say, "Well, I haven't got the paperwork yet, I don't know what it's about. We'll do a bail application when we've got the paperwork," and that's what happened in a practical sense when we've got it, and he lost and he appealed to –

CHAMBERS J:
Is Mr Kim held today pursuant to Justice Brewer's decision?

MR ELLIS:

Mmm, well he's – no, he was declined bail by Justice Brewer. He's held by a warrant of detention in October this year by a District Court Judge which gets rolled over.

CHAMBERS J:

What happened to Justice Brewer's decision which required him to be held in prison?

MR ELLIS:

He still is.

CHAMBERS J:

Yes but what I'm asking you is why wasn't that sufficient to continue his detention in prison? Was it time limited or something?

MR ELLIS:

Yes, until the next –

CHAMBERS J:

Where is Justice Brewer's decision? I have read it but –

MR ELLIS:

Tab 4.

CHAMBERS J:

Tab 4.

WILLIAM YOUNG J:

Presumably in each – the case is adjourned to another date and the warrant –

MR ELLIS:

It just –

WILLIAM YOUNG J:

– for detention is, expires on that date I think?

MR ELLIS:

Yes.

WILLIAM YOUNG J:

And he gets – another one gets issued?

MR ELLIS:

Yes. So if you look – you're still on tab 143, you'll see there's 144, 145, 146, 47, 48, 49 are all warrants of detention just rolled over and then there aren't in there the later ones. I mean there was some mishap at the last callover which I needn't worry you about. The Registrar forgot to cancel calling him over so we simply agreed to have him remanded without prejudice for these arguments until the next day.

ELIAS CJ:

But isn't your argument he is held pursuant to this warrant of detention –

MR ELLIS:

Yes.

ELIAS CJ:

which is effectively on the basis that the bail has been declined but you're attack is that the substratum of the warrant of detention is not lawful because the provisional arrest warrant shouldn't have issued, isn't it?

MR ELLIS:

Yes and all the detention warrants say that. They refer you back to Judge Broadmore's provisional warrants, integrated into it yes, that is my challenge.

GLAZEBROOK J:

Mr Ellis can I just, just so that I'm clear, just see whether I've got the challenges right to that provisional warrant. The first one is that there was only a suspicion of murder and one cannot in New Zealand arrest for questioning. So you say the suspicion of murder means merely a wish to question someone, have a suspect for murder but you can't arrest for questioning, that's one challenge. The second one is that the extradition request itself was not properly authorised.

MR ELLIS:

Yes.

GLAZEBROOK J:

What I did want to ask you on that is did Judge Broadmore have to be satisfied as to that or did he merely have to be satisfied that there was an arrest warrant issued by a person able in China to issue an arrest warrant, which seems to me to be a different point because in fact the arrest warrant that was before him says to bring him to the Shanghai Court, doesn't it? So the question is, I understand yes in an extradition proceeding you need the permission of all of these people.

MR ELLIS:

Yes.

GLAZEBROOK J:

But in fact does our Extradition Act say that you have to be satisfied that the – you have to be satisfied the extradition request is made, I suppose?

MR ELLIS:

Yes –

GLAZEBROOK J:

But – so, but in fact if you look at what he had to be satisfied is, all he had to be satisfied was that there was an arrest warrant by somebody who was able to exercise that in the country.

MR ELLIS:
Well it seems –

GLAZEBROOK J:
Which doesn't mean the Supreme Court or any of those people.

MR ELLIS:
I understand what you're saying. It seems to –

GLAZEBROOK J:
And probably I should, I'm not meaning to waylay us on that because if I just get the – and the other issue was the death penalty issue but there's only those three issues, aren't there?

MR ELLIS:
Well –

GLAZEBROOK J:
And I'm not denigrating the death penalty issue, I was just making sure that you knew I hadn't forgotten it.

MR ELLIS:
Well death penalty and torture, yes.

GLAZEBROOK J:
So death penalty and torture comes into that so...

MR ELLIS:
Yes well it must be a bit elementary, I suppose, that you've got to have a valid application before the Court, before the Court can accept an application and

that's my proposition, that you can't, there's no lawful authority for the PRC to come to Court and that Crown Law should have alerted the Judge to that.

WILLIAM YOUNG J:
This is a natural justice argument effectively?

MR ELLIS:
Yes –

CHAMBERS J:
The difficulty with –

GLAZEBROOK J:
But it's not actually anything to do with the provisional arrest warrant itself because –

MR ELLIS:
I beg your pardon?

GLAZEBROOK J:
Well it's just that the arrest warrant that's referred, do you accept that the arrest warrant referred to in section 20 refers merely to an arrest warrant in China and not the extradition request itself?

MR ELLIS:
Yes I do but when you look at the arrest warrant, as I think I've said in one of the other Courts, you don't actually know, for example, that there's an offence being alleged to have been committed even in China. You don't know where, where it's suspected of, intentional homicide, of who, where and when. There's no allegation of an offence in China so you can't make a Chinese extradition request.

ELIAS CJ:

I thought that your argument was directed at section 21(c) rather than section 21(a). Am I –

MR ELLIS:
Yes it is.

ELIAS CJ:
– wrong in that?

MR ELLIS:
No you're not but I'm just trying to answer Justice Glazebrook and I know Justice Chambers wants to ask something too but I'm saying you look at that, it's so fundamentally flawed you can't make an application. Where's it say he's wanted for murdering in China.

WILLIAM YOUNG J:
It's fairly obvious, isn't it?

MR ELLIS:
Well then why isn't it on the arrest warrant?

WILLIAM YOUNG J:
Because they may have a different style of drafting.

MR ELLIS:
Yes but –

CHAMBERS J:
Can I just ask you, Mr Ellis, it's really the question which the Chief Justice opened with, and which at least to my mind I haven't got a clear answer yet.

MR ELLIS:
Yes.

CHAMBERS J:

The write of habeas corpus is all about springing someone who is currently unlawfully detained.

MR ELLIS:

Yes.

CHAMBERS J:

Now as the Chief Justice pointed out, the extradition process under the Extradition Act doesn't actually need a provisional arrest warrant to get it started. It so happens in this case it is but why don't we concentrate on whether the warrant which Mr Kim is currently held under was validly made. In other words, let's take it from you, let's take it in your favour that – and I'm not saying this is the case, but take it in your favour that he was unlawfully detained at one stage, why can't that be cured by what has subsequently happened at the numerous hearings since then and in particular at the hearing under which he's currently held.

MR ELLIS:

Well the hearing that –

CHAMBERS J:

And that warrant under which he's currently held.

MR ELLIS:

Well the warrant under which he's currently held in yellow 16, sorry I forgotten we'd included it, and that was – there was no argument –

ELIAS CJ:

Sorry is it yellow 16? Oh yes, it may well be I've got the wrong colour. Yes, thank you.

MR ELLIS:

There was no argument at this hearing, or any of the others for that matter, I mean this was just a mess up with the registry. He wasn't supposed to appear on that date. He was in Auckland. They called him by mistake and we just agreed to have it adjourned without prejudice for these arguments so – but if you go back through all the detention warrants that are in tab 2 – no, tab 6, then there's never been an argument in any of those hearings that had advanced any of these things.

ELIAS CJ:

But is your answer simply that all the warrants of detention rely on the provisional warrant for arrests made by Judge Broadmore and that's the foundation for it and you say that should not have been made?

MR ELLIS:

Yes, that's precisely what –

ELIAS CJ:

And they all recite it, don't they?

MR ELLIS:

They all do.

ELIAS CJ:

Yes.

McGRATH J:

And that really comes down on your argument to whether he's an extraditable person.

MR ELLIS:

Yes.

McGRATH J:

Because that's where you pick up the issue of whether or not he is accused of having committed an extradition offence.

MR ELLIS:
Yes and whether the second argument –

McGRATH J:
I suppose though, at a bail hearing, it would be a pretty good argument for a person who's been provisionally arrested, that he was not an extraditable person.

MR ELLIS:
Well I wondered that because as I said to you if I don't succeed here I want to make a bail application next week and I'm wondering whether I'm going to be met with the same sorts of you can't argue this, it's a summary determination, and we'll never get him out. The only way you can ever get him out is a judicial review which might take forever. There seems to be – I mean that's why this was a genuine attempt to get him out of jail.

McGRATH J:
Yes I can see that. quite frankly at the present time I'm inclined to the view that you are able to attack on the basis the Chief Justice has indicated because it's a foundation decision, whether or not he is an accused person in terms of the definition of extraditable person and that that's really the main point of your argument –

MR ELLIS:
Yes.

McGRATH J:
An article 47 point as well, I'm not diminishing that.

MR ELLIS:

Yes, sure, sure. Well –

ELIAS CJ:

And the additional point that the, he's not extraditable because it's not, the information provided to the Court doesn't disclose that the agencies that have to make the request, have agreed, have done so, is that right?

MR ELLIS:

Yes.

WILLIAM YOUNG J:

So the request isn't material, is it, to the issue of the provisional warrant?

GLAZEBROOK J:

That's what I was asking.

MR ELLIS:

The request –

WILLIAM YOUNG J:

Comes later does it or can come later anyway?

MR ELLIS:

Yes, yes. But there's a – well it's in the bundle in tab 1 isn't it.

ELIAS CJ:

Well where is it, sorry?

MR ELLIS:

112.

GLAZEBROOK J:

What I'm just – what I was asking, Mr Ellis, was why was that, whether or not that procedure had been followed relevant to whether there was a provisional warrant be able to be issued. The only thing I can think of is that possibly someone can't be extraditable, although extraditable just says accused of an extraditable offence, if the procedure for extradition hasn't been followed. But in fact all that is actually required is the warrant issued in an extradition country, not the extradition request being valid.

MR ELLIS:
Well that's rather like a sort of abuse of process argument, isn't it? You can't bring a completely invalid application to a Court, it doesn't matter if it's the Extradition Act or any other Act, if you haven't got the authority –

GLAZEBROOK J:
So you just say it's a foundation to the use of section 20 even though it doesn't appear in section 20?

MR ELLIS:
Yes.

ELIAS CJ:
Well, maybe it does appear in section 21(c) because the Judge has to be satisfied –

GLAZEBROOK J:
That's what I was asking Mr Ellis –

ELIAS CJ:
– there's reasonable grounds to believe –

GLAZEBROOK J:
– whether that was the argument.

ELIAS CJ:

Yes, I think that must be the argument.

WILLIAM YOUNG J:

Yes but I think the request from the Minister comes later at least in terms of section 23.

GLAZEBROOK J:

Well you don't have to have a request for surrender before you can issue a provisional warrant, you just have to be satisfied of those factors so in fact it maybe that, well I'm not entirely sure to be honest, but –

ELIAS CJ:

I'm getting confused about the request. The request I was asking about is the Chinese agencies that all have to –

GLAZEBROOK J:

That's for extradition not for the warrant itself – well that's my understanding.

WILLIAM YOUNG J:

It's section 23.

ELIAS CJ:

Is he extraditable if those bodies have consented in terms of Chinese –

GLAZEBROOK J:

Well it depends what extraditable, because extraditable definition is, sorry I'm just trying to –

WILLIAM YOUNG J:

It's just, you just have to be accused.

GLAZEBROOK J:

You just have to be accused of the offence.

McGRATH J:

"Accused of having committed an extradition offence."

ELIAS CJ:

Yes.

MR ELLIS:

But in the request for extradition, which is 112, it does not say we've been to the five or six people that we're supposed to go to.

WILLIAM YOUNG J:

Do they need that, for a warrant, do they need that on your argument for an extradition request?

MR ELLIS:

Well they need it to start the process. It's an error on the face of the record, I suppose, isn't it.

GLAZEBROOK J:

You just say that it's – it's not in the definition of extraditable person and it's not in the section 20 provisional warrant requirements but it is a fundamental foundation to even put a request before the Court.

MR ELLIS:

Yes, yes.

GLAZEBROOK J:

That's the argument, have I understood that?

MR ELLIS:

Yes, yes, absolutely. And –

WILLIAM YOUNG J:
I'm not 100% sure I do understand it. This is to do with what appears at page 178 of the case, Article 47.

ELIAS CJ:
147?

WILLIAM YOUNG J:
No, page 178.

MR ELLIS:
Yes, the Article 47.

WILLIAM YOUNG J:
So this deals with the request for extradition?

MR ELLIS:
Yes.

WILLIAM YOUNG J:
Now we know that a request for extradition in fact was made relatively early in the piece.

MR ELLIS:
It needs to be, yes.

WILLIAM YOUNG J:
However, under section 23(4)(a).

MR ELLIS:
23.

WILLIAM YOUNG J:

Yes, subsection (4)(a).

MR ELLIS:

(4)(a), yes.

WILLIAM YOUNG J:

The request for extradition can come in after the provisional arrest warrant has been issued.

MR ELLIS:

But he didn't in this –

WILLIAM YOUNG J:

Yes, yes I know, I know but what I'm suggesting is that when it comes to whether to issue a provisional arrest warrant whether or not there is a request for extradition is a controlling consideration. There will be a controlling consideration when it comes to whether there should be extradition. Just looking at the order of events contemplated by section 23.

MR ELLIS:

Yes, isn't that the process that the Chinese and the Minister carried out is integral to the judicial review?

WILLIAM YOUNG J:

Yes – but an extradition couldn't proceed unless and until there's a request.

GLAZEBROOK J:

In section 2(2) also says you can issue it before you've got a request for surrender explicitly.

MR ELLIS:

Yes and then the Minister's got to say, you can carry on. It's not to send a certificate saying, you can carry on.

WILLIAM YOUNG J:

So say the request is invalid for the reasons you say. What does that matter in this context and at this time of the process?

MR ELLIS:

Well my man's been locked up –

WILLIAM YOUNG J:

Yes.

MR ELLIS:

– for 18 months.

WILLIAM YOUNG J:

But under the statute he can be locked up until there's a valid order. Now it's possible to test the validity of the order I guess in the extradition process.

MR ELLIS:

Yes, well in the same way, Sir, that imagine you're awaiting trial, you wouldn't expect many people to be locked up for 18 months while you're awaiting trial. You would think after some period of time they'd be let out on bail and we shouldn't start with the assumption –

McGRATH J:

But the scheme of the Act, though, is that a person can – who is accused of an extradite – who is an extraditable person who arrives in New Zealand can quickly be detained under a professional warrant if he is or she is an extraditable person. You don't have to wait until the machinery for creating an application for extradition in the foreign country has got underway. The Act's intention is to ensure for public safety reasons that a person who's accused of an extraditable offence can quickly be detained if the basic requirements of section 20 are met. The quid pro quo for that is that they must immediately be brought before the District Court so that bail can be considered but it indicates that the section 20 provisional warrant process is detached, as Justice

Young's putting it to you, from the request for extradition and as a process that is intended to operate expeditiously with a fairly low threshold.

MR ELLIS:

Well, I go along with the former but not the latter. Let us assume that somebody's absconded from jail in Thailand. They're coming to Australia and the plan stops at Auckland. You won't have very much information but you might want to arrest somebody on a provisional warrant there and then you're going to have the detention warrant hearing and I don't think that's a low threshold. That is now – somebody is being sought to be detained. It's the normal threshold for somebody being detained. There's no low threshold about it. There might be a low threshold for issuing the warrant in an emergency but in this case why is it being issued? I mean it's –

McGRATH J:

The threshold is the existence of a warrant issued for arrest, in the extradition country –

MR ELLIS:

Yes.

McGRATH J:

– and that the person is reasonably believed to be an extraditable person by the District Court with the part of that being that the person has been accused of committing an extradition offence. I mean that's the threshold. We shouldn't try and elevate that threshold.

MR ELLIS:

Well we're not. I mean 20B, 1B, says you're suspected of being in New Zealand on your way so that's the scenario that I've just given you. You're on your way so there's different standards for whether it's an emergency in my submission and whether there isn't an emergency and what we're being told here is he's a flight risk. I would say he wasn't a flight risk. He'd been here for –

ELIAS CJ:

But the flight risk –

McGRATH J:

Flight risk was only relevant to bail. The bail hearing subsequently. That was Judge Gibson's assessment.

MR ELLIS:

Well, no. At the provisional warrant hearing it's elevated to paragraph 2. It's setting the scene that this is a dangerous man –

ELIAS CJ:

But in terms of the statute it's not necessary to consider flight risk at that stage?

MR ELLIS:

It's – yes it is.

ELIAS CJ:

Unless it's an element, of course, in whether it's necessary or desirable for the warrant to be issued urgently –

MR ELLIS:

Yes.

ELIAS CJ:

I suppose it comes in there.

MR ELLIS:

Yes, it is.

ELIAS CJ:

Yes.

MR ELLIS:
So that's why I say if you're on a plane from somewhere there's a different standard. It's urgent and necessary.

ELIAS CJ:
No but it may be urgent if you're a flight risk too.

MR ELLIS:
Well yes I agree but then you've got to give the District Court Judge the relevant information that they must know where he is. He's got the criminal record – you know, that – they know where he is. He's not a flight risk. He's been here for months and months and months and he's not going anywhere. That information isn't fairly given to the Judge so it's elevated it to an urgent need for a warrant which there isn't an urgent need.

ELIAS CJ:
But then it comes back before a Judge to consider the question of bail.

MR ELLIS:
Of bail, yes.

ELIAS CJ:
Whether he has to be detained.

MR ELLIS:
Yes that's right and I started – I mean I got files and I looked at them and I thought, what's going on here? There's been two bail applications, right? There's been some errors by the Minister of Justice. He's not being heard by the Minister of Justice. He's got the power to quash and he's got the power to refused to allow the proceedings to continue.

ELIAS CJ:

But none of that is before us.

MR ELLIS:

No, no. I'm just explaining what happened. So I just said, "Right, let's do a judicial review," but then I thought, "Oh no, there's some simple points that can be done by way of habeas corpus and if we don't succeed with habeas corpus we'll go and do a bail application if we get some guidance on, 'Can we bring these issues up in the bail application?'" Because we don't want to have to go around all over again so you can't –

ELIAS CJ:

I don't see that we can give you any guidance at all on that.

MR ELLIS:

Well Justice McGrath's already said something. That's sufficient guidance for me. It'll be in the transcript.

ELIAS CJ:

Good luck.

MR ELLIS:

Do you want – yes –

ELIAS CJ:

Is that a convenient time to take the adjournment?

MR ELLIS:

Yes it would.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.45 AM

MR ELLIS:

There's two matters that I'd like to recap. One is in tab 6 which at page 155 and 156 which is in the memorandum of counsel that was before in the white volume, Justice Young.

WILLIAM YOUNG J:
Oh sorry.

MR ELLIS:
The case on appeal.

WILLIAM YOUNG J:
Oh sorry.

MR ELLIS:
In the memorandum of counsel before Justice Broadmore which explains at paragraph 11 the initial request that the Chinese have to make because their – don't have a treaty, yes we don't have a treaty with them so we've got to make a request and I don't want to take you through it all but – and then at 12 the point, I think you were trying to make there, but they did need to make in the first place, the request, and I've since that discussion I've worked out I need to amend my judicial review to say the Minister shouldn't have gone to the request in the first place but that's neither here nor there. But if you could go a little bit further along to quite a crucial document in that tab at page 174 please? And this is a document written by the head of the Shanghai Municipal People's Procuratorate, a difficult word to say, the prosecution, and he's writing to Mr Bill Peoples who's general manager of international something in the Ministry of Justice and he says –

GLAZEBROOK J:
Sorry I think I've just lost you again.

MR ELLIS:
Right, sorry. We were in the case on appeal, tab 6, page 174.

GLAZEBROOK J:

Ah, 74, thank you.

MR ELLIS:

And this is post-Judge Broadmore but it's very interesting. It's attached to Mr Kim's affidavit. It tells the process of the Chinese undertake and at 2.5.6 on page 176, "If Kim is extradited to China he will be arrested and detained in the Shanghai detention centre on the basis of either Mr Kim's confession of guilt or his innocence, the police will gather further evidence to transfer the case to the prosecution with a recommendation to initiate a public prosecution," so he's plainly not been prosecuted yet. That's what will happen if he's extradited to China. And the next paragraph, "The documents, all of the documents have been examined and verified by the Ministry of Public Security, the Supreme People's Procuratorate and the Freedom People's Courts. The documents were selected in accordance with the principle they could be proved sufficiently and validly to be a suspect of the case." He's a suspect. "Selected documents have been well arranged and will be submitted when initiating a public prosecution." So they're updating the Ministry and saying, "This is what we will do if we extradite him."

ELIAS CJ:

Sorry when was this –

MR ELLIS:

21st of July.

ELIAS CJ:

Oh, July.

MR ELLIS:

Well this letter provides supplementary information. The purpose of those letters provide my expert opinion on criminal procedure provisions. I describe below what happens. You filed a case, you arrest somebody." 2.54 quite interestingly – well, I found it interesting – you can't actually get the

documents until you've been charged. So you can't look at anything until you've been charged and you can be detained for questioning, apparently, for up to 13 months. So, I mean, the question of a fair trial is neither here nor there for this hearing but this is the expert giving evidence about what happens and he says we'll send you back to China, we'll gather further evidence, and then we decide to recommend or not, depending on whether you've confessed your guilt or your innocence then we decide on a prosecution.

ELIAS CJ:
When was this – was this put before –

MR ELLIS:
No.

ELIAS CJ:
– anyone, no.

MR ELLIS:
No because it's July the 21st. It's been put before the – yes, it's before the District Court –

ELIAS CJ:
Is this before the High Court?

MR ELLIS:
Yes, this was before the High Court, and the content of it went before the District Court but not at the provisional warrant stage. But it's further information. It's the expert evidence as to what's happened that the Crown have tendered. They say we are going to send him to China and we'll decide so there can be no reasonable explanation that they want to question him and you do wonder why he's been in prison for 18 months, somebody hasn't been around to question him.

ELIAS CJ:

Well it's probably a system in which formally an accused person must be questioned before a public prosecution is initiated.

MR ELLIS:

Well that maybe the case but, I mean, you don't have the right to silence or a lawyer or all these sorts of things.

McGRATH J:

The process doesn't sound to be markedly different from the processes in Europe in terms of their jurisdiction in some of the cases that are looked at over there where the proper, one of the, they talk about the purpose of the questioning is to decide whether or not, contrary to the thinking at that stage, there was good reason not to proceed directly to trial.

MR ELLIS:

Well –

McGRATH J:

We can't get hung up on the common law system here. We have to interpret these provisions in relation to international law which they're part of. They're implementing international law.

MR ELLIS:

Yes but if you want to go down that track you've got to consider whether he's capable of getting a fair trial and –

McGRATH J:

The issue is whether he's an accused person in terms of the definition of "extraditable person".

MR ELLIS:

Well yes that –

McGRATH J:
Your argument is he's not an accused person, he's only a suspected person.

MR ELLIS:
Yes, but if you're saying it's like Europe, which respect it's got some similarities, but there isn't an examining Magistrate here is there? There's not a judicial officer questioning him like many of the European systems. This is the prosecution questioning him and/or the police who, in my submission, have a track record of torture.

McGRATH J:
Well I appreciate those points but I want you to focus on whether or not he's an accused person and I'm putting to you that we should not treat the term "accused person" as we would in our domestic legal system where we might even say you have to be charged before you're an accused person. But in other countries the system doesn't work that way and I'm suggesting to you that there is authority supporting that view in terms of cases like *Ismail* and *Assange* which is in the English Court of Appeal.

MR ELLIS:
Yes and I'm putting to Your Honour that if you read 2.5.6 and 7 is quite clear that whatever you call "accused" this man is wanted for nothing more than questioning, whatever the system may be, anywhere. He is not going to be prosecuted until he has been questioned here and been found to be a valid suspect in the case. That's all. They haven't – and they've had plenty – they've had 18 months to come and question him if they wanted to and they could have moved to the next stage except they don't want to come and question him here because he's got the right to silence and the right to a lawyer, which he won't have over there. So it's plain, it's plain as day that he is not being prosecuted so if he's not being prosecuted he can't be accused. There's no other rational explanation to what this Chinese expert says.

McGRATH J:

Are you going to deal with those authorities? I don't read them at the moment in exactly the same way as you do.

MR ELLIS:

Well I will deal with them in reply because I know my friends are going to take them –

ELIAS CJ:

Well if you're going to leave the substantial part of your argument to reply that maybe rather unsatisfactory. I think you should probably develop it now so that we can hear what the Crown has to say in respect of it. But I do think that it will be necessary for you to conclude by lunchtime, Mr Ellis, to give the Solicitor-General an opportunity to respond.

MR ELLIS:

Yes. Well in the respondent's bundle at 12, the Australian case there, that I'd like to recite, I think the best explanation, as I saw it, I think this is Justice Gummow at page 558.

ELIAS CJ:

Sorry, which tab is it?

MR ELLIS:

The last one, 12. This is the one that my learned friends got in the High Court after nipping out to the library to find it and at the middle of page 558 we have the term conviction and convicted do not include or refer to conviction so we've got the term accused person includes a person so convicted. As – the last paragraph – "As was pointed out in *Narain* (1987) 15 FCR 411, in the common law the term 'accused' is not a legal term of art. It may be used in legislation with purely domestic concerns so as to encompass terms such as 'charge', 'indict', 'impeach', 'arraign', 'incriminate', as well as to refer to the laying of an information in a private prosecution. But it would not readily be

understood as including suspicion by prosecuting authorities but without prosecution. Much would depend upon the particular statutory of constitutional context where what is in issue is a constitutional guarantee."

So I rely upon that and say the expert says this is not conviction, indictment, whatever. The only rational interpretation is that it's questioning. It's mere suspicion. That's the best point I've got to reply to the Crown's submission. I suppose I've also got, which you'll probably tell me off for but I'll give it a go, the House of Lords case in *Re Guisto* [2003] 2 All ER 647 (HL) which is my yellow bundle 13, where it is plain that, I'll go to the conclusion of Lord –

McGRATH J:
Can I just say that, just coming back to –

MR ELLIS:
Yes.

McGRATH J:
– *Kainhofer*, I just notice in the head-note at page 529, the final six or seven lines speak of the fundamental question as being whether the person whose extradition is sought is one in respect of whom they have been taken by the competent authorities in the extradition country, "A decision to invoke the operation of the criminal law by the taking of steps that are necessary to initiate what might fairly be described as a prosecution." Is that a – I can't place that immediately in Justice Gummow's judgment but is that – do you accept that's the test we that we should be applying when looking at the term "accused person"?

MR ELLIS:
Yes I think that's a fair summary of what he's saying, yes.

McGRATH J:
Right, thank you.

MR ELLIS:

And I think it just followed because my recollection was - my friend's read out something and I looked a little backwards.

GLAZEBROOK J:

If you look at page 564 I think, at the bottom of 564?

MR ELLIS:

564, yes.

McGRATH J:

Thank you. Ah yes, thank you.

MR ELLIS:

Yes, I looked a little backwards so there's – yes, must be in advance of mine. Yes, so I just wanted to say, didn't I, tab 13 of the yellow bundle, the House of Lords decision there that – in paragraph 41 in the conclusion of Lord Hope's judgment to at least two Lords agree with, Lord Nicholls and Lord Rodger and not too sure about Lord Hutton but anyway the majority say you must ensure that the extradition procedures are strictly observed. The importance of the principle cannot be over emphasised so I'm saying you've got to have strict adherence and so, well I understand you want me to finish by lunch time it's nice and generous, I wasn't planning to go that far because you seem to –

ELIAS CJ:

Well don't take it all if you don't need to, Mr Ellis.

MR ELLIS:

No, no, I just wanted to go now, if I could, to the second proposition, the article 47 argument which you seem to have grasped anyway, and if I could go to my submission at page 25, paragraph 86 and there it sets out the five ministries that we're supposed to have forwarded their opinion to set out the article which has been supplied by the prosecution and –

ELIAS CJ:

Mr Ellis, I wouldn't want you to be under a misapprehension. You say we've clearly grasped this. For my part, I have not really appreciated until the argument that this question may well be irrelevant?

MR ELLIS:

This question?

ELIAS CJ:

Yes. On the statutory provisions. And I'd like you to explain why it's relevant under section 20.

MR ELLIS:

20? And (c). Well it's a foundation argument. You can't come to Court and say, "I've got an extradition request," if you haven't got an extradition request.

ELIAS CJ:

But we're not dealing with the extradition at this stage. We're dealing with the provisional arrest warrant.

MR ELLIS:

No, we're dealing with extradition. I mean the provisional warrant is an arrest under the Extradition Act 1999.

ELIAS CJ:

I understand that.

MR ELLIS:

Can't conjure it up.

ELIAS CJ:

But the decision as to extradition is not being made at this stage.

MR ELLIS:

Well in my submission, you can't advance anything under the Extradition Act unless you've got a proper request before the Court.

WILLIAM YOUNG J:

But that's not – can't be right because you can get a warrant without a request under – section 20(2) says that.

MR ELLIS:

But you can't get a warrant if it's unlawful if there's some, if it's not ex parte and there's a reasonable –

WILLIAM YOUNG J:

But that's a different issue. The –

MR ELLIS:

No it's not it's the same issue Sir.

WILLIAM YOUNG J:

Well say they had mentioned nothing about the extradition request.

MR ELLIS:

Yes.

WILLIAM YOUNG J:

That wouldn't have stopped a warrant – that wouldn't have been material to whether a warrant would issue? The section 20(2) doesn't require –

MR ELLIS:

Yes, I understand what you're saying but section 20(1)(c) says, "There are reasonable grounds to believe that the person is an extradition person."

WILLIAM YOUNG J:

Is an extraditable person, yes.

MR ELLIS:

Well how can he –

GLAZEBROOK J:

As defined in section 3?

MR ELLIS:

Well how can he be if there's no –

GLAZEBROOK J:

But the definition of "extraditable person" is given in section 3.

MR ELLIS:

Yes.

GLAZEBROOK J:

And it just says someone who there is reasonable grounds to believe is accused of an offence, I'm sorry, I might have the wording slightly wrong.

MR ELLIS:

Sure, but I'm saying –

WILLIAM YOUNG J:

But it doesn't say anything about a request having been made.

GLAZEBROOK J:

And it couldn't because subsection (2) of section 20 quite clearly says a request doesn't have to have been made.

CHAMBERS J:

So in other words you must be able to apply the section 20(1) test in the absence of a request for surrender and the information that such a request would normally contain. So the test can't be higher than that.

MR ELLIS:

Well the warrant for the arrest of the person is pretty useless. It doesn't describe that he is an accused person or that he's committed a crime in any particular country, who the victim is, or when, it's a pretty slack piece of paper in terms of an arrest warrant so it doesn't fulfill (a). He is in Auckland and they know he's in Auckland and they've been dealing with him through the New Zealand criminal justice system and in my submission there is nothing necessary or desirable that a warrant be issued urgently and there can't be any reasonable grounds to believe he's an extraditable person because there isn't an extradition offence which is purported to have been sought for.

WILLIAM YOUNG J:

Well these are all other arguments. These aren't arguments that are directed to the request issue and it's –

MR ELLIS:

The request issue?

WILLIAM YOUNG J:

What you're saying is that the request issued by the Chinese Government does not qualify with the – was made without the requirements of Article 47 having been satisfied.

MR ELLIS:

Yes?

WILLIAM YOUNG J:

Okay. Thinking only about that issue, nothing else, on the face of it that's irrelevant because it wasn't a material consideration or a required

consideration when the arrest warrant was applied for. So they didn't need a request.

MR ELLIS:
No, no, no well your thinking of request in terms of the piece of paper that they've described as request –

WILLIAM YOUNG J:
Yes.

MR ELLIS:
– for extradition. I'm saying, that's on, I don't remember where it was, towards the end of the first bundle, 112, request for extradition.

WILLIAM YOUNG J:
Yes.

MR ELLIS:
Whether they needed one or not they've got one and they've given it to the District Court Judge. But I'm saying you can't make a request to the Court, you can't file an application unless you've met the foundation of the – your own domestic law because otherwise –

ELIAS CJ:
Well that maybe an argument that will succeed on the section 24 hearing.

MR ELLIS:
Well hopefully.

ELIAS CJ:
If this is the only document before the Court, if this is the only information.

MR ELLIS:

Well they have made a request, haven't they?

ELIAS CJ:

But they can supplement it. They just have to make another one.

MR ELLIS:

I know they can and I've been saying to them, make another one, if I'm wrong, show me. I don't mind being wrong, just produce a piece of paper and say I'm wrong but three months –

McGRATH J:

But the authorities are entitled to say, we have complied with the statutory requirements and that's – we don't have to do more. And that means you have to answer that argument.

MR ELLIS:

Well I do by the letter to Mr Peoples from their own expert. It's plain as day that they haven't fulfilled the requirements on the first point.

McGRATH J:

We've addressed that. We didn't go back to that.

MR ELLIS:

But on the second point, on 2.5.7 page 176, he's addressing the second point I have, isn't he? It's been examined by one, two, three people. It's got to be examined by five and it hasn't – they haven't examined it in the way that article 47 says so he's giving expert evidence that it's not being complied with, effectively.

WILLIAM YOUNG J:

He may be giving expert evidence that what's been done is sufficient?

MR ELLIS:

Well he doesn't say that.

WILLIAM YOUNG J:
Doesn't he?

MR ELLIS:
And that's what I say. If somebody wanted to produce another piece of paper and say, "What has been done is sufficient," then my argument collapses but they've had three months and they won't produce that because it doesn't exist and it hasn't happened. It's that simple. Now I've either convinced you or I haven't and I can just move, no I obviously can't – I was going to just move to my conclusion. Yes, well, we might not have known about the expert opinion in June before Judge Broadmore but we know in July because they tender it and as we offered to them, "Have a week, find it," and we've had three months so we've had nothing, nothing extra. So returning to my conclusion, *Manuel* was decided in 2004. Nobody was seeking to challenge it here. We specifically asked the High Court, on the invitation effectively, of Austin Powell, Crown counsel, who, as always, behaved in an exemplary model litigant fashion, maybe you can treat it as a judicial review and come back next week? We're quite happy to do that but that wasn't a direct – there's no challenge.

CHAMBERS J:
Can I just ask you, Mr Ellis, is it your contention that Mr Kim has been unlawfully detained ever since Judge Broadmore's warrant?

MR ELLIS:
Yes.

CHAMBERS J:
And let's assume it was wrongly issued. Was it possible, in your view, or the position to be corrected or was the die cast the moment Judge Broadmore made his, in your submission, error?

MR ELLIS:

Well I would like to think it could and should have been corrected at detention warrant number 1 or any subsequent warrant thereafter.

CHAMBERS J:

So how could it have been corrected?

MR ELLIS:

How could it have been corrected? By arguments that have been advanced both today and some of the judicial review arguments as well that don't relate to matters beyond the jurisdiction of the District Court, the Ministry of Justice stuff. So they could be like – well, like, if we go back through a new bail application and –

CHAMBERS J:

Well, Mr Kim was represented by counsel at those earlier hearings.

MR ELLIS:

Yes?

CHAMBERS J:

These arguments weren't taken then. What effect, if any, does that have on the lawfulness of the detention?

MR ELLIS:

Well, Mr Foley is a very able criminal lawyer. He's not a human rights lawyer. He didn't bring him – Mr Kim hasn't waived any of his arguments and is no fully –

ELIAS CJ:

But if the detention is unlawful –

MR ELLIS:

It doesn't matter, yes.

ELIAS CJ:
It doesn't matter?

MR ELLIS:
Doesn't matter, I agree.

ELIAS CJ:
No.

MR ELLIS:
Yes, doesn't matter what – who argued what, when. You can't agree to be unlawfully detained.

WILLIAM YOUNG J:
Well if you agree, you're probably not unlawfully detained but I mean – but not taking the point is not an agreement.

MR ELLIS:
I don't think you can agree to be unlawfully detained.

ELIAS CJ:
But habeas corpus is not discretionary.

MR ELLIS:
You can't agree to be unlawfully detained. That's unlawful and the Judge shouldn't accept the agreement and the Judge is – I might be asking for a greater level of scrutiny than is currently required that then our law shouldn't be any worse than Kazakhstan's which, if you don't have the level of heightened scrutiny and the human rights approach from the beginning then I'm afraid it's going to be. Yes, so I'd say he's been unlawfully detained from the start and he should – and that's been 18 months. He can be released and the extradition can continue and the judicial review can continue and no doubt

it's going to continue for some time. Yes, unless there's any questions, I'm not going to take you until lunch time.

ELIAS CJ:

Thank you Mr Ellis. Yes, Mr Solicitor?

SOLICITOR GENERAL:

Yes, good morning everyone – or good afternoon I should say. If I could just assemble myself, Ma'am?

ELIAS CJ:

Yes, of course.

SOLICITOR GENERAL:

And would you mind if I pick out from my written submissions, in particular the issue I wanted to commence with was the issue in para 2.1 and that is in – doe the Court of Appeal's decision in *Manuel* correctly describe the constraints on the High Court's jurisdiction? And could I add to that, and it's important in my argument, that in the context of extradition because at the end of my argument I would like to urge the Court, at least, to consider to adopt the approach in *In re Ismail* [1999] 1 AC 320 (HL) and *Kainhofer* and the statements there, and if I can come to those in due course, and in the course of my argument I hope to deal with to the extent necessary the two deficiencies that my learned friend, Mr Ellis, raises. Those are set out at 2.2. I won't...

ELIAS CJ:

Mr Solicitor, I'm just thinking, Mr Ellis didn't challenge *Manuel*, somewhat surprisingly.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Perhaps – and really, it does seem to come down almost to a question of fact on his argument, does it not?

SOLICITOR-GENERAL:

It seems to, at least – there are some legal impediments I would put forward later, I'm certain of the arguments, but there is a factual content at the heart of the accused's point and I think, Your Honour, *Ismail* and *Kainhofer* and even *Assange* talk about this reasonably cosmopolitan approach that one should take to that phrase and I think that's –

ELIAS CJ:

Yes, yes.

SOLICITOR-GENERAL:

– probably clear enough to the Court for him.

ELIAS CJ:

And then I – well, by all means, going to that but I wonder also whether you've heard the discussion as it's developed concerning the terms of section 20 –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

D – and I think we'd also be assisted if in your oral submissions you would develop slightly more than is in the written submissions any argument you want to, relating to the terms of the Extradition Act.

SOLICITOR-GENERAL:

Yes, all right. Would you mind if I –

ELIAS CJ:

And in particular –

SOLICITOR-GENERAL:
– carried on through the –

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
And just in summary, it is our submission that Justice Kós in the Court of Appeal rightly concluded that those two issues were not capable or fairly capable of summary determination and I want to, and do, urge this Court to consider *Manuel* and consider confirming that that approach is right in this context and that –

GLAZEBROOK J:
I must say for myself I can see quite a lot of merit in Mr Ellis' submission that if they're capable of summary determination for the purpose of an arrest warrant, then the actual legality of them should be capable of summary determination in a habeas corpus application if, indeed, summary determination is the test and *Manuel* is right in that.

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:
So for myself, I would see the issue is whether the request for surrender was rightly performed as irrelevant to section 20 because at nowhere does it come under section 20.

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:

And as for the other one, there seems to be a wealth of material and it's been conceded there's a prima face case to say that the person is an accused person without even necessarily needing to go into the issue of equivalents in different legal systems.

WILLIAM YOUNG J:
I think the concession was there's a prima face case that he's guilty.

GLAZEBROOK J:
Well that's right so –

WILLIAM YOUNG J:
Not that he's a prima facie case that he's an accused person.

GLAZEBROOK J:
Well, no, no. I understand that but it seems to me that the two are likely to –

ELIAS CJ:
Come together at some stage.

WILLIAM YOUNG J:
Yes, yes.

SOLICITOR-GENERAL:
Well, one would hope so Your Honour and I don't disagree with Your Honour's observations and if the Court were all of the same mind then I could move on.

GLAZEBROOK J:
No, I was speaking for myself so...

SOLICITOR-GENERAL:
But I do think there's a wealth of material on my submission that was available to Judge Broadmore to conclude there were reasonable grounds that Mr Kim

was an extraditable person and that he was an accused applying *Ismail* and *Kainhofer* and the like and the difference, if I may just pick up Justice Glazebrook's question, the difference is that on habeas, that's a final determination that he isn't an accused is what my learned friend is asking whereas Judge Broadmore was faced with reasonable grounds to believe that he is one and the two are different in my respectful submission, albeit acknowledging Justice Glazebrook that the attraction of the argument, if it is capable of Judge Broadmore reaching that conclusion then in certain circumstances I would readily concede it's also capable for the High Court to reach a conclusion but bearing in mind the context and the constraints that one is acting under.

Well, Your Honours, I might move through this summary and –

ELIAS CJ:
If by that last statement you were – as I imagine you were, rehearsing *Manuel* if it is *Manuel*, again. I should say that I have some real difficulties with that approach.

SOLICITOR-GENERAL:
Mhm.

ELIAS CJ:
So you shouldn't assume that I'm with you on that.

SOLICITOR-GENERAL:
Sure.

ELIAS CJ:
Or even that I would want to do more than record Mr Ellis' indication that he's not attacking that –

SOLICITOR-GENERAL:
Yes.

ELIAS CJ:

– authority. But it does seem to me that if there is any element which is necessary to detention it must be able to be challenged in habeas corpus proceedings and I don't, myself – I'm not convinced that a summary approach means that you can't enquire properly into those essential elements of detention.

SOLICITOR-GENERAL:

Well the Habeas Act makes it clear under section 14 that the Court must enquire to matters –

ELIAS CJ:

Yes, exactly.

SOLICITOR-GENERAL:

– of fact in law claim to justify the detention.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And in my submission, that's really the elements that the Court has been looking at in terms of the provisions warrant.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

But I will go further and pick up Justice Chambers' line of thinking as, well, even if you were to conclude that the provisional warrant was not lawful which I don't accept at all, I think it patently was, but even if you were you then need to look at, and you are required to, to look at the current detention and the lawfulness of that detention and what would be the relevance of the earlier

could I put it error and that's just traditional looking at procedural error along the way and what other –

GLAZEBROOK J:

What else has happened since the provisional warrant to provide further information? Possibly the letter that we were taken to by Mr Ellis but what else has been before the Courts because obviously yes, one can fix that up but only if extra material has been put before the Court that might be relevant.

SOLICITOR-GENERAL:

Yes I understand. In fact there's four Eastlights now before the District Court because they're preparing, obviously, for the section 24 hearing so – and of course you've seen the additional material that came in July, but there's a raft of further material before the District Court that, of course, this Court isn't aware of because we, rightly in my submission, say well that's not for this Court to look at, that's for the section 24 and all the protections there. So there's volumes and volumes of material that's before the District Court and that's my point that one can't approach this in a vacuum.

GLAZEBROOK J:

Well if you're asking us to say, even if the original one was unlawful the current detention is not because there's a whole lot of material that we don't know about, that becomes a slightly different argument – a slightly difficult argument for the Crown, I'd suggest.

SOLICITOR-GENERAL:

Well I don't need to make it so I'm not –

GLAZEBROOK J:

So you're making the argument that the provisional warrant was properly issued in accordance with the statute?

SOLICITOR-GENERAL:

Absolutely, yes, I am. But I wouldn't concede that even if it wasn't that has a necessary impact downstream quite some 18 months later without at least enquiring into the questions you've asked as to what has changed. For example, the Minister has confirmed that a request has been received so we have moved on. The provisions of detention are different in any –

ELIAS CJ:
But you don't have to have a request under section 20.

SOLICITOR-GENERAL:
That's right.

ELIAS CJ:
And on the elements of section 20 I would have thought if there was additional material bearing on section 20 considerations they'd either be before this Court or we can take it that there aren't any bearing on it?

SOLICITOR-GENERAL:
I'm not convinced of that Your Honour but I don't need to convince so I'll put it that if it's not relevant to the sensible and fair determination on the summary level then –

ELIAS CJ:
Well I don't understand this reference, I must say, to summary level. I know there are expedited proceedings but he Court has to give it what it takes to make the assessment whether the detention is lawful and that's the reasoning in *Manuel* that I find very difficult to accept.

SOLICITOR-GENERAL:
I see.

ELIAS CJ:

So I just wanted you to be aware of that. I don't know that it's necessary for you to go there.

SOLICITOR-GENERAL:
That is the question isn't it. I would invite the Court because in the declining to give leave in *Manuel* you might recall –

ELIAS CJ:
No but we –

SOLICITOR-GENERAL:
– the question.

ELIAS CJ:
Did we?

WILLIAM YOUNG J:
I thought we did.

ELIAS CJ:
I thought that was precisely what we gave leave on actually.

SOLICITOR-GENERAL:
Well I'll get, I'll dig that up because there was the comment that in another case there may – issues of the scope within the habeas jurisdiction of judicial review were for another day. Now probably this isn't that day but –

GLAZEBROOK J:
I think that's what I was suggesting to you, that this isn't that day.

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:

Because I must say for myself I'm not certain about *Manuel*. I'm not necessarily as uncertain as the Chief Justice but certainly by no means certain that *Manuel* or the distinctions in *Manuel* are correct. But, in fact, there is no need to deal with it in a situation where, to me, the facts seem pretty overwhelming in terms of that provisional warrant.

SOLICITOR-GENERAL:

Well I certainly hear that and I, of course, can't force the Court to consider something that isn't really before it. We had prepared, obviously, on the basis that there was that indication.

ELIAS CJ:

Well the approved ground is whether the Courts below were correct to just dismiss the proceeding because the alleged deficiencies in the request to surrender and the application for a provisional warrant were not suitable for determination on a habeas corpus application. It seems to me –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– immediately to raise – and it is the basis on which the Courts below decided this matter.

SOLICITOR-GENERAL:

Yes, yes, and we support that. What I was saying about the grounds of leave that was, my comment was in *Manuel* leave was declined so if *Manuel* –

ELIAS CJ:

Oh I'm sorry, yes.

SOLICITOR-GENERAL:

– being a Court of Appeal case –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– and this Court declined leave, as I recall.

ELIAS CJ:

Well three Judges of the Court.

SOLICITOR-GENERAL:

Three Judges.

ELIAS CJ:

It might have been two Judges actually.

SOLICITOR-GENERAL:

I don't know.

ELIAS CJ:

It was a leave judgment however.

SOLICITOR-GENERAL:

It was, yes.

ELIAS CJ:

But the matter is before us at the moment although Mr Ellis doesn't want to argue it and so you really only need to meet the argument that he's put up.

SOLICITOR-GENERAL:

I accept that.

CHAMBERS J:

Just as a matter of interest, do we have in the documents the document by which the Crown commences a section 24 hearing or the move towards surrender, not the provisional, the application for the provisional warrant but the document by which you then start towards the section 24 hearing. Do we have that document?

SOLICITOR-GENERAL:
I don't believe we do but I suspect it is the documents that you've referred to in the sense that the provisional warrant –

CHAMBERS J:
But clearly you can go to a section 24 hearing without a provisional warrant.

SOLICITOR-GENERAL:
Yes, yes.

CHAMBERS J:
And so what I wanted to see is, what is the document by which you commence a section 24 hearing process?

SOLICITOR-GENERAL:
Yes, I don't know but let –

CHAMBERS J:
We don't have it?

SOLICITOR-GENERAL:
– me check that, I don't think we have it on the case. We can certainly find out. I don't know myself whether such a document exists in this case but we don't have it, I can say that.

CHAMBERS J:

There's nothing in regulations or anything which dictates the form of that document?

ELIAS CJ:
Prescribed form, yes.

SOLICITOR-GENERAL:
Not that I'm aware of but again I don't know.

CHAMBERS J:
Okay.

McGRATH J:
Just while we're talking about regulations I would be interested in knowing the regulations which presumably give effect to treaty arrangements of a general or specific kind whereby New Zealand and China have extradition, have settled on extradition arrangements which have been given effect under the Extradition Act.

ELIAS CJ:
They haven't, have they? No.

SOLICITOR-GENERAL:
There isn't a treaty between –

McGRATH J:
There's no treaty.

SOLICITOR-GENERAL:
No.

McGRATH J:
So we're acting under the general –

SOLICITOR-GENERAL:
That's right.

McGRATH J:
– ad hoc provisions if you like?

SOLICITOR-GENERAL:
Yes.

McGRATH J:
Of the Extradition Act.

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:
But that section 67 has an equivalent to section 22 and to section 23, six or whatever it is.

ELIAS CJ:
Yes.

McGRATH J:
Thank you.

SOLICITOR-GENERAL:
I don't believe then, unless there are questions arising, I've recited the facts from pages 4 through to the commencement of our submissions. If I could just pick them up there at page 6 unless there's any questions before that? and I'm not sure whether the Court has had an opportunity to read through these because I won't spend much time.

ELIAS CJ:
No we've read them.

SOLICITOR-GENERAL:

All right, thank you. The points that I did want to come through to then is habeas corpus at early stages of extradition proceedings because I am urging this Court to reflect the kind of caution that in Australia in Canada and in the United Kingdom is also exercised and we state at para 25 that we've identified only two occasions. My learned friend quite rightly points out *Mailley* as another case. It's a slightly different one because it's a backed warrant case so it's Australian and you might recall, you probably do, the slight difference in process. But the Crown isn't contending that an extradition habeas doesn't have a place at all. There will be, in my submission, rare cases that it does and in the case – we included *Poon v Police* [2000] 2 NZLR 86 (HC) and *Inglin v General Manager of Auckland Remand Centre Prison, Australasian Correctional Management Ltd* HC Whangarei M30/01, 9 June 2001 in particular. *Inglin* was a provisional arrest warrant which was challenged and over the weekend, Justice Nicholson dealt with that and reached conclusions that the provisional warrant was lawfully issued and *Mailley* is obviously another example.

So we're not suggesting that it has no place at all but I do want to submit to the Court that there is, as in Australia, or ought to be, a strong presumption against interference with the extradition process and I'll come to the language used in other jurisdictions and the language used in *Ismail*.

ELIAS CJ:

But in this case in footnote 40 –

SOLICITOR-GENERAL:

Yes?

ELIAS CJ:

– presumption against interference within fragmentation of the extradition process. What sort of context is that?

SOLICITOR-GENERAL:

Can I take you to that?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

That's tab 4 and –

ELIAS CJ:

Of your?

SOLICITOR-GENERAL:

Of the bundle of authorities. Just want to make I've got mine marked.

ELIAS CJ:

I just wonder what the nature of the fragmentation was.

SOLICITOR-GENERAL:

The nature in *Vasiljkovic* and excuse my pronunciation.

ELIAS CJ:

I think that's probably perfect.

SOLICITOR-GENERAL:

Could I just take you to that? It's tab 4 of our bundle of authorities because it does have some similarities, albeit it's a long way further down the track. Mr Vasiljkovic, if we look at the head note, was arrested pursuant to a provisional warrant. He was remanded in custody. There was then a request to prosecute him before a Croatian Court in allegations of war crimes. There was the requisite ministerial notice and then the process proceeded. Ultimately an order was made that he be surrendered.

ELIAS CJ:

Sorry what was the nature of the challenge? What was he to – what –

SOLICITOR-GENERAL:
The nature of the challenge in this case was habeas corpus.

ELIAS CJ:
But on what basis?

SOLICITOR-GENERAL:
On the basis – and I'll come to that because it had a rather tortuous regime if – for example at para 33, and this is where some of the similarities come, so para 33, page 332, the statement of claim filed was seeking declarations that, "The applicant is not an extraditable person. He's been unlawfully imprisoned and he's only required for questioning. He's not accused of or charged with offences and he also sought a writ of habeas corpus."

Now it occurred at a different stage but as an overview of Mr Vasiljkovic's case which comes at para 40, and you'll see again some similarities in the case being put.

GLAZEBROOK J:
Well this wouldn't be something that we would say that it's a jurisdictional fact and the magistrate satisfied of it so that it wouldn't be subject to review is that if you look at paragraph 66.

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:
I mean wouldn't it be at the heart of any determination as to the legality of a provisional warrant and, in fact, the person that – well, that there were reasonable grounds to believe that somebody was an extraditable person?

SOLICITOR-GENERAL:

Well, for example, if the material was just –

GLAZEBROOK J:

And if absolutely, clearly they weren't –

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

– because quite clearly they were never accused of anything whatsoever then there would have been no grounds for doing it. We wouldn't say, oh well it's a jurisdictional fact and we don't worry about it.

SOLICITOR-GENERAL:

No. And I worry a little about this report in the sense is whether that is reporting the argument or the conclusion. So I wasn't relying on that at all.

GLAZEBROOK J:

Well it seems to be recording the conclusion.

SOLICITOR-GENERAL:

It certainly records the conclusion in other cases and I'm just not sure whether that was the conclusion of the Court –

GLAZEBROOK J:

Well it says, it discloses no reasonable cause of action. The argument is earlier, isn't it, that's the analysis of the submissions.

SOLICITOR-GENERAL:

Right, right.

GLAZEBROOK J:

So they throw that out on the basis that they're not even going to look at it. Which just couldn't be the case here, could it?

SOLICITOR-GENERAL:

No we don't suggest that the Courts –

ELIAS CJ:

The exception was in the Australia administrative law again.

SOLICITOR-GENERAL:

So restricted. I was relying on the authority for the comments in para 84.

ELIAS CJ:

This may well be about judicial review interfering with the statutory process because of course the Australians do have a very different approach to judicial review.

SOLICITOR-GENERAL:

It could be, I mean it's certainly commenting about habeas interfering as well, and the risk, we've got it here, is that we have a lot of protections that were referred to in a process and it gets protracted or delayed by other collateral attacks.

GLAZEBROOK J:

But this isn't really a collateral attack, is it? It's just saying, I shouldn't be in detention because section 20 is not met in my case.

SOLICITOR-GENERAL:

Well –

GLAZEBROOK J:

Because I'm not an extraditable person and then there's a subsidiary argument which I think we've probably indicated we don't think is anything to do with section 20 and this –

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

– subsidiary argument is that the extradition process was flawed i.e. the request – sorry, the request was flawed, but that doesn't seem to me to have anything to do with section 20.

SOLICITOR-GENERAL:

Yes, yes. My concern, I suppose, is that the Courts don't get distracted in this regime and delay it when Justice Chambers' comments are absolutely right. It's supposed to work fairly and quickly.

GLAZEBROOK J:

Well, but fairly and quickly, if you're not supposed to be in detention because section 20 isn't met, then you shouldn't be in detention should you?

SOLICITOR-GENERAL:

Yes that's right and one –

GLAZEBROOK J:

However quickly the other processes are going.

SOLICITOR-GENERAL:

Well, and of course this habeas commenced 12 months after. Or more than.

GLAZEBROOK J:

Well it doesn't really matter if you've – are not lawfully in detention then you shouldn't stay in detention whether it's 12 months after you've been in – in fact it's almost worse if it's 12 months afterwards isn't it?

SOLICITOR-GENERAL:

I suppose if it's patently so but if it's not patently so then one wonders why.

McGRATH J:

There's been no decision of the District Court and these various adjournments of dates that's based on the existence of a habeas corpus proceedings is there? As a reason for not getting the extradition proceedings under section 24 underway.

SOLICITOR-GENERAL:
Not that I can see, no.
McGRATH J:
No.

WILLIAM YOUNG J:
I thought there was actually.

ELIAS CJ:
Yes, I thought there was too.

WILLIAM YOUNG J:
I thought the extradition proceedings had been put off because of the habeas proceedings.

SOLICITOR-GENERAL:
Oh there is – now we come – I think we have the history that we provided certainly doesn't refer to that so that might have come more recent because the early remands were, and the early adjournments of the extradition hearing were on the basis of incomplete disclosure or inadequate time to prepare. I might just check that. I'm advised the October hearing was adjourned because of judicial review but I'm not sure whether –

WILLIAM YOUNG J:
I'm looking at the decision of Justice Kós, his timetable, the timeline which –

SOLICITOR-GENERAL:
Right.

WILLIAM YOUNG J:

– refers to what happened in September. Applicant's counsel applied for fixture on 15 October to be vacated pending determination of habeas corpus and judicial review applications.

SOLICITOR-GENERAL:

I beg your pardon.

WILLIAM YOUNG J:

7 September People's Republic of China's counsel opposed vacation of 15 October and then at some stage there must have been – ah yes, surrender eligibility hearing 15 October vacated on application by Mr Kim. I may be –

ELIAS CJ:

I don't know that that was linked with the habeas corpus though, was it?

WILLIAM YOUNG J:

Well that was the – the basis of the application but whether that was the basis – well I'm just looking at what the Judge has said –

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

– it doesn't say that that was the basis of the decision.

SOLICITOR-GENERAL:

No, forgive me, I wasn't involved at all. I don't know that that was advanced. In any event the concern is there in the Federal Court of Australia and it's repeated elsewhere and I want to just draw that to the attention of the Court. And we – I'm just coming back to my written submissions at 27 in another case involving the same application what occurred, and that's possibly one option, is to adjourn it until after the issue could be considered at the very

hearing that appears to be delayed at least the section 24 hearing because that will be a live issue.

ELIAS CJ:

Well she can't adjourn an application to discharge from unlawful detention. You've got to give that priority.

SOLICITOR-GENERAL:

That must be the case.

ELIAS CJ:

Yes. You can't wait for the arrow to catch up.

SOLICITOR-GENERAL:

No, no. well a statute doesn't seem to allow for it. *United States v Gaynor; Re Gaynor and Greene [No 3]* [1905] AC 128 (PC), the Canadian position, there's a couple of cases there which I wouldn't mind just pointing out some relevant passages. So this is para 28 in *Gaynor* –

ELIAS CJ:

Where do you find *Gaynor*?

SOLICITOR-GENERAL:

I'll just get that for you, that's at tab 6. Here the two respondents were in Canada and had been arrested in Montreal by order of the Extradition Commissioner seeking to be extradited to Georgia where there were indictments filed in relation to fraud on the US Government and this was a Privy Council consideration with challenges to that extradition and if I can pick up at page 133 of the House of Lords judgment from the Lord Chancellor. There it just notes, at the bottom of the page, that the facts weren't in dispute. Two respondents were in employment of the government of the USA. Charged with criminal offences in Georgia and when in Quebec an application was made to extradite them and there was an issue of a warrant. They were arrested and they applied for habeas corpus. Now I rely on this simply for the

comment which come halfway down the page, 137, which start, “Whether the accusation was well founded, or whether there was enough,” et cetera.

ELIAS CJ:

Well this is a case of interference in the statutory process, is it?

SOLICITOR-GENERAL:

Yes and interference in the extradition proceeding by virtual habeas application and a habeas order, in fact.

ELIAS CJ:

It doesn't seem to be, though, the sort of bifurcated provision we have in terms of provisional warrant here.

SOLICITOR-GENERAL:

No, no, I don't –

ELIAS CJ:

And the challenge to that –

SOLICITOR-GENERAL:

That’s right.

WILLIAM YOUNG J:

Well I think it was a challenge to the warrant wasn't it?

SOLICITOR-GENERAL:

There was a –

ELIAS CJ:

But it was a –

SOLICITOR-GENERAL:

It was an arrest warrant but I must go back –

WILLIAM YOUNG J:

He's a judicial officer. It looks as though the extradition commissioner was a judicial officer who issues a warrant.

SOLICITOR-GENERAL:

Yes and –

WILLIAM YOUNG J:

And then the defendants, if that's the right word, were discharged from that and so this case is all about the principle because it would appear from the argument that they had got clean away, as it were, as a result of the discharge.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And that is part of the concern, obviously of the Crown. If a Court was to finally conclude on a habeas that a person wasn't an accused that may have a terminal impact potentially in such a speedy turn around if a Court, High Court –

ELIAS CJ:

But it could only be a determination on the information before the Judge he wasn't warranted in granting a provisional warrant.

SOLICITOR-GENERAL:

Yes, well –

ELIAS CJ:

It wouldn't preclude a further application on different information.

WILLIAM YOUNG J:
Might be an abuse of process?

ELIAS CJ:
Well hardly.

WILLIAM YOUNG J:
Henderson v Henderson, could be.

ELIAS CJ:
If there really is – well –

SOLICITOR-GENERAL:
Well that –

McGRATH J:
That habeas, sort of coming back immediately with another application is discouraged.

SOLICITOR-GENERAL:
And there are provisions in the Act that do discourage it and that's the concern that –

CHAMBERS J:
I was looking, actually, to see is it possible to bring a second application?

SOLICITOR-GENERAL:
Extradition?

CHAMBERS J:
For extradition.

SOLICITOR-GENERAL:

I understand it is but I need to check that.

CHAMBERS J:

I tried to see if there was something about that but...

GLAZEBROOK J:

But the extradition itself has got nothing to do with the provisional warrant has it?

CHAMBERS J:

Well it's distinct, yes. But a conclusion that someone is not an accused, if made unequivocally, might later make it difficult for the issue to be raised because it might be said, "Well you should have put your best case forward at the first time around."

ELIAS CJ:

But there could never be a determination on that – there could never be a determination of that point because the section 20 process is directed at having reasonable, a reasonable basis on the information presented.

GLAZEBROOK J:

Because if a request hasn't been made then presumably in many cases you won't have much information at all. You may just have the arrest warrant itself.

SOLICITOR-GENERAL:

I would imagine that it clearly envisages there will be much more to come but I still submit that a summary – final determination, might use, sorry, but if determination of the High Court that a person is not an accused could pose real problems for the Crown.

WILLIAM YOUNG J:

Depends – it may depend on how it's framed. If the High Court Judge makes an affirmative finding that so and so is not an accused, it might be quite difficult to challenge that later, particularly in the District Court.

GLAZEBROOK J:
But if they aren't an accused, they should be let go.

SOLICITOR-GENERAL:
Well, no, if it's not reasonably – if it's not possible to have reasonable grounds from the material I accept that the High Court must be able to look at it.

WILLIAM YOUNG J:
The Judge may be wrong.

GLAZEBROOK J:
That's all I meant. That's all I was saying.

WILLIAM YOUNG J:
But the risk is – and this is, I suppose, really, a *Manuel* point that the Judge might be wrong as the Judge was wrong in *Gaynor*, and a wrong decision completely derails the process.

SOLICITOR-GENERAL:
Precisely yes.

WILLIAM YOUNG J:
Possibly beyond repair.

SOLICITOR-GENERAL:
Possibly.

WILLIAM YOUNG J:
Possibly not.

SOLICITOR-GENERAL:

And in *Gaynor* you can see what it took to try and rectify it.

ELIAS CJ:

An impenetrable decision –

SOLICITOR-GENERAL:

Well it is, rather. I mean it suffers a little from age I would imagine but –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Now a classic example of what can go horribly wrong is the *Saxena v Canada (Minister of Justice)* [2009] BCCA 223 case which we've referred to in the footnote 47, this is paragraph 29, and I just want to draw it to your attention because the same –

ELIAS CJ:

Have we got that –

SOLICITOR-GENERAL:

Yes, that's at – this is *Saxena v Canada* –

ELIAS CJ:

On tab?

SOLICITOR-GENERAL:

Tab 7. Now you'll see in Justice Hall's commencement, there were three matters before the Court. First, to reopen a decision of the Court of Appeal. Second, and this is para 2, habeas corpus. And I just ask you to note that in the end of para 2, the proceedings against Mr Saxena have been going on since 1996 and we're in 2009 at the time of this judgment and the comment that I want to draw to your attention comes from para 8 and 9. That there exists a code in the legislation dealing with rights of appeal so it's neither

necessary nor appropriate for the invocation of habeas corpus and then over the page –

McGRATH J:
Sorry which page were you reading from?

SOLICITOR-GENERAL:
I was reading from page 7, paragraph 8.

McGRATH J:
Thanks.

SOLICITOR-GENERAL:
And then the Court goes on to discuss the *May* case where the Supreme Court of Canada, "Held that habeas corpus is a broadly available remedy and that only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its jurisdiction." And then it goes on to give the example that – which is cited there, "Jurisdiction should also be declined where there is in place a complete comprehensive and expert procedure for review of an administrative decision." And in this case we do have the section 24 process whereby that's exactly what's going to happen.

Now again I mention that the Court shouldn't sanction the use of habeas as a collateral tack at the early stage of extradition, save in exceptional circumstances and with respect, whilst the Court must be able to go into it on occasions, they will be rare and *Manuel* does make that point and I urge that on the Court that it ought to be rare.

McGRATH J:
Well rare if it's going to interfere with the extradition process.

SOLICITOR-GENERAL:
Yes.

McGRATH J:

Mr Ellis, if I understand the submission correctly, is emphasising the bits – his issues on habeas corpus will not interfere with the section 24 process because if he succeeds, he gets release of Mr Kim but does not stop the habeas corpus process continuing. Now I think your only argument against that is if the terms of the judgment were to interfere with issues it would be better decided under the section 24 proceedings, is that right?

SOLICITOR-GENERAL:

Yes that's my primary point. But secondary is this must, as a matter of practical impact, interfere with the section 24 process going ahead.

GLAZEBROOK J:

But if section 20 gives the right to have a provisional warrant only if those conditions are satisfied, are you seriously suggesting if those conditions aren't satisfied on the information before the Judge that you keep them locked up anyway because they might be satisfied later?

SOLICITOR-GENERAL:

No.

GLAZEBROOK J:

Because the only basis upon which to issue a provisional warrant and therefore detention under section 23 because that follows, if not released, is that the section 20 conditions are fulfilled?

SOLICITOR-GENERAL:

I'm not suggesting that but the reverse is worth considering as well. Must the Court freeze in time the position that existed back in June of 2011 grant habeas in complete ignorance of what has gone since then?

GLAZEBROOK J:

Well Mr Ellis, I think, has conceded that if those – if the difficulties under section 20 have been fixed up since then habeas doesn't issue.

SOLICITOR-GENERAL:
But we don't have to fix them. That's our point. We shouldn't be required to fix them on a habeas when we've got this whole other process.

GLAZEBROOK J:
But if section 20 provisions were not fulfilled and continue not to be fulfilled because you haven't put in front of us information to suggest that they are now fulfilled then why shouldn't habeas be granted?

WILLIAM YOUNG J:
Well a possible answer, it may not be a completely satisfactory one, is that the section 20 test, and this is – picks up the point made in the Australian judgment, the section 20 test depends on the District Court Judge being satisfied so it's a subjective test. Presumably one would say that he was satisfied otherwise he wouldn't have made the order. Now the question –

ELIAS CJ:
It sounds like (inaudible 13:01:53) to me.

WILLIAM YOUNG J:
Yes but if the question then is whether he shouldn't have been satisfied then that may be whether that's a judicial review or a habeas issue may have to be debated. It's – the point is the criteria are not objectively subject to be expressed.

SOLICITOR-GENERAL:
Yes. And that matters have moved on with respect.

GLAZEBROOK J:
But we never, in terms of legality, say because somebody quite wrongly thought that they were complying with the law even though they had no

reasonable grounds whatsoever to think that they were complying with the law that that's okay and especially in terms of the detention of somebody.

SOLICITOR-GENERAL:
Yes –

GLAZEBROOK J:
A fundamental right of liberty.

SOLICITOR-GENERAL:
We never do say that, I accept that. However, the Court, when it comes to look at the nature of the breach, the consequence, the right, et cetera, doesn't automatically set aside the operative decision. That's in a long line of cases which, in fact, were argued in front of this Court on a case called *Sestan* which Mr Ellis and I did which was in the mental health context and there was a procedural error early on in the compulsory treatment order process and the Court said, "Well, even though that was a clear jurisdictional error, that doesn't vitiate the order that was made under which the patient is held." So it all depends on the nature of the error.

ELIAS CJ:
Well at the moment he's being held under the provisional warrant.

SOLICITOR-GENERAL:
No, no, he's not.

CHAMBERS J:
Well is he though?

ELIAS CJ:
Well, okay, he's being held under the detention warrant which cites the provisional warrant.

SOLICITOR-GENERAL:

Yes. That's right and it's worth just having a quick look at the provisional warrant.

ELIAS CJ:

Would it be convenient – we're going over time a little bit.

SOLICITOR-GENERAL:

Yes, I'm sorry.

ELIAS CJ:

Shall we return to that immediately after lunch?

SOLICITOR-GENERAL:

I was happy to wrap up by lunch time unless there were –

ELIAS CJ:

We'll probably have to be back.

SOLICITOR-GENERAL:

Right. That suits.

ELIAS CJ:

I would have thought. Mr Ellis, do you want to be heard a little bit in reply or not?

MR ELLIS:

Two minutes.

ELIAS CJ:

Did you want to wrap up?

McGRATH J:

Were you going to refer to *Ismail*?

SOLICITOR-GENERAL:

Ismail, I was.

McGRATH J:

Yes. I think –

ELIAS CJ:

I think you'll take a few minutes. We'll take the adjournment now, thank you.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.34 PM

CHAMBERS J:

Mr Heron, may I begin just by asking you one question? If I were to ask you by what authority you say Mr Kim is currently held –

SOLICITOR-GENERAL:

Yes?

CHAMBERS J:

– I take it you would say it's the warranted detention, tab 16 of Judge Cunningham's warrant?

SOLICITOR-GENERAL:

It's later than that.

CHAMBERS J:

Oh.

SOLICITOR-GENERAL:

It's a successive to that. Isn't it?

CHAMBERS J:

Tab 16.

SOLICITOR-GENERAL:

Well he must have had a warrant, mustn't he –

ELIAS CJ:

Tab 16?

CHAMBERS J:

Tab 16 of the appellant's bundle.

SOLICITOR-GENERAL:

So that's 15 October. So if that's –

CHAMBERS J:

That's to run until the 22nd of December?

SOLICITOR-GENERAL:

Yes, I had understood there was a further adjournment from 15 October but if not, yes, that's right.

CHAMBERS J:

Now –

GLAZEBROOK J:

(inaudible 10:19:15)

CHAMBERS J:

The thing that interests me is that if you look at the warrant, for instance (inaudible 10:19:27) I think it was Judge Gibson, and Judge Gibson's warrant was due to expire on the 15th of October in the same way that Judge Cunningham's is to expire on the 22nd of December.

SOLICITOR-GENERAL:

Yes.

CHAMBERS J:

And what I want to ask you is, is it your case that each of those warrants should be seen as stand alone authority? So that whatever preceded them doesn't actually affect the issue of whether Mr Kim is currently lawfully or unlawfully detained. He may have been unlawfully detained in the past but because presumably under section 7(5) Bail Act, which is incorporated by section 20(2) of the Extradition Act, it behove Judge Cunningham to consider as at that point whether or not there was just cause for continued detention of him.

SOLICITOR-GENERAL:

So –

CHAMBERS J:

And therefore if this were right, and I don't know if it is or not, but if it were right, it would follow, perhaps, that what one would have to concentrate on is the information insofar as one can go behind the warrant at all the information that was available to Judge Cunningham at the date she made her warrant requiring him to be detained –

SOLICITOR-GENERAL:

Yes is my short answer and the only qualification is to deal with the point that if the Court was able to look back at a, for example, a procedural error or an error on the provisional warrant, then it would apply that orthodox analysis of, "Well, what is the impact of that error on the current detention?" But in short, yes, your analysis is our case.

CHAMBERS J:

There is one other provision which no one has concentrated on so far, and again, it may take us nowhere. Another provision which is incorporated by section 22 is section 204 of the Summary Proceedings Act.

SOLICITOR-GENERAL:
Yes.

CHAMBERS J:
Says that, among other things, "No warrant shall be quashed, set aside or held invalid by any Court by reason only of any defect, irregularity, omission, or want of form unless satisfied there's a miscarriage of justice." Now probably that's not very material because it's got a miscarriage of justice point but –

SOLICITOR-GENERAL:
Well Justice Kós looked at that and, on the arguments about the dates, said, "This is a section 204 matter," yes.

CHAMBERS J:
Oh he did. No problem then.

SOLICITOR-GENERAL:
Yes. So it is relevant, I would say. I suppose I was trying to put the Crown position as that even if the Court was to say that the provisional warrant was unlawful, and I don't say within a thousand miles of that, but even if it was, it still must examine the current detention and the current power and that isn't pursuant to the provisional warrant and even though it's recited, it's not necessarily dependent upon it.

ELIAS CJ:
Well –

GLAZEBROOK J:
Well it is subject to the provisional warrant. Where's the other power in question to the rises because doesn't – don't you have a provisional warrant and then go before the Court to see whether you get bail?

WILLIAM YOUNG J:

You mean a section 19 warrant?

GLAZEBROOK J:

Oh no, no. Apart from –

SOLICITOR-GENERAL:

You could have a different process and –

GLAZEBROOK J:

But I don't understand whether you have one?

SOLICITOR-GENERAL:

No.

GLAZEBROOK J:

Okay.

CHAMBERS J:

Well I wonder whether it's the Summary Proceedings Act which is incorporated which gives the power to detain.

SOLICITOR-GENERAL:

Well –

CHAMBERS J:

Because there must be some power to detain –

SOLICITOR-GENERAL:

Well it is.

CHAMBERS J:

– the circumstances where there hasn't been a provisional warrant and it seems to me that the moment that it must come from the Summary Proceedings Act which is, again, incorporated.

ELIAS CJ:
But aren't you – don't you give an order to surrender under section 24? If there is –

CHAMBERS J:
Oh later you do.

ELIAS CJ:
Yes.

CHAMBERS J:
Later, but in that phase up to –

ELIAS CJ:
(inaudible 10:24:46) under the warrant.

SOLICITOR-GENERAL:
Yes.

WILLIAM YOUNG J:
I'm left with the impression that there are only two ways to meet the extradition. That is under section (inaudible 10.24.53).

SOLICITOR-GENERAL:
That's my understanding. But – so that the power comes to remand in custody as Justice Kós and the Court of Appeal analysed. It comes both from the Act given the Summary Proceedings powers of a committal hearing or preliminary hearing, so section 22 and 23 but in particular, 22 of the Extradition Act gave the Court the powers to remand in custody and that, it seems, is not challenged and rightly so because it seems clear.

CHAMBERS J:

What I hadn't followed was this is merely a question I asked you before. How did you commence these proceedings?

SOLICITOR-GENERAL:

Yes.

CHAMBERS J:

If there was an arrest warrant. Is it your case that there are only two ways? Either, in other words, you must have an arrest warrant either under section 19 or section 20.

SOLICITOR-GENERAL:

Well that's my understanding. Let me just check that with Mr Perkins who knows more about these things. In order to get to a section 24 hearing, yes, it's – you have one or other.

CHAMBERS J:

Thank you.

SOLICITOR-GENERAL:

Now Your Honours if that completes that point, I just wanted to go to *Ismail* and discuss that briefly. I pick this up at page 22 and onwards which is para 70 of my submissions and it's the question, "Is the appellant accused?" And then come down to para 73, if you wouldn't mind, where we state, "Given the different foreign legal systems with which the Act must engage, Parliament's chosen 'accused', a word of broad ambit but rather than 'charged' or 'indicted,'" and then in our submission it should be given a purposive and cosmopolitan interpretation, which is not our word but in the authorities, that recognises the diversity of criminal law and I'll just come to *Ismail* and then *Assange* because they're both relevant on that point.

Do Your Honours have *Ismail* which is tab 11, I think – I'll just double check that. Tab 9, sorry. Tab 9 of the respondent's case book. *Ismail* involved a very large fraud in Germany whereby, and you can pick this up from page 324 of a Judgement of Lord Steyn in between F and G is a narration of the essential facts and over the page it describes how *Ismail* was collected up, in some sense, by statements of one of the conspirators and therefore a warrant was sought. With respect to him, and the case then discusses the evidence upon which came before the Court as to what exactly would happen in the course of this proceeding or process against Mr Ismail.

And for example it was discussed – well, and you can pick this up at 325 from G onwards, because a Mr Moers, a German lawyer, explained the three stages of criminal procedure and then outlined that. The lower Courts dismissed habeas corpus and at the middle of 326, Justice Garland made a statement there that he was left in no doubt whatsoever that the competent authorities have, "Taken a decision based on compelling evidence to invoke the operation of the criminal process." You might think that's quite resonant of the language in *Kainhofer* which Justice Glazebrook pointed out. And then Lord Steyn goes on to discuss what the House of Lords thinks about that approach and dominion of accused.

At the bottom of 326 it picks that up by stating that it's not a term of art. It's a question of fact in each case whether the person passes the threshold test of being an accused and this is one – there – it goes on, Lord Steyn, to say, "Next there is the reality that one is concerned with the contextual meaning of the 'accused' in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties and statutes, ought, therefore, to be accorded a broad and generous construction so far as the text permits it in order to facilitate extradition," and the Crown emphasises that and that authority is, as I understand it, at least certainly well-respected today.

And then Lord Steyn goes on to discuss what exactly "accused" should mean and at D onwards that discussion occurs and I suppose if the phrase to be

taken out of it is – this is at F, "I am satisfied that the divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution." And I, with respect, submit in this case there's no doubt about that.

And just finally then on *Assange*, it's a case that made its way to the Supreme Court, as I understand it, on a different point but in the High Court of Justice in the Queen's Bench Division, the decision which we have at, it should be at tab 10, tab 10 and then I'll just draw your attention to paras 149 onwards where the Court says, "There hasn't been a decision to charge Mr Assange. Under the law of Sweden that decision will only be made after he has been questioned." And it goes on to discuss, state at para 151 that looking at the matter through cosmopolitan eyes, I'm still not entirely sure what they are, but some type of ice-cream I think but in any event, it cannot be said that a person can be accused of an offence even though the decision has not finally been taken to prosecute or charge. One cannot simply look at the matter as a common law and I think that's, with respect, an obvious point.

CHAMBERS J:
Do you know if this point was not taken to the higher Courts because Mr Assange didn't try or because leave was denied?

SOLICITOR-GENERAL:
I don't know. I might just see if – no, we don't know, sorry. The –

CHAMBERS J:
In any event the point wasn't taken?

SOLICITOR-GENERAL:
The point wasn't taken. The point, as I understand it, that was taken is about whether the Swedish prosecutor was, in fact, a judicial authority and there is discussion along that but this point didn't go further.

McGRATH J:
What's clear in the Swedish Courts, the evidence before the Courts (inaudible 10.35.34) before the Court –

SOLICITOR-GENERAL:
Yes.

McGRATH J:
(inaudible 10.35.37) on that. The evidence of the complainant is clear as to what (inaudible) on the basis of intense (inaudible).

SOLICITOR-GENERAL:
Yes and in this case if you look at it I think as Justice Glazebrook made clear and others, well, it's patently clear that this man in this country would be charged unless he was to come along and say, well actually I was there and someone else did it and I can tell you who that person is and I want immunity et cetera, et cetera, or that kind of scenario. But on the evidence we don't have that. With the DNA and the limited access to the property and the statement that he has killed someone and the leaving prior to the expected leaving, those sorts of matters are reasonably persuasive, I would have thought.

Just finally, unless there are questions, my learned friend made comments, I'm sure it's not going to be a matter for you but about torture and death penalty et cetera. You will appreciate that the Minister has mandatory and discretionary grounds upon which to deal with the matter if it comes to the Minister and – for example, section 32(b), "The Minister must refuse if she believes there are substantial grounds that Mr Kim would be in danger of torture." And 30(3), "The Minister may refer if the Minister considers that Mr Kim maybe sentenced to death." Now all the information we have is the Chinese don't contend that as a sentence but no doubt that will be scrutinised at another place.

Your Honours, I sense a reluctance to go to, I do urge you to give guidance to the High Court and to confirm the approach that was taken as being a sensible one. Justice Kós did look at legality, appeal legality and that make sense but both the Court of Appeal and Justice Kós didn't look at issues which they just couldn't fairly have determined in such a rapid process.

Unless –

McGRATH J:
That is a principle answer to the Chinese law as part of the Court of Appeal document. It's not something that could be dealt with.

SOLICITOR-GENERAL:
No I, there are multiple answers to that. The act of state doctrine should be a conclusive answer to that. The extradition provisions around the finality of the seals being evidence of the process, that should also be an answer to that. And section 47, in fact this was like a Halsbury's attach for assistance. It may become an issue on the section 24 hearing as to what exactly has happened but in my respectful submission there's a number of complete brick walls to that approach and this Court, I would urge, doesn't go down that road.

GLAZEBROOK J:
Where do you (inaudible 10.39.15) locked up legality?

SOLICITOR-GENERAL:
In the question of was there power to remand under section 23 of the Extradition Act and the issue of section 22 and the application of Summary Proceedings Act powers to remand in custody and Mr Ellis' argument was section 23 is rather oddly expressed. There is no power to remand in custody expressed there. So we would accept that's the kind of question that could be looked at. It's purely –

GLAZEBROOK J:

But not whether (inaudible 10.39.55) specific application as to whether – or the resource (inaudible 10:40:05) as to that, it's actually specifically in section 20 and you say it can be determined on summary in order for a District Court Judge to come to that view but it's too complicated to look at.

SOLICITOR-GENERAL:
No, no –

GLAZEBROOK J:
(inaudible 10.40.25) and you called it for – what is the argument?

SOLICITOR-GENERAL:
The argument is that in the period of time, or that provisional warrant is the issue, is the lawfulness of detention, is the means by which he's detained and a habeas Court must be able to look at that reasonable grounds, but to be cautious that if it is an intensely factual issue involving, for example, foreign law, such as the accused –

GLAZEBROOK J:
I understand that.

SOLICITOR-GENERAL:
Yes, so we're not saying that the Court can't look at it. We are saying in the case of *Inglin*, in the case of *Mailley*, in the case of *Poon*, that those are, in particular *Inglin* and *Mailley*, those are the rare cases that the Court must be able to look at. Does that assist Your Honour, at least answer the question?

GLAZEBROOK J:
Well I don't (inaudible 10.41.23) because Justice Kós said. "I'm sorry but I can't look at any of that stuff." Whereas isn't the answer, really, "Why don't you look at it?" At least one of the answers you're putting, if you look at it in a suitably cosmopolitan way there was ample evidence upon which a Judge would come to that conclusion.

SOLICITOR-GENERAL:
Yes. Yes, that's right.

GLAZEBROOK J:
Which is a different matter to saying, it's too complicated and I can't look at it. It could be, (inaudible 10.41.49) evidence upon which you come to that but I see in your submissions why I put it to you, you shouldn't (inaudible 10.41.59) if it's too complicated.

SOLICITOR-GENERAL:
I suppose it does, yes. You should be very careful in the High Court on a three day non-appealable turnaround where you may be making a grave error that impacts upon a very serious process. Be careful –

GLAZEBROOK J:
But how does (inaudible 10.42.21) whether that particular arrest warrant was rightly issued?

SOLICITOR-GENERAL:
Speaking from a practical perspective as a prosecutor in the past, this would have, if a Court was to say no I'm not, I find that he isn't an accused, that would create real problems because the Chinese –

GLAZEBROOK J:
But that (inaudible 10.42.45)

SOLICITOR-GENERAL:
Absolutely.

GLAZEBROOK J:
The Court (inaudible 10.42.48) and that comes to create exactly the same legal problems in the District Court (inaudible 10.42.55) there isn't enough here.

SOLICITOR-GENERAL:

But the District Court looks at it differently. They look at reasonable grounds in the first case.

WILLIAM YOUNG J:

Personal satisfaction.

SOLICITOR-GENERAL:

Personal satisfaction. They don't make a final determination which is –

ELIAS CJ:

(inaudible 10.43.08) wouldn't do on habeas corpus because that's the issue that certifies it.

SOLICITOR-GENERAL:

Yes and if it was clear about that, that's right, and it wasn't binding or making a determination that impacted on further.

ELIAS CJ:

I would like also to query your emphasis on the quick turnaround and there being the characterizations process as summary. It has to be expedited.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

The matter has to be set down but thereafter what is there in the Habeas Corpus Act that prevents a Court fashioning the procedure to meet the different (inaudible 10:43:55) the case?

SOLICITOR-GENERAL:

Nothing I suppose Your Honour other than that it's all about quality at decision making, isn't it?

ELIAS CJ:
Yes but that's not under the control of the Judges because the habeas corpus remedy traditionally has been to empower the Court to determine the question of liberty to view control of the body to the –

SOLICITOR-GENERAL:
Yes.

ELIAS CJ:
– to a Judge. That is achieved if the matter is within the control of the Judge and that's expedited and the Judge has control I don't see where all of this comes from, the suggestion that this is a summary process.

WILLIAM YOUNG J:
It has to be given precedence –

SOLICITOR-GENERAL:
Precedence, yes.

ELIAS CJ:
I understand all of that but to do that nothing in that requires a Judge not to make a proper decision is the point that I'm –

SOLICITOR-GENERAL:
Yes.

ELIAS CJ:
– putting and the Judge has control, the Judge has to do what is necessary, surely?

SOLICITOR-GENERAL:
Well yes, obviously Your Honour, but there is a context in which this occurs. You don't – you only have the prison before the Court firstly.

ELIAS CJ:

Yes, no I understand that.

SOLICITOR-GENERAL:

It's non-appealable. It's so quick.

ELIAS CJ:

I understand all of those things. I am simply you responding to the submission you make that this will event proper decision making and I'm not sure why it's said on the statute that that result is compelled?

SOLICITOR-GENERAL:

Proper, perhaps, not the word in my submission. Quality decision making.

ELIAS CJ:

Well quality. What's to prevent the Judge providing a quality decision? The Judge needs the information, what's to prevent the Judge getting it?

SOLICITOR-GENERAL:

Yes that's true but of course, you don't have the Chinese before the Court.

ELIAS CJ:

No, no, no, I understand all of that.

SOLICITOR-GENERAL:

You don't –

ELIAS CJ:

It's only a provisional determination against the information put before the Court but what's the prevent all argument, say, that if the Judge decides that that is necessary? It's just this characterisation –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– I think these words compel responses that need to be unpicked and to dismiss this as summary is, I think, a mischaracterisation of the Act. It's got to be expedited.

SOLICITOR-GENERAL:

Sure.

ELIAS CJ:

And you've got to give it priority but there's nothing in it that prevents a quality decision.

SOLICITOR-GENERAL:

Yes well I understand that as long as the decision isn't one, rushed; two, based on incomplete information; three –

ELIAS CJ:

Well you have to put the information before the Court. That's your obligation.

SOLICITOR-GENERAL:

Well, no. With respect, we don't need to put the entire extradition case, which is now before –

ELIAS CJ:

No you have to put before the Court what is necessary to substantiate the detention in custody.

SOLICITOR-GENERAL:

Yes but that's circular and of course, we say well, a provision warrant isn't necessary and the grounds behind it aren't necessary and Your Honour might –

WILLIAM YOUNG J:

Yes but either way you say – you can produce what Judge Gibson says, namely what looked like a regular warrant?

SOLICITOR-GENERAL:

That's right.

WILLIAM YOUNG J:

And then –

ELIAS CJ:

(inaudible 10:47:29) to that.

WILLIAM YOUNG J:

And then the problem there is the decision-maker is prophetic.

SOLICITOR-GENERAL:

No, and the other context, which I was trying to overlay, is extradition. That there are protections in the Act.

ELIAS CJ:

I understand that.

SOLICITOR-GENERAL:

So that's why the Court ought to be in the interests of not just liberty but comity. Comity is a major factor here.

ELIAS CJ:

There's no comity in this case. It's ad hoc.

SOLICITOR-GENERAL:

Well I'm not sure what that means but the comity is an important factor as *Ismail* makes clear, and others, but we, you know – from a Crown –

McGRATH J:
We want to extradite people from China too?

SOLICITOR-GENERAL:
Precisely.

GLAZEBROOK J:
But given the fact that I'm giving them a test – but the test as to whether somebody such as an accused person would look at in terms of comity and I would have thought –

SOLICITOR-GENERAL:
Yes, yes.

GLAZEBROOK J:
– the fact the warrant has been issued in the past. We don't go behind what section 21 says. A warrant is sufficient so you don't go behind the warrant to see whether it should have been issued. What you do is look at it, through the person who's the extraditable person and when you're interpreting that, you interpret it against the background of an extradition treaty, international comity –

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:
(inaudible 10:48:47) what's in the legal systems and (inaudible 10:48:51) your suggestion has been done off shore.

SOLICITOR-GENERAL:

Yes, yes and you don't draw an adverse inference from, for example, my learned friend's submissions because comity suggests that, well, at least, at first until inquiry, you don't, for example, take a view about the validity of the legal system or process in the country. That's not one's role. I suppose it's a summary.

McGRATH J:

First let us look at the suitability of the habeas corpus. The summary assumes that and for emphasis on the importance of section 24, it (inaudible 10:49:36) in the middle of judicial review.

SOLICITOR-GENERAL:

Yes.

McGRATH J:

Except that your criticisms are of the inadequacy of process do not apply to judicial review?

SOLICITOR-GENERAL:

If you mean by that that judicial review can deal with those questions.

McGRATH J:

Well can deal with it in a more – in a more substantive way.

SOLICITOR-GENERAL:

Yes.

McGRATH J:

In a way that's not summary by comparison with habeas corpus.

SOLICITOR-GENERAL:

That's right, yes, I do accept that and that's in –

McGRATH J:

In fact in *Manuel* I suppose, whether *Manuel* has a place –

SOLICITOR-GENERAL:

Well that's what we thought in crafting our submissions because that question was left open and in our view that – particularly in this context, the comments of Lord Steyn about the interpretation of extradition treaties and statutes is apposite and the approach of the Court there applies. And really that's the reason I'm here if I can put it that way.

McGRATH J:

You support *Manuel*?

SOLICITOR-GENERAL:

Yes, very much so, as we do on the written submissions and we say that overlaid on that needs to be this consciousness of the extradition context.

CHAMBERS J:

Of course there may not even be much, even in this particular case, of the context of the Extradition Act or judicial review because your section 24 hearing is (a) supposed to be extremely prompt and (b) would appear to cover, I haven't seen Mr Ellis's statement of claim in its final form but it would appear that you could raise just about any matter you could think of in the context of a section 24 hearing.

SOLICITOR-GENERAL:

I don't want to seen to be encouraging it but that's certainly possible, yes.

McGRATH J:

Except perhaps (inaudible 10.51.41).

SOLICITOR-GENERAL:

That's right, yes, and that, of course, but there is review ability at a later stage without doubt. There's an appeal right on the decision for surrender and there's review ability of the ultimate Ministerial decision so all of those remedies we accept are there. Unless there's any questions Your Honours?

ELIAS CJ:

No thank you Mr Solicitor. Yes Mr Ellis?

MR ELLIS:

I seem to have more to reply to than I did before lunch but I won't be that long anyway. The first discussion point was about the adjournment of the case and why it was adjourned and what did Justice Kós' chronology say. It did say it was adjourned for habeas and judicial review but that was limited in the context. That was the 5th of September and the habeas was heard on the 14th. It was mostly adjourned so that a judicial review could be drafted and that, Justice Chambers, is in the full pleading, is now in the yellow tab 14 and in response a little to Justice McGrath's earlier, it's now 43 pages as opposed to 30 and seven causes of action and not five so it's changed. It's changed a bit and certainly the – if you look at the index to it there are challenges to the Minister that can't be done in the extradition proceeding. So it's a wider jurisdiction in the High Court judicial review than would be in the extradition proceedings and that's what I was proposing –

McGRATH J:

(inaudible 10.54.32) Minister's decision, it's already been taken under the Act?

MR ELLIS:

Yes in breach –

McGRATH J:

Or not taken (inaudible 10:54:39).

MR ELLIS:

In breach of natural justice you didn't hear from Mr Kim and it should have so we need to go back to square one but to incorporate perhaps into that argument, discussion what happens next, well I didn't file a 43 page statement of claim because I thought this case was a technical knock out. I thought I was doing the judicial review next and section 24 of the Extradition Act provides for, 24(6) provides for the ability of the applicant to remedy a petition. The Court may adjourn the hearing for such period as it considers reasonable to allow the deficiency or deficiencies to be remedied. So I'm imagining if we win this he's released in custody, they file some more bits of paper and we get on with the judicial review. It's not the end of it.

Abuse of process, yes, that's argued in the judicial review but on completely other grounds than the ones that we've been discussing. So that's dealt with that.

The, if my learned junior could hand to the registrar the covering document relating to the section 24 matters that Your Honour Justice Chambers asked about, and Mr Solicitor said they were four volumes, I think they might be three. There's four now but anyway those are the, that's the paperwork that was handed to the District Court and there's two matters in there that are of some use. In the one that's got Chinese writing on it, which would be the fourth page, a logo and some Chinese writing beginning, "The Embassy of the People's Republic," three paragraphs down there's some suggestion here, Chinese Government request the New Zealand Government to take Mr Kim into custody and extradite him back to China so that they can file criminal law suits against him. Well, that's got a bob each way, hasn't it. They can file or they haven't yet but maybe they intend to. Then in the last page in that bundle, I haven't given you the four volumes obviously, but in the little contents page we've got at page 13 there the arrest approval. Well why haven't we got the approval for extradition?

And we have – I did neglect to go through all the documents that Justice McGrath asked me to originally. I started off and got sidetracked somewhere. So on the case on appeal there's five references, apart from the

one I've just dealt with, in the tab 1 which is the red notice from Interpol. The – so on page 4, down the bottom of the page, suspected or murdering, then it sort of contradicts itself up on the next page. Then on page 10, which is the –

McGRATH J:
Page what, page 25, what we make of that arrest warrant or (inaudible 10.59.07) bail has been granted for murder.

MR ELLIS:
Page 25?

McGRATH J:
25, yes.

CHAMBERS J:
I think it's (inaudible 10.59.11).

ELIAS CJ:
Yes.

McGRATH J:
Thank you.

GLAZEBROOK J:
It said it contradicted.

MR ELLIS:
It said it contradicted?

McGRATH J:
Yes, it contradicted –

MR ELLIS:

Yes.

McGRATH J:
Yes, sorry.

MR ELLIS:
But it's not relevant in the way because it's another authority, isn't it, it's Interpol, it's not relevant to our purposes. Nobody's, we don't need to get into Interpol, but it's just confusing information. But on page 10, which is the information the Chinese are giving to Interpol from Shanghai under the heading "Summary of the Case", female corpse was found, Mr Kim is suspected of killing the victim. And then on page 11 which you've seen a number of times, he's suspected of intentional homicide and at page 165 which is a deposition, it's marked D, and under the heading "Warrant of Arrests," three lines down, "suspected of committing an intentional homicide," and that's paragraph 5, yes, and then in paragraph 6, again the penultimate and the last line "for suspected of committing an intentional homicide."

And if one were to consider – probably a good place to see with *Ismail*, I was keeping it to the end. In *Ismail* which my learned friend took you to which is 9 in his bundle, I don't disagree with what he says but I would add to it so on the page he took you through and finished somewhere at – in the F on page 327. If we go a little further down 327 to G, perhaps in the light of the diversity of cases which may become the former Courts, it's right to emphasise that ultimately the question of whether a person is accused within the meaning of section 1, "Will require an intense focus on the particular facts of each case," and then we go into the facts. First, just before the bottom of the page, it is common ground what the German Judge has been satisfied on compelling evidence that the applicant was guilty of conspiracy to do fraud. Leaving aside the intriguing question of Judge's finding you guilty before you've been charged.

Second, the other point was disputed. It's cleared beyond any reasonable doubt the senior public prosecutor had been satisfied there was sufficient evidence to justify criminal proceedings.

Thirdly, and most importantly, there are the terms of a particular warrant of arrest. He does not dispute the warrant of arrest recites that, "The accused is charged with the following," and then it sets out at some length the criminal conduct alleged against the applicant in the statutory provisions whereas in our one which was, you recall, case on appeal tab 1/11, and bearing in mind that *Ismail* says importantly, most importantly, in terms of the particular warrant, it says no such thing. It doesn't set out at length the criminal conduct alleged. It sets out no criminal conduct whatsoever. Not even the country or the victim or the date. So I – *Ismail* is of significant assistance to my case as was *Kainhofer*. So that's *Ismail*.

I'm not sure that – I'd like to be able to say something about *Assange* and we did do an analysis of the Supreme Court of the UK's one but my learned friends have put in the two Courts down so I'm not sure that much can be said to what they say other than this is all about, of course, a European arrest warrant which is different from a Chinese arrest warrant and the whole concept of what's fair in a system would come into play but those are matters for the judicial review.

In respect of comity, and if we're going to invoke comity, as my learned friend to do that, I'd invoke the United Nations Human Rights Committee at my tab 12 and just refer you to one paragraph of that decision because one should also accord comity to international human rights and this is a decision of 2011 and at paragraph 9.5 on page 8 of that judgment we have, about six lines down, the committee considers at the outset that it was known or should have been known to the state party's authorities at the time of the author's extradition that they were widely noted in credible public report that China resorted to torture against detainees and the risk of such treatment was unusually high in the case of detainees belonging to –

ELIAS CJ:

These are particular to detainees, though aren't they?

MR ELLIS:

Yes they are.

ELIAS CJ:

(inaudible 11:06:37) style and...

MR ELLIS:

They're – yes, they want to –

ELIAS CJ:

Freedom fighters or something?

MR ELLIS:

Well, they're terrorists, yes, I think. Well, could be freedom fighters, depending on your point of view.

ELIAS CJ:

Well (inaudible 11:06:50), I shouldn't have said that.

MR ELLIS:

No. But the point I'm making is we're saying, "We shouldn't extradite you because there's a real risk of torture or the death penalty," and it's the –

ELIAS CJ:

Well, I'm not sure whether it's really made as sweepingly as you suggest because it is in a context.

MR ELLIS:

Well in my submission, it is. Especially about the death penalty. While a statement was made by the Chinese authority in their request for extradition that the author would not be sentenced to death, see paragraph 2.2 above,

exactly the same as what we've got, at paragraph 2.2, letter from the Chinese Embassy, extradition request by the Chinese General Prosecutors' Office in which it stated the Supreme Court of China had decided if found guilty, he wouldn't be sentenced to death. Exactly the same. The statement – party didn't address this issue. The committee considered the risk of conviction and death penalty being procured through treatment incompatible in article 7 is not removed. Then the circumstances, the committee has the view there also may be a risk of violation of article 7 so I'm saying the state authorities here should have known that the first instance that this is a possibility and need to consider it. There's no intense scrutiny.

McGRATH J:

What do you say to the fact that the statute appears to contemplate innovation to (inaudible 11:08:31) the Ministry to say, presumably on advice, (inaudible 11:08:39). So it's an area which is for ministerial decision.

MR ELLIS:

Right, I say that that is the long stop if you like, in cricket terms. In human rights terms I say as soon as we embark upon an extradition proceeding, we would start to consider section 8 of the Extradition Act and I would say that having in C, 1C, having regard to all the circumstances it will be unjust or pressured to surrender the person. That is a judicial decision regardless of whether it's in the Extradition Act or not there is a Bill of Rights duty to consider section 8 and section 9, death and torture, in any event. So the Minister is only a backstop. There is absolutely no reason why – and in fact there is every reason why you should bring it up before judicial authorities before you get to the ministerial authorities and so at a section 24 hearing we can raise all these issues and get another go if we lose at the ministerial stage.

McGRATH J:

Thank you for even contemplating section 24 and finding (inaudible 11:10:27).

MR ELLIS:

Yes, yes. We must cover judicial consideration of those most substantial human rights before we get to the Minister.

McGRATH J:
Under the section 24 process?

MR ELLIS:
Yes, because section 8 applies and it's the judicial decision to decide on whether you're going to proceed – you can't get to the Minister until you've been through the judicial process. Right, where was I. Justice Chambers' question about each warrant, is it a stand alone one, and well the first answer is, of course, each warrant incorporates reference to the provisional warrant and it sort of purports to be relying on it because nobody anywhere along the way, in any of the detention warrants, gives a reasoned decision about why they're issuing a detention warrant and it's only fortuitous, and I didn't really want to take advantage of it because it was just a mishap in the system at the last hearing was the detention warrant was issued without prejudice to the argument that the detention is unlawful. So I suppose on (inaudible 11.12.03) the Judge needed to consider that but we were deferring that to here. It was just a mishap that they called into Court by mistake that day. We just had a quick phone call to Auckland to move things along.

But – the proposition that, this is linked with what my learned friend said, in referring to the case which he did in the Supreme Court of Canada in *May v Ferndale* which was a 2005 decision which my learned friend has copies of. You only need look at the head-note. This is a prison habeas case and at paras, I think I had it, I just remembered it when I heard him saying it as we used this before, for other reasons and it's a clash of provincial and federal jurisdiction amongst other things. But if we could look at, if we could, page 8 of the head-note, "However habeas corpus should be granted because CSC," that's the Canadian, it's the equivalent of the Corrections Department, Correctional Service of Canada, "Failure to disclose the matrix..." while the *Stinchcombe*, which you're probably aware of from disclosure cases, "Is inapplicable to an administrative context, in that context procedural

fairness requires that the decision-maker disclose the information relied upon. The individual must know the case he has to meet. If the decision-maker fails to provide sufficient information his decision is void for lack of jurisdiction." And I say the, in this case, the applicant doesn't supply sufficient information in terms of Article 47 and their application by analogy is void which is what the Supreme Court there finds in 9 in the end of the first long paragraph three lines up. "They are therefore null and void for want of jurisdiction," and not supplying sufficient information.

And if one follows that process one could say that and none of the detention warrants provide any information whatsoever. We haven't really run it as – I think we had some skirmish about reasons in the High Court but, you know, not, not beyond. I don't think I need to say anything about section 204 I don't think but as Your Honour said there's a, miscarriage of justice is incorporated in that and I think habeas corpus hopefully trumps section 204.

As for the quick turnaround, which I think is my last point. The quick turnaround point and the three day - my learned friend laments the three day process. The High Court Judge only gets three days or maybe he's lamenting that the general manager only gets three days but in this case, as in all cases, I do anyway, you always give them the submissions at the same time as the application so you've got a full three days to know what they're having to answer. It did seem a little, I think in *Hunia* I think it was, back in about 2001 I tried to get the case before Justice Robertson. I had a habeas and a statement of claim and I wanted it adjourned so we could argue everything together and I was told I couldn't and from them on.

I think also before Justice Anderson in *Miller*, I tried the same thing, the matter was adjourned so we could argue it more fully and the dicta, at least, seemed to suggest that you couldn't do that which just makes big problems because if you do want to argue a more full argument and give the other side an opportunity to respond, why shouldn't you and certainly the case law seems to develop that you shouldn't but why not, why shouldn't we have what the Chief Justice suggested there and I say, well the quality decision well the

applicant – not the applicant, the detainee gets no time at all when a provisional warrant is sought so I don't feel greatly any sympathy the three days. They're three days better off than the detainee is and that's what, there should be a system of justice, not a system of injustice, which seems to be what's happening. If you can't bring a habeas to correct it then *Manuel* has been misinterpreted and it was quite capable of some nuanced reasoning to explain it but this wasn't a full scale attack on its provisions.

Thank you Your Honours.

ELIAS CJ:

Thank you Mr Ellis. Thank you counsel. We will reserve our decision.

COURT ADJOURNS: 3.34 PM