NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF MR RADHI'S WIFE AND CHILDREN REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND SC 57/2017

BETWEEN **MAYTHEM KAMIL RADHI**
Appellant

AND **THE DISTRICT COURT AT MANUKAU**
First Respondent

AND **THE COMMONWEALTH OF AUSTRALIA**
Second Respondent

Hearing: 22 November 2017

Coram: William Young J
Glazebrook J
O'Regan J
Ellen France J
McGrath J

Appearances: R M Mansfield for the Appellant (via AVL)
D Harris for the First Respondent
(attendance excused – abiding)
M J Lillico and R K Thomson for the
Second Respondent

CIVIL APPEAL – FURTHER HEARING

WILLIAM YOUNG J:
So you're appearing for the appellant, Mr Mansfield. You'd probably prefer Mr Lillico to go first wouldn't you?

MR MANSFIELD:
I would, given that I feel rather shy Sir. There's very little to add beyond what he says.

WILLIAM YOUNG J:
Thank you. And Mr Lillico you appear for the Commonwealth of Australia?

MR LILLICO:
Yes Sir. Perhaps the matter to highlight really for the second respondent is the regime that was in place before the '99 statute as it was enacted. So the situation for extradition to Australia was regulated by an Imperial statute, the Fugitive Offenders Act 1881, and that's dealt with in the submissions at page 1, the relevant section is section 19. Now under the 1881 statute the system of extradition to Australia was even more streamlined than it is now. It didn't involve a Ministerial decision maker at all. It involved only a judicial decision maker and the important thing to highlight in relation to that judicial decision maker is that under section 19 the judicial decision maker could refuse surrender, for either a permanent personal circumstance, or circumstance of the case, or one that was temporary. That was only going to last until the expiration of a particular period. So, and that's over the page at page 2 where you'll see the highlighted phrase "either at all" so simply refuse to surrender, or refuse to surrender until the expiration of a particular period. So that was a situation which lasted up until 1999. Until the 1999 statute New Zealand was subject to that Imperial statute.

Then the 1999 statute sought to amalgamate a fairly piecemeal extradition regime where New Zealand extradited under treaty firstly, but also there were disparate regimes for the Commonwealth, for Commonwealth countries and other countries, and so the 1999 statute sought to consolidate matters in one Act, and as introduced there was a consistency with the position in relation to Australia with the 1881 statute because you'll see at page 3 of the second respondent's submissions, the Bill is introduced in clause 8, had a similar provision where because of circumstances that were incompatible with humanitarian considerations, that phrase actually dropped out, but certainly because of unjust or oppressive circumstances the decision maker could either refuse to surrender the person at all, or to surrender him or her before the expiration of a particular period. So again permanent and temporary grounds for refusal were contemplated in clause 8 and that clause 8 was applied to referrals to the Minister because under the 1999 statute there was an added protection of referral to the Minister, even for extradition to Australia, so they added a Ministerial decision maker that didn't exist in the 1881 statute, but the consistency with the 1881 statute was that refusal could be, refusal to surrender could be deferred for expiration for a particular period by the Minister.

Now the wording that you see in clause 8, in terms of the Bill as it was enacted, after the Select Committee at that stage changed, and you will see that at page 4 of the submissions, so the wording at (4)(a)(ii), that's at paragraph 12.3, page 4 of the second respondent's submissions, effectively missed out the wording, just looking at subparagraph 2, "it would be unjust or oppressive to surrender the person before the expiration of a particular period". It should have read, "unjust or oppressive to surrender the person or to surrender him or her before the expiration of a particular period", and that wording would have preserved the power of the Court to refer situations where there was a temporary injustice, or temporary oppression, as well as a more permanent set of circumstances.

WILLIAM YOUNG J:

The word “or” is missing. If the word “or” was in there it would be all right, or slightly clunky.

MR LILLICO:

Yes Sir.

WILLIAM YOUNG J:

To surrender a person or before the expiration of a particular period.

MR LILLICO:

Yes Sir, yes, and that leads to the situation identified by the Court of Appeal mainly where someone says, and they use the example of a permanent health problem, someone with a permanent health problem couldn’t be referred to the Minister under Part 4. Someone with a temporary difficulty with their health which could be overcome, say, after treatment, could be. And we’re really inviting the Court to read the “or” into the statute.

GLAZEBROOK J:

Or to say that it would certainly be unjust for a particular period, at least until death, then you could read it that way, couldn’t they. So if somebody has a terminal illness it would be unjust for the particular period up until they do die or alternatively miraculously recover, for them to be surrendered and then the Minister has the choice as to whether that’s temporary for that, for a period or permanent.

WILLIAM YOUNG J:

Your argument is simply that it’s to be read as “at all or before”, but if you read it “or before” then you’ve – Justice Glazebrook’s mentioned that it’s…

MR LILLICO:

Yes, yes.

WILLIAM YOUNG J:

And as the Court of Appeal pointed out, age is a requirement, it's not something that's likely to be mitigated against by the effluxion of time.

MR LILLICO:

Yes, I suppose in other words we should be shifting, we're shifting the test and making sure that the test is injustice or oppression, which was the focus of the substantive hearing, and we're not cutting off people because of this temporal requirement.

ELLEN FRANCE J:

Could I just ask you, Mr Lillico, as I read it the point being made in the excerpt from the departmental report that was attached to the Court's minute at page 7, is that the model that's to be adopted is the one that relates to prisoners serving sentences, and the key there is that the Minister, rather than the Court, makes the decision. So might not that intention, that is to give the broader decision-making power to the Minister, and then correspondingly to limit the powers residing with the Court, provide an explanation for the change made to section 48(4)(a)(ii)? In other words, that it's not a mistake but a deliberate intention to give the broader power to the Minister, not the Court?

MR LILLICO:

I certainly agree that, well firstly there was a widening in terms of the reference to the Minister at all, because under the old statute that wasn't possible and the only decision maker was the Magistrate. But –

GLAZEBROOK J:

Well they were taking that away, weren't they, because that was quite clear. That they didn't want that to be a judicial decision.

MR LILLICO:

Yes, and so I agree and you, I think the term used during the substantive hearing was gateway, narrow gateway. The difficulty with the interpretation, the alternative interpretation, the very restrictive interpretation, is that it

narrows the gateway to a crack in the wall really, and it means that the Minister would never hear of cases where there was a permanent set of circumstances that was, that could be seen as unjust.

ELLEN FRANCE J:

Well I'm not sure that necessarily follows. I agree it suggests that the gateway is a narrower one, but that's arguably consistent with the two changes that were made, that is the removal of the reference to the humanitarian, the boarder expression of humanitarian circumstances, and the change in decision-making.

WILLIAM YOUNG J:

The point you're making is if the ground that is made out to the Court is one which can't sensibly be one for a temporary duration but would necessarily be permanent, then the Court simply can't refer it, even though the Minister, if referred, would accept that refusal is appropriate.

MR LILLICO:

Yes and that seems illogical and out of step with the previous scheme where the decision maker could have that kind of, had that power to deal with permanent disabilities, a better term, but you're not going to find this set out. There's a limit to how much the second respondent is going to argue this because ultimately a narrow interpretation of the statute suits the second respondent.

ELLEN FRANCE J:

Well in terms of consistency in approach, there is, I think I'm right, a similar approach adopted in terms of sections 32(3) and (4) and 51(3) and (4), where there's a reference in, if you look at 51(3) for example, there's a reference to "compelling or extraordinary circumstances", "expiration of a particular period".

MR LILLICO:

Yes.

ELLEN FRANCE J:

And that's linked into deferral, isn't it?

MR LILLICO:

That's right, and that's part of the power at subsection (5), Your Honour, where the, at (4) and (5) where the Minister, after having taken hold of the matter, having been referred the matter, if the Minister is impressed with the temporary disability, can then specify a period. Of course the Minister has two months in terms of the statute anyway to make the decision, so you might not get a period specified at all, so for instance if the Minister had thought that he should approach the other country, the requesting country for an undertaking, that process would just happen. You wouldn't see the Minister specifying a period.

ELLEN FRANCE J:

And I understand the submission you make about the previous regime in relation to Australia, but in terms of the current Act, there is, it seems obvious, a distinction between Part 3 and Part 4.

MR LILLICO:

Yes.

ELLEN FRANCE J:

And Part 4 is obviously designed to be the more streamlined procedure, which might also provide some explanation for a deliberate narrowing of the power under 48(4)(a)(ii).

MR LILLICO:

Perhaps.

GLAZEBROOK J:

I just can't see the sense in why you would narrow the power though, when you don't narrow the power on the Minister, especially if it is a permanent one

I can't see why, the policy reason for narrowing that. I mean I can see the policy reason for narrowing a temporary one because you could –

MR LILLICO:

There is some support for it because the Minister of course can, the wording is under 30, the Minister can, once you get to the Minister the Minister can refuse surrender for any reason.

GLAZEBROOK J:

I know, I understand that, I just don't understand what the policy reason would be to restrict the Courts in terms of a permanent, but to say it's okay if it's temporary.

MR LILLICO:

No, because in –

GLAZEBROOK J:

I mean if somebody's in a vegetative state, well I mean presumably they're not even going to be seeking extradition, but of course they might have sought it at an earlier stage when that wasn't the case I suppose.

MR LILLICO:

Yes, I agree. Just broadly speaking, we refer things to the Minister where there's a good reason to refuse surrender and it's hard to see why the logic of distinguishing between temporary, say, health reasons which are going to be less serious than permanent health reasons.

GLAZEBROOK J:

Unless you interpret it the way that I was suggesting, it will be for a period because obviously with age it'll be for a period until the person dies, which is inevitable, with health it'll be, a terminal illness, is it'll be for the period until they die.

MR LILLICO:

Yes, Your Honour, we all face expiration of a particular period.

McGRATH J:

There is nothing particularly surprising, Mr Lillico, is there, in giving the Minister, the statute giving the Minister a comparatively broader discretion at the end of the process?

MR LILLICO:

No.

McGRATH J:

I mean that's the way legislators generally look to dealing with things.

MR LILLICO:

Yes, particularly when you're dealing with extradition, which involves an international relations dimension and you might want the State, in terms of the Minister, making a decision about those things.

McGRATH J:

I'm a little uncertain as to why you are arguing that this is a clear indication of a mistake.

MR LILLICO:

Just for the, simply pointing to the regime that lasted for 100-odd years before this statute, in terms of the Fugitive Offenders Act. It seems fairly clear that the decision maker was empowered for the 100-odd years up until the 1999 statute, to deal with permanent circumstances or temporary ones.

McGRATH J:

But a lot has happened since then and obviously the Part 4 procedure has really been drafted to reflect the mutual respect that two countries have, possibly more, but two countries in particular have, Australia and New Zealand, for the quality of each other's criminal justice systems, and how

much weight one can place on the English legislation, or even the previous legislation before that –

MR LILLICO:
Yes.

McGRATH J:
– I'm not at all sure of.

WILLIAM YOUNG J:
The strongest point though is the asymmetry, isn't it? It's the asymmetry of the referral of the decision-making power.

MR LILLICO:
Yes.

WILLIAM YOUNG J:
And the absence of an obvious reason why –

GLAZEBROOK J:
Permanent gets the shunt and temporary – because there was no explanation for that in the select committee to say well if it's permanent too bad, the person has to go anyway.

MR LILLICO:
No I think, just two points perhaps. Perhaps it might give comfort to Justice McGrath. As a broad proposition we, as you say Your Honour, we defer to other countries, ones we're in a close relationship of comity with, in terms of what justice they can provide, and we trust Australia's justice system. But extradition, Courts who are dealing with extradition are more ready to look at personal circumstances, separate from whatever justice might be faced in the requesting country. That's just as a general proposition, and that's what we're concerned with, not with what justice Australia can provide in terms of the criminal process, but what Mr Radhi's personal circumstances are.

So that's really the broad submission about that. The – and as Justice Young says –

McGRATH J:
Part 4 is really concerned with a new balance in relation in particular to Australia, between the efficiency of extradition on the one hand, and individual rights to criminal justice, and other rights on the other, and it's certainly a tilting of the balance in Part 4 compared with every other part of the statute, and that's the context in which we have to determine what these words in subparagraph (ii) mean.

MR LILLICO:
Yes, I agree with that.

McGRATH J:
Yes, thank you.

MR LILLICO:
Unless I can assist further?

WILLIAM YOUNG J:
Thank you Mr Lillico. Mr Mansfield?

MR MANSFIELD:
Well I think we all agree that Part 4 is a fast-track procedure between New Zealand and Australia, but it still provides under section 48 provision for the Court to refer matters in particular circumstances to the Minister. The intention and purposes shouldn't matter whether it's temporary or permanent, but certainly "period" doesn't necessarily need to be read by reference to a date. It could be read by reference to an event such as until Mr Radhi is not exposed to the risk of indefinite detention, which is the concern here. So I agree entirely with what the Crown is submitting as far as the intention and purpose, and I'm grateful for the work that they have done, but in my submission it's perfectly clear that if there is a permanent issue, that

it would still provide the means for the matter to be referred to the Minister. I'm sorry if I sound a bit awkward but there's a wee bit of feedback coming through.

WILLIAM YOUNG J:
No, that's fine, you're simply adopting Mr Lillico's submissions?

MR MANSFIELD:
I am, but I also accept what Justice Glazebrook has said by the way in which we could read it. We don't need to limit it to a date.

WILLIAM YOUNG J:
I understand that.

MR MANSFIELD:
May it please the Court.

WILLIAM YOUNG J:
We'll reserve our decision again and take time and deliver a judgment in due course.

COURT ADJOURNS: 9.21 AM