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: 11 October 2017

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

Appearances: R M Mansfield for the Appellant
No appearance by or for the First Respondent
M J Lillico and R K Thomson for the Second Respondent

CIVIL APPEAL

MR MANSFIELD:

May it please the Court. Counsel's name is Mansfield, and I appear for Mr Radhi the appellant.

WILLIAM YOUNG J:

Thank you Mr Mansfield.

MR LILLICO:

Tēnā koutou e ngā Kaiwhakawā, ko Lillico māua ko Ms Thomson e tū nei mō te pāpaka a māui. May it please the Court. Counsel's name is Lillico. I appear along with Ms Thomson for the second respondent.

WILLIAM YOUNG J:

Thank you Mr Lillico. Mr Mansfield.

MR MANSFIELD:

May it please the Court. This appeal is not about whether Mr Radhi is eligible for removal. He is. But only whether his case needs to be referred to the Minister pursuant to section 44(4)(a)(ii) so the Minister can pursue undertakings if the Minister determines such undertakings are required, the Court being the accepted gatekeeper, that being the required separation of power. Mr Radhi, like any resident in this country, refugee or otherwise, is protected against disproportionately severe treatment or punishment and arbitrary detention. Those rights are protected pursuant to the Bill of Rights Act 1990. Being indefinitely detained in a detention centre, in immigration limbo after a criminal proceeding, including sentences complete, would be a flagrant breach of those rights. It would be unjust and oppressive. Because of his status as a refugee in New Zealand if he is surrendered to Australia then it is certain not just a real risk that at the end of any criminal proceeding in Australia, of two years or longer, he will be determined an unlawful non-resident, and as a result detained and remain in detention indefinitely. While due process may be available in the form of a review, it is

meaningless. That is because it is not certain whether he will be granted a public interest visa and/or when. In fact the evidence establishes that he will not qualify and again any due process, while available, will be futile because he will fall within the exclusion provisions and/or fail the character test requirement whether convicted or not.

While the Australia Minister has an unfettered and non-reviewable discretion to release him from detention, a public interest visa pursuant to section 195A of the Migration Act 1958, there is no timeframe provided and it seems unlikely on the evidence such a visa would be granted, let alone far from certain. Accordingly, because he is a refugee there is a real risk that if surrendered at the end of any criminal proceeding, he may indefinitely be detained in a detention centre. This, in my submission, is a flagrant breach of the rights we expect of any person. this can only be avoided by the referral of the case to the Minister. There is a clear separation of powers under the Extradition Act 1999. Our Courts cannot require such an undertaking, only the Minister can under Part 4, and only if the case is referred to the Minister. The Minister can then seek appropriate undertakings to prevent rights violations. The Court is the gatekeeper and the threshold must be met. Here, in my submission, it is clearly met. Such a course of action in a case such as this, is obvious, in my submission, and does not undermine the extradition process, the streamline process required under Part 4. In fact it follows it.

Now at this point I was going to refer the Court to a case which I have just filed with the Court this morning, albeit it's a case that is referred to in some of the other decisions which have been filed. That is the case of *Soering v United Kingdom* (1989) 11 EHRR 439, which is a decision from the European Court of Human Rights. In my submission if the Court is able to refer, and I pick by now you have a hard copy at least before you on the bench there, to paragraph 88. The paragraphs are difficult to discern because they don't sit out like ours do, but there is also no page reference to my electronic copy, which I apologise for. But if you can turn to paragraph 88, which appears at the bottom of the page itself, and if I can ask you to turn to

the following page where I'll pick up partway through that paragraph, which is the second paragraph on the next page.

The start of the paragraph reads, "The question remains whether the extradition of a fugitive to another State," that's how it starts, but I want to pick up partway through where there's reference to the particular Article they're examining, it's Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Which provides that 'no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture,'" et cetera.

If I can move down then to paragraph 89, which is the paragraph I'd like to specifically refer the Court to. It reads, "Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3)," that's the Article to which we earlier referred, "by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3) (see paragraph 87 above).

In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."

GLAZEBROOK J:
Is the submission that indefinite detention is inhumane or degrading treatment, not matter what the conditions of detention are?

MR MANSFIELD:
Certainly after the completion of the criminal proceeding, Ma'am, yes. But in my submission –

GLAZEBROOK J:
Is there authority on that?

MR MANSFIELD:
In my submission Ma'am if you look at section 9 and 22 of our Bill of Rights you will see that we protect the right to ensure that someone is not subject to disproportionately severe treatment or punishment. Further, we protect the right against arbitrary detention and it stays –

GLAZEBROOK J:
Well I understand that, I'm just asking about the torture convention in particular. So obviously there's a right not to be subject to arbitrary detention, and indefinite detention where there's no prospect of being removed. I don't need much persuasion that that's arbitrary detention, even if it's authorised by law, but I'm really asking about the torture convention.

MR MANSFIELD:

You're quite right Ma'am. I misunderstood your question. I really refer to this authority because it endorses principles which, I submit, might be relevant to this Court, mainly the balance that is required.

GLAZEBROOK J:

All right, thank you.

MR MANSFIELD:

And the test I suppose which is the test promoted by my learned friend's, the second respondent, namely that a real risk needs to be shown and I accept that. That authority simply endorses that in my submission.

The Court hopefully has received the affidavit of Mr Burnside AO QC in relation to the position should Mr Radhi be removed from our jurisdiction, go to Australia, and remain there for two years while the criminal proceedings are complete including any sentence. In my submission that evidence is helpful to the Court and certainly shows that there is a real risk. Certainly it's certain that there will be determined to be an unlawful non-resident at the completion of that criminal proceeding, and will remain there unless he gets a visa or is removed.

GLAZEBROOK J:

On what basis would the character requirement be breached if he was acquitted?

MR MANSFIELD:

On the basis that a conviction isn't required Ma'am.

GLAZEBROOK J:

Well I understand that but I just wonder how you can be, how you can assert that it will definitely be in that, not breach the character requirement.

MR MANSFIELD:

Well the opinion is that conviction isn't required and the allegation of itself and/or the alleged involvement may in fact be sufficient for the character requirement to not be satisfied.

GLAZEBROOK J:

But it's more of a risk it won't be satisfied rather than a certainty one assumes?

MR MANSFIELD:

Well it's a real risk in my submission.

GLAZEBROOK J:

All right.

MR MANSFIELD:

I mean the only thing that is certain is that he will be classified as an unlawful non-resident. It is certain that he will be detained in a detention centre and he would remain there for an indefinite period unless granted a visa, and there's discussion regarding the two types of visas. So there's the protection visa, which you have evidence he's unlikely to qualify there, then the public interest visa, which the Minister has an unfettered discretion and is a non-reviewable decision.

McGRATH J:

But that visa is not a statutory creation, it's the Minister's creation?

MR MANSFIELD:

It's a statutory creation so far as he has that discretion, but it's unfettered.

McGRATH J:

Yes, but he can shape the visa or the permission that he issues.

MR MANSFIELD:

Quite correct.

McGRATH J:

And that's what the other person allegedly involved in this incident who did serve a prison term in in Australia, is remaining in Australia under, as I understand?

MR MANSFIELD:

Yes. he was extradited in 2003 when there was quite a different political climate in relation to people that come into Australia on these types of allegations, and his own personal circumstances were such that he was granted such a visa, but it's a restricted visa so far as he's released within the community, but it's reviewable by the Minister at any time, so it could be revoked at any time, and there are restrictions on his movements.

McGRATH J:

Yes.

WILLIAM YOUNG J:

Can he work?

MR MANSFIELD:

I can't assist you there on the information I have. My learned friend may be able to Sir. One assumes that he could, but I would need my learned friend's confirmation as to whether they know that information.

ELLEN FRANCE J:

Mr Mansfield, if you're talking about indefinite detention following conviction, how is it you say that flows from the extradition?

MR MANSFIELD:

Because once he's removed from New Zealand, and if he remains out of New Zealand for two years, then he has no right to return here. There is nowhere else for him to go because he can't be returned to Iraq –

WILLIAM YOUNG J:

What about Indonesia?

MR MANSFIELD:

In my submission there is no evidence as to whether he'd go to Indonesia. He's not from Indonesia, he simply went there initially as a refugee before he was granted refugee status and then came to New Zealand.

ELLEN FRANCE J:

Am I right that he could seek a further 12 months?

MR MANSFIELD:

It's at the discretion, so it's, the time period, as I understand it, is two years.

ELLEN FRANCE J:

But he could get a further 12 months at the discretion of the Minister?

MR MANSFIELD:

At the absolute discretion as I understand it.

ELLEN FRANCE J:

And he could apply for that when he was in Australia?

GLAZEBROOK J:

One assumes so, I don't know, oh, because you can only apply for the first one when you're in New Zealand, can't you.

MR MANSFIELD:

Yes, that's right, and he needs to do that before he goes. Because my understanding of the period of two years is that it is the point. He can only apply for a variation allowing him to return within 24 months. And I think my learned friend's agree with that. So then he could apply to come back to New Zealand if he met the requirements, but with a conviction it would be unlikely that he would meet the character requirements to come to New Zealand, and that again is uncertain.

GLAZEBROOK J:

We, I don't think, have a character requirement for refugees do we, apart from whether they come within Article 1F but then they wouldn't be a refugee if they came within Article 1F. I don't know the answer to that.

MR MANSFIELD:

I can't assist you there. I thought we did have a character requirement but…

GLAZEBROOK J:

I mean we do certainly when we're trying to resettle people, but that's because we don't have to take them if they're not in the country. If they haven't arrived at the border we don't have to take them. So obviously we'd have character and restrictions on the voluntary quota.

MR MANSFIELD:

I might have to look at the issue as to whether there is a character requirement. Certainly I know that he was interviewed and there was –

GLAZEBROOK J:

Well certainly because we had no obligation to take him at all.

MR MANSFIELD:

No. I might let my learned friend talk to you about the wider content of coming back in and out if that helps.

MR LILLICO:

I think my understanding is that as it stands currently for a quote refugee, if we accept them then we simply grant them permanent residence. That wasn't the case, though, with Mr Radhi.

GLAZEBROOK J:

No, no, I understand that. Mr Lillico do you know what the position is with refugees generally, whether there's a character requirement like in Australia? People who arrive and we are obliged to take them in, can't send them back.

MR LILLICO:

Yes, I think my understanding is that there is because it then becomes an open question about what kind of status that we give to them, and then a character test applies to what status we might choose to give them, whether it's permanent residence, citizenship, what have you.

GLAZEBROOK J:

Or just a temporary visa.

MR LILLICO:

Or just a temporary visa.

MR MANSFIELD:

I say that accords with my general understanding but I can't refer you to anything specific. I can, if I get a break, pull that up and provide that to the Court.

O'REGAN J:

Could I ask you just what is it you envisage the Minister would do if the case was referred to the Minister?

MR MANSFIELD:

The Minister could speak to the Minister in Australia regarding what will happen to Mr Radhi at the end of any criminal proceeding, and between the Ministers agree to what should happen to prevent him being indefinitely detained in that country. So either New Zealand could agree to have him back, which would address the concern the Australians would have, or otherwise the Australians could undertake to provide him with a visa, that would be suitable and would address the concerns I have regarding indefinite detention.

O'REGAN J:

So would you be looking for the Minister to give some kind of assurance that a future Minister of Immigration will allow him to return, even if he's outside the 24 months plus 12 months period?

MR MANSFIELD:

I would expect the New Zealand Government to provide an undertaking, or the Australians to provide and ask for an undertaking as to how he would be treated Sir.

GLAZEBROOK J:

But how do we know what his character actually is before the criminal proceedings, or how involved he was before the outcome of the criminal proceedings?

MR MANSFIELD:

Well I'm sure the criminal proceedings would canvas that in relation to the allegation then before the Court.

GLAZEBROOK J:

Well exactly. Binding a future Minister, even if that's possible in this sort of timeframe, when at the moment we don't know what his involvement was, if any, and how serious his involvement was with what was a very serious incident.

MR MANSFIELD:

Well the Australia Government who are prosecuting him for people-smuggling know what their case is, and a determination could be made on the basis of their case, I would have thought. Anything less than that would be to Mr Radhi's favour. But I acknowledge the point Your Honour makes. However, all we're seeking is an undertaking as to what will happen to him and an assurance that he won't remain indefinitely detained in Australia. There must be a mechanism for dealing with that between the two Ministers and certainly that is what section 49 envisages. That such undertakings can

be sought and provided. Does the Court have any other questions? I don't have any further submissions unless –

ELLEN FRANCE J:

Sorry Mr Mansfield, just in terms of timing, this application has become, that is the application under section 48, has become quite removed in time from the initial decision in relation to eligibility and I just wondered, I'm not suggesting there's any issue in relation to the present case, but if you look at section 48, I suppose my query is whether that envisages that these sort of applications will, in fact, be made at a much earlier point in time, so that it's then been considered more directly, if you like, in the context of eligibility and a decision as to surrender.

MR MANSFIELD:

Well I would accept that Ma'am. I'm not so sure why there was such a delay between the determination other than the appellate process was invoked, which came through to this Court, and that may have in fact delayed the application in the normal way.

ELLEN FRANCE J:

Right.

MR MANSFIELD:

Otherwise I would expect it to follow quite shortly after.

WILLIAM YOUNG J:

Or at the same time as part of the same hearing.

MR MANSFIELD:

I see no reason why it couldn't Sir.

McGRATH J:

I think the first application was on very narrow grounds, wasn't it. It was concerned with the definition of "arrival" and what it meant and matters of that

kind, and then the matter started expanding from there and I think you're right, if I understand you, not to try to resist the notion that the Act really does contemplate that these matters would be dealt with in the course of one hearing. It had to be raised then, not afterwards, but not that I'm saying there's a problem with hearing your case, and deciding.

MR MANSFIELD:

No, I have to agree that that's what I would anticipate the legislation would expect, otherwise you get the very delay that we have here which is unattractive given that this is intended to be a streamlined process, and I accept that. May it please the Court.

WILLIAM YOUNG J:

Mr Lillico.

MR LILLICO:

May it please the Court. Mr Mansfield, my friend, set the scene for his case by saying that there wasn't an issue about whether Mr Radhi was eligible and simply the controversy was about whether he would be referred to the Minister in terms of his surrender. In terms of that very issue, the matter in controversy here, the second respondent is not saying, in terms of the level of hardship to Mr Radhi, the potential level of hardship, that it couldn't possibly be oppressive, and he submitted to you and provided you with decisions of the Human Rights Committee of the United Nations where asylum seekers, for want of a better term, were detained for up to four years in detention centres in Australia. So it's possible that the level of hardship could amount to oppression. The second respondent's case focuses on the counter public interest in extradition and also in prosecuting a serious crime, but mainly on what we say is the contingency involved in asserting in this Court that that will be the outcome. That that will be a real risk. And it may assist if I can outline to the Court the different paths in which Mr Radhi, and I'll be brief, which Mr Radhi may go down in terms of his immigration status, because the allegation before you is that he will be relegated to what's called "immigration limbo" and that's a term that appears in the literature.

So the contingencies are outlined at paragraph 62 of the second respondent's submissions, and these decisions involve delegated powers by officials in both New Zealand and Australia. Sorry 61, page 16.

GLAZEBROOK J:
Well 61.1 as we understand it, if he applies he's just about certain to get that extension isn't he?

MR LILLICO:
Yes he has to get it, that's correct Your Honour. He can't –

GLAZEBROOK J:
And it's probably relatively likely that they take longer than two years, isn't it?

MR LILLICO:
Yes.

GLAZEBROOK J:
It's quite a complex case I think.

MR LILLICO:
Yes and if he's convicted of course –

GLAZEBROOK J:
And if he's convicted it will definitely be longer.

MR LILLICO:
Yes Your Honour.

ELLEN FRANCE J:
And just so I'm clear, the evidence is that he could get a further 12 months. There is a, that's discretionary, and there is a requirement of having spent a certain amount of time in New Zealand.

MR LILLICO:

Yes Your Honour.

ELLEN FRANCE J:

Prior but that aspect could be waived, as I understand the evidence?

MR LILLICO:

Yes, there's a discretion, an absolute discretion as is often termed with immigration matters for the Minister to do so. Then once in Australia, of course, the matter is in the hands of the immigration officials in that country.

GLAZEBROOK J:

Can I just clear up one thing. Is there any, I know it says, is there any impediment to any review of a refusal to allow that absolute discretion visa, or does it – because I seem to remember there's something in the Immigration Act 2009 that says you can't review anything that happens in relation to visas being granted or not granted. So not only does it say absolute discretion but I think there's something that says it's not reviewable and certainly not appealable, but do you know the answer to that?

MR LILLICO:

I don't Your Honour. The visas in Australia are reviewable, so if he was refused a protection visa, for example –

GLAZEBROOK J:

No, but that's only because he's in Australia, because they're reviewable here as well and appealable, but –

MR LILLICO:

The short answer is, Your Honour, is I'm just not sure. The two year one, as you said, can't be refused, but further extension to that I'm not sure of the position I'm afraid.

ELLEN FRANCE J:

There are limitations in relation to review proceedings concerning residence class visas, where you're outside the country, so I suppose the question is whether those also apply to the extension.

MR LILLICO:

The extension. Certainly if he was outside the country, say at the conclusion of – and this is further down the decision, this is the next point in the decision tree, if you like. The proceedings are disposed of, he's either been acquitted or served his sentence. He then applies for residence or some sort of status in New Zealand, then certainly there's difficulties with reviewing that and –

GLAZEBROOK J:

That was really my question. I mean I suppose the other issue is that one year extension, which mightn't be much use to him in any event if he's convicted, because of the timeframe. If he gets anything like, a sentence anything like his co-defendant, which I understand was nine years.

MR LILLICO:

Yes, nine years, so while we're at the point, Your Honour asked, Justice Glazebrook you asked about what would the position be in terms of acquittal. That perhaps wouldn't change the landscape very much for the immigration officials in New Zealand because they did know about the allegations before he entered.

GLAZEBROOK J:

Well I suppose if he's acquitted it might be slightly irrational for anybody to deny him entry, but if there's no review possibility then irrationality is a possibility, and it might depend, again as Mr Mansfield says, on whether, yes, he's acquitted at a criminal standard, but maybe would not have been at a civil standard, which is presumably the sort of thing that immigration officials can legitimately take into account.

MR LILLICO:

The evidential restraints I've left behind but…

GLAZEBROOK J:

Well in a character it's, character is not just characterised by convictions is it?

MR LILLICO:

No Your Honour. The reference for the point that the immigration officials knew about the allegations at least, on an allegation basis, is in the case on appeal at 320, paragraph 7 of Karen Read's affidavit. So that UNHCR –

GLAZEBROOK J:

They knew about them but assumed that they'd been investigated by the Australians and also by UNHCR, as I understand it –

MR LILLICO:

Yes, they accepted what Mr Radhi said –

GLAZEBROOK J:

– and that they weren't in issue, yes.

McGRATH J:

Mr Lillico, do I take it that you're not really able to give us a clear cut submission on whether or not judicial review of a prospective decision by the Minister after, say, conviction and serving the sentence, where the prospective review, sorry, prospective decision by the New Zealand Minister is reviewable, you're not sure…

MR LILLICO:

In terms of immigration status?

McGRATH J:

Yes.

MR LILLICO:
No Sir, I'm not sure about that.

McGRATH J:
That could be quite important because you're building your argument on the submission this is all contingent –

MR LILLICO:
Yes.

McGRATH J:
But if in the end there is no access to the Courts at the end of the day, that could be quite an important matter, and it should be possible to get it clarified during, before long, shouldn't it.

MR LILLICO:
Quite easily Sir.

McGRATH J:
I'm not even sure if your junior can help in the matter.

MR LILLICO:
Perhaps Sir, yes. the main point of me taking the Court through this though is simply to say that obviously we're talking about a future event. Many of the cases that have been produced by my friend talk about situations where someone has been detained in an immigration centre and what the consequences for them were. Here we're looking, in the context of an oppression test in an extradition sense, we're looking at likelihood and what the second respondent is essentially saying is that likelihood and the prospect of the risk is part of oppression and –

WILLIAM YOUNG J:
What about real risk. That's the expression used in the *Sullivan* case.

MR LILLICO:

Yes.

WILLIAM YOUNG J:

It'd be hard to say there isn't a real risk here.

MR LILLICO:

Well the glosses that are put on real risk in *Sullivan v Government of the United States of America and Secretary of State for the Home Department* [2012] EWHC 1680 (Admin), [2012] 1 Ex LR 435 is clear and here, given the number of contingencies, we say it's not clear.

GLAZEBROOK J:

Can we perhaps go through the, keep going through?

MR LILLICO:

Yes.

GLAZEBROOK J:

Because that might answer this.

MR LILLICO:

Yes Your Honour.

GLAZEBROOK J:

Because what Mr Mansfield says was – well we've done 61.3 and we're going to find out whether there's a review possibility of that, and also it might be worth actually finding out about the character requirements, because that's probably in the immigration policy, possibly, but I don't know, to be honest I don't know the answer to that because refugees are in a different stage, there might well be a difference between quota refugees and people we're obliged to hold onto because they're here, and it might be that the new visas where we can't send people back there might be some issue in respect of those as well, because in fact he'd come within those even if not a refugee, because

he's presumably got a concern for life if he goes back. So he's denied a protection visa. Now Mr Mansfield says he's, just about inevitable that he will be denied a protection visa because of the character requirements.

MR LILLICO:
That's not the evidence though is the point to be made about that.

GLAZEBROOK J:
Well do you want to take us to the evidence then?

MR LILLICO:
Yes, 289 is the applicable part of the record. So at 289 it was put to the Australian official that if Mr Radhi was convicted of these matters he simply wouldn't qualify for a protection visa, which is probably the –

GLAZEBROOK J:
Whereabouts are you on 289?

MR LILLICO:
I'll just turn it up if I may.

GLAZEBROOK J:
Well it actually is the only hope is the Minister. At 288 it would be up to the Minister whether he got a protection visa.

MR LILLICO:
Yes, so 288 to 289. It's quite conceivable –

McGRATH J:
Which line are you at?

MR LILLICO:
Sorry, 12 Sir, of 289, 38 of the original pagination. It's quite conceivable, this is being put in cross-examination, "it's quite conceivable that a refugee who had a people-smuggling conviction with no family in Australia might not

receive such a visa from the Minister, isn't it?" "That would require me to speculate."

WILLIAM YOUNG J:
I mean the answer to that must be yes I would have thought.

MR LILLICO:
Well it didn't happen for Mr –

WILLIAM YOUNG J:
I mean it's a very guarded answer.

MR LILLICO:
I suppose the best evidence we have about that is what happened to Mr Daoed.

WILLIAM YOUNG J:
Well it is that we don't know much about what happened to him really do we?

MR LILLICO:
We do know that he was given a bridging visa and he spent a year in immigration detention, so he's been given status, he's been given a formalised immigration status, and has been permitted to go into the community, that's in the affidavit –

WILLIAM YOUNG J:
That's not a protection visa?

MR LILLICO:
No, no, so he was, the evidence in fact was that Mr Daoed was declined, so your question Sir, yes, I agree. That the evidence really is that he would probably be declined a protection visa, which is the thing he would hope for most if he was in this situation. Mr Daoed didn't get one. That's in the affidavit of Mr De Ruyter which is before this Court, filed in this Court. So if we're just looking at 61.4 of that list of contingencies, probably the evidence

is, and it's a matter for the Court obviously, the state of the evidence is probably that he wouldn't get a protection visa.

GLAZEBROOK J:
So you're accepting that he wouldn't get it then, you accept Mr Mansfield is right?

MR LILLICO:
Yes, yes, I think that's a fair view of the evidence. 61.5, moving onto the next one.

WILLIAM YOUNG J:
The answer to that is probably yes.

MR LILLICO:
Yes, the answer to that is yes, and that was the focus, just picking up from Justice McGrath's point earlier about other issues being live in this case previously, there was an issue that was run really in the District Court, namely that Mr Radhi might be refouled to country of origin and gives us no evidence of that, and that was the finding of the District Court. So it's likely that Mr Radhi would be assessed to engage protection obligations and not refouled.

WILLIAM YOUNG J:
So it comes down to six, 61.6.

MR LILLICO:
So it really comes down to six which is –

WILLIAM YOUNG J:
Which is really only one real speculative issue.

MR LILLICO:
Yes.

WILLIAM YOUNG J:

And if it's a 50/50 chance either way then there is a real risk isn't there, even a sort of 30/70 chance would be a real risk, wouldn't it?

MR LILLICO:

Well the other thing that might happen to him, Sir, is that he's acquitted and he returns to New Zealand, or he's convicted and returns to New Zealand.

WILLIAM YOUNG J:

I'd sort of rather assumed that if he's acquitted it's probably not going to be such a big deal. Now that may be too favourable, from the point of view of the Commonwealth, but if we assume he's convicted, then New Zealand doesn't have an obligation to take him back. Australia is probably going to find, a struggle to find a home to him and then what do they do.

MR LILLICO:

Well, in terms of an application to New Zealand he's got three children and a wife here who are all citizens. He's worked here as a mechanic and a panel beater. So – and I can only take it so far of course because he's –

WILLIAM YOUNG J:

Have they got a right to go to Australia as New Zealanders –

MR LILLICO:

Yes they do.

WILLIAM YOUNG J:

– or is that subject to any contingency?

MR LILLICO:

No, they're citizens Sir.

O'REGAN J:

What do you say in response to Mr Mansfield's answer that he gave to me about what the Minister could do if the matter was referred to the Minister

here. What sort of undertakings could be obtained, what sort of undertakings could be given by the Minister?

MR LILLICO:

Well I have to say in general he could, obviously he could seek an undertaking, that's an explicit matter under the statute that she can, she can obtain from the Australian Government, that's the first thing, and the second thing that she might do is speak to her Cabinet colleague, the Minister for Immigration who, as we've said, has an absolute discretion about ordering visas. So I agree, basically, with what my friend said about what may happen at the Ministerial stage. The terms, sorry Sir?

O'REGAN J:

So the Minister could obtain from the Immigration Minister some kind of assurance that in the event of acquittal or conviction he would be permitted to return to New Zealand, is that the sort of thing you're talking about.

MR LILLICO:

Yes, I mean whether that is politically likely or practical, it's probably not a matter for me to say. They're matters that are negotiated by the Ministry of Justice and Ministry of Foreign Affairs and trade officials, but one can see practical difficulties with gaining such an undertaking at this stage when there are so many possible outcomes for Mr Radhi in Australia. But broadly speaking it's possible to seek an undertaking from the Australian Government. It'd be up to them as to whether they give it and in what terms. The point to be made really for the second respondent about that is the Minister can do things for Mr Radhi, that's a certainty. Can make Mr Radhi's immigration situation more certain, but the point is that the Minister in a Part 4 extradition to Australia such as this, the so-called streamlined procedure –

WILLIAM YOUNG J:

It's a good thing it's been streamlined.

MR LILLICO:

Yes, I don't think I'm the only one Sir. I think the Law Commission think rather the same. So the Minister can make things better for Mr Radhi. It's whether he can jump through what's been called the gate keeping function of the Court in terms of this referral to get there, and to do that he has to satisfy you of the fact that there will be oppression and if he can't get through that hoop itself, then the question to ask is not what the Minister can do for Mr Radhi but whether the Court is satisfied on the oppression test.

So broadly we get into difficulty guessing at what an undertaking might look, given all these contingencies, but there may – I agree with my friend that that's something, the Minister can do things for Mr Radhi, it's just whether it gets through the gate keeping.

GLAZEBROOK J:

Can your junior help on the appeal point and the character issues or do you want to have time just to point in a memorandum.

MR MANSFIELD:

I think the character issue, if I can assist, is at section 137 of the Act, and we might be different than Australia.

GLAZEBROOK J:

Sorry?

MR MANSFIELD:

We're different than Australia I think there. Section 137 of the Act applies. Australia has an additional character requirement which we don't.

GLAZEBROOK J:

Yes, I mean because most of the people who come under that new category by their very definition wouldn't meet the character requirement.

MR MANSFIELD:

Yes, but 137 sets out some requirements in relation to character, in relation to criminal offending at paragraph 2.

ELLEN FRANCE J:

So that is some form of character requirement, isn't it?

MR MANSFIELD:

Yes, but we don't have an additional one, which I think the Australians do have. I've just been emailing back and forth with –

WILLIAM YOUNG J:

So what's the section under?

MR MANSFIELD:

137 Sir.

ELLEN FRANCE J:

Of the 2009 Immigration Act.

GLAZEBROOK J:

Maybe it's easier if people put in, maybe the Crown is the best person. You think?

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

So the Crown puts in a memorandum on those two points.

MR LILLICO:

Two issues being reviewability of ordinary visas and character –

GLAZEBROOK J:

And the character in relation to refugee.

WILLIAM YOUNG J:

Could you just ask a third –

GLAZEBROOK J:

And maybe reference to the policy statement, because there's a policy statement under the – there's still a policy statement under the Immigration Act?

MR LILLICO:

There's certainly a manual Your Honour.

GLAZEBROOK J:

That's what I mean.

WILLIAM YOUNG J:

And thirdly if there's any restriction, practical restriction on the ability of Mr Radhi's family to go to Australia as New Zealand citizens.

MR LILLICO:

I think there was some limited evidence, but we can address that Sir, about their financial means because they've been on a benefit.

WILLIAM YOUNG J:

Right. Is that what you were going to say Mr Mansfield?

MR MANSFIELD:

Yes Sir, the evidence before the Court is they will be restricted to a benefit at that point, and wont' have sufficient funds to be able to go to and/or to resettle there. They are solely reliant on his income as a panel beater and mechanic. That was the evidence before the District Court.

ELLEN FRANCE J:

Just in terms of what Mr Lillico is doing on the reviewability, just to make sure we cover the situation where he's convicted and he's detained in Australia for

a period of time and then he makes some form of application to come back here.

MR LILLICO:
Yes, most likely to be a residence visa I would have thought.

ELLEN FRANCE J:
Well I'm assuming if it's –

GLAZEBROOK J:
And then that's non-reviewable, especially if you're out of New Zealand.

ELLEN FRANCE J:
That's right, I'm –

GLAZEBROOK J:
That's definitely –

ELLEN FRANCE J:
If what you're looking at is what they call a residence class visa, then I'm assuming that 187(8) applies, but that's, it maybe there's something else that I don't…

MR LILLICO:
Yes .

GLAZEBROOK J:
And it might be relevant that he has been accepted as a refugee here because there might be an overlay of the refugee convention and obligations in terms of people who are lawfully staying. The trouble is, and he's not, it's not his choice to have gone overseas as against being sent there because one can understand that you're not in breach of your obligation under the refugee convention with our two year limit if people have chosen to go but, because presumably they've chosen to go to a safer country at that stage.

MR LILLICO:

You'd hope that it wouldn't be counted as an indication that he wasn't committed to New Zealand. So just in terms of the contingent nature of what we say might happen to, and it's clear that we'll need to provide something further to the Court about his legal rights in particular, but in terms of the test of whether it would be clear that hardship would occur, I take that wording from a case called *Government of the Republic of South Africa v Dewani (No 2)* [2014] EWHC 153 (Admin), [2014] 1 WLR 3220 in the United States, which is at page 62 of the Court's bundle. I don't, well it may assist, in fact, if we have a look at that because there's a useful analogy there with other parts of extradition case law. So this is 62 of the second respondent's bundle.

GLAZEBROOK J:

What tab? The second respondent's bundle of authorities are you referring to?

MR LILLICO:

Yes.

O'REGAN J:

It's tab 4.

MR LILLICO:

Thank you. So in *Dewani* it was said by the Court that, and this is decision of the High Court England and Wales, and it's about paragraph E.

GLAZEBROOK J:

Paragraph E on page 62?

MR LILLICO:

Yes. Page 62 of the bundle itself. Page 3235 of the original decision's pagination, paragraph 51. "The only situation in which a court would most probably say it would be oppressive and unjust to return him is where it is

clear that he would be found by the court in the requesting state to be unfit to plead."

GLAZEBROOK J:
It's in a slightly different context, isn't it, because the question is whether it would be fair to try him or not.

MR LILLICO:
Well the overlay which makes this case somewhat similar, and I wouldn't say that it's precisely on point, but the overlay that makes it somewhat similar is that Mr Dewani was, he was thought to be unfit at the time that the Court made its extradition decision, it's eligibility and surrender decision, and the difficulty for Mr Dewani was that he may be held indefinitely once he reached South Africa until he got to a point where he might be fit to stand trial, and so – and of course the test in the UK for this type of objection to extradition, as opposed to the purely rights-based objections is in terms of oppression and injustice. So it has that value for the Court in my submission at any rate. They did articulate the real risk test but in this particular context they required the evidence to be clear and the facts of the case perhaps give us some indication of what clear in that case meant. As I say, Mr Dewani, and this is at page 52 of the main pagination of the bundle, page 3225 of the original pagination of the report, you'll see at paragraph 11 the kind of state that Mr Dewani was in.

Paragraph 11, page 52, "Professor Eastman said in his evidence that he believed that the appellant was a long way from being fit to plead. At the time the appellant could not, in his opinion, instruct counsel or solicitors or follow the course of the proceedings; any attempt to give an account of what had happened to his lawyers or at trial would enhance his PTSD." So, and the other expert, Dr Cumming, this is at paragraph 2, agreed that the appellant understood the charge against him, it was murder, but was unfit to stand trial and would remain so for some time at least. So the Court was conscious that because of the way that the system worked in South Africa that that might mean that in fact there was a prospect of indefinite detention and they thought

that because, and they were confident that was a real risk because of the way that Mr Dewani was actually unfit at the time that the Court had to consider the extradition. And the issue was framed at 41, the issue about indefinite detention was framed at paragraph 41 of the case report, page 60 of the main pagination. "We recognise," the Court said, "that it is comparatively unusual for extradition to be effected in respect of a person who it is currently agreed by the medical experts is currently unfit to plead and has been for some time. In the event that the return was effected and after an appropriate passage of time and treatment it was determined after appropriate inquiry that this condition remained, and the appellant then faced indefinite detention without conviction, the question of what then could or should be done may give rise to serious issues." And the Court found that in the end that extradition couldn't be contemplated unless assurances were given, because without that there was injustice or oppression.

GLAZEBROOK J:

How does that help you, if it's almost inevitable he, or there's a real risk he will be detained. You have to say it has to be certain he's detained before it would be just – so if the South African authorities had some possibility of saying he wasn't going to be detained, which actually I presume they would.

MR LILLICO:

They said he'd be reviewed and so forth, but the –

GLAZEBROOK J:

Well what's the difference there? They say it's unjust to send them unless there's an assurance he'll be sent back.

MR LILLICO:

The prognosis was poor. He was unfit at the time and there was no, and –

GLAZEBROOK J:

I'm just asking how this helps you, whether they required an undertaking?

MR LILLICO:

I see. Because in this case the, it was oppressive without the undertaking and because we say in this case we don't reach that level of certainty. If the Court could be certain –

GLAZEBROOK J:

Was there a certainty in the South African case?

MR LILLICO:

Yes, because he was already unfit, Your Honour.

WILLIAM YOUNG J:

But he was, in fact, tried. Dewani was, in fact, tried and acquitted. I mean it's a notorious case. But I mean it can hardly have been inevitable that he was going to be found unfit to plead because in fact he wasn't.

MR LILLICO:

No, not inevitable, but at the time that the decision was made there was a good prospect that he would be because he was unfit then and it looked like there was a risk, a real risk of indefinite detention.

WILLIAM YOUNG J:

But it seems to me there is a good prospect that Mr Radhi will be in immigration limbo if he's sent back. One can express with varying degrees of probability by use of different adjectives, but he's in that ballpark of real and substantial risk, as I see it anyway.

MR LILLICO:

Yes.

WILLIAM YOUNG J:

I'm not sure you really disagree do you?

MR LILLICO:

The question for the Court is whether it reaches, it goes far – the difficulty is that we're all agreed that a fanciful, fanciful is a term that's sometimes used in this area, that a fanciful risk doesn't get there.

WILLIAM YOUNG J:

I'm not troubled by the thought the Australians would send him back to Iraq. So I don't see that as a real risk. So we can treat that as an exemplar on one side of the continuum, as something we don't have to worry about.

MR LILLICO:

And then at the other end there's certainty that the hardship will happen, and I'm not advocating for that standard either. It's somewhere in the middle. They almost got to the point of certainty in *Dewani* and they almost got to the point of certainty, well they got to the point of 80% in *Sullivan*, which is the next case.

GLAZEBROOK J:

Well it wasn't really certainty in *Dewani* was it?

MR LILLICO:

No, no they didn't get quite to certainty. They knew that he was unfit. They didn't quite know what was going to happen to him in South Africa but they were pessimistic about the chances of him being in custody for a long time. irrespective of what later happened. In *Sullivan,* which is the other case we've cited, that was also indefinite detention but for. It was a civil detention for risky sex offenders, and the psychologist in that case said in my view there's an 80% chance that you will be, after you're dealt with, even after you serve your sentence, you'll be put in this civil detention regime.

WILLIAM YOUNG J:

But that wasn't really a case for the psychologist to say. That was really, it depended very much on the approach the prosecutor took and you're prosecuting evidence from the District Attorney's office, or County Attorney's

office, was a bit equivocal and shifted over time, initially saying probably not, and then later maybe and referring to a different statutory regime which hadn't been initially mentioned. So they weren't, the Court wasn't much impressed with her evidence.

MR LILLICO:
No.

WILLIAM YOUNG J:
But they only came down on a real risk. That was their test.

MR LILLICO:
Although they did pick up on the wording in the UK House of Lords in the case of *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [2004] UKHL 26 where they used the phrase "strong grounds for believing", and that's at 69 of the bundle, paragraph 14. So, "Strong grounds for believing that the person, if returned, faces a real risk of being subject to torture or to inhuman or degrading treatment." So should be 69 of the second respondent's bundle, and the reference you'll see is the last paragraph on the page, where in the middle of that indented quoted from *(Ullah)* the House of Lords, Lord Bingham in that case, translated "real risk" to "strong grounds for believing".

WILLIAM YOUNG J:
Sorry, I can't actually find it.

GLAZEBROOK J:
Yes, I've lost it too, sorry.

WILLIAM YOUNG J:
So we're looking at *Sullivan* are we?

MR LILLICO:
Yes, at page 69 of the second respondent's bundle.

WILLIAM YOUNG J:

But strong grounds for believing, faces a real risk, so it's a sort of a double set of qualifiers.

MR LILLICO:

Yes, and so we say that that is a standard that's really dictated by, we say the standard is closer to certainty.

WILLIAM YOUNG J:

I don't think it is. there are strong grounds for believing, namely that's what the Australian statute says, that he may face a risk, a real risk.

MR LILLICO:

Yes if he's not diverted down the –

WILLIAM YOUNG J:

Well that's just common sense appreciation and I don't think it makes – well, it's helpful in the sense that it's candid but I don't know that it helps the argument that much that you're advancing.

MR LILLICO:

The other thing that has to be set against, and the other argument about whether this amounts to oppressiveness beyond simply the matter of probability, is that when these cases are assessed, when extradition cases are assessed, they're assessed against a nation/state, nation/state obligation firstly, and secondly they're assessed against obligations that we have in respect, or public interest we have, is a better way of putting it, in supporting the prosecution of serious crimes. So that being said where there is a risk, or a real risk, and again it's hard to put it on probabilities, some real risk is tolerated, for quite serious outcomes, because of this extradition imperative, the nation/state obligation, and because of public interest in prosecuting crime.

WILLIAM YOUNG J:

Except that it's an issue that can be dealt with between the New Zealand and the Australian Governments?

MR LILLICO:

If we first find that its oppressive, yes.

WILLIAM YOUNG J:

Yes, I mean it's a soluble problem. It can either be dealt with by the New Zealand assuring the Australian Government, we'll take him back, or the Australian Government assuring the New Zealand Government, we won't lock him up.

MR LILLICO:

Yes Sir. Yes, and really I rely on the gate keeping nature of this application. So in terms of the other way of viewing the oppression test, this extradition context, the most useful authority in my submission is *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor Intervening)* [2012] UKSC 25, [2013] 1 AC 338 where, and that's at page 185 of –

GLAZEBROOK J:

Just give us the tab number if you could?

MR LILLICO:

Tab 9, I'm indebted to my friend. Lord Kerr is probably the most useful point to pick it up Your Honour. So this is in the context of a discussion of the contrast between extradition and exportation, and the Court said there that, "There is a principled distinction to be recognised between extradition and expulsion. The latter is performed – "

GLAZEBROOK J:

Lord Kerr said that so you probably need to show us the others as well.

MR LILLICO:

Yes. So, "The latter is performed unilaterally and is designed to protect the state's national interest; the former involves compliance with an international obligation and is performed in furtherance of the suppression of transnational crime and the elimination of safe havens. But, just because the interests that require to be protected are different in the two contexts, it does not automatically follow that the approach to an evaluation of article 8 rights has to be different. It is true that the importance of protecting a system of extradition carries greater weight than will (in general terms) arrangements to expel unwanted aliens or the control of immigration. Extradition is, par excellence, a co-operative endeavour and it depends for its success on comprehensive (if not always total) compliance by those who participate in the system." And probably skipping down to the final sentence which is important, in my submission. "The intrinsic value of the right cannot alter according to context; it will merely be more readily defeasible in the extradition context."

GLAZEBROOK J:

It's a weasel word, isn't it?

MR LILLICO:

Well it means that we might tolerate some real risk because there is an extradition imperative, and that can be seen in some of the suicide cases, if I can call them that. in your bundle there's a case *Turner v Government of the USA* [2012] EWHC 2426 (Admin), [2012] 1 Ex LR 515 where Ms Turner was sought by the United States for extradition.

WILLIAM YOUNG J:

She basically said, if you send me back I'll commit suicide, and she had a reasonably go at it just at a point in time when she thought the Divisional Court was about to require her to be taken into custody.

MR LILLICO:

Thank you Sir. And so the Court said, well undoubtedly she's got mental health problems, is in a delicate position, and she may commit suicide if she's

extradited, but we have a treaty obligation with the US. We don't have a treaty obligation with Australia, but it's written into a statute that we have this relationship of high comity. We have a treaty with the US and they are pursuing her legitimately for this motor vehicle manslaughter case. So the real risk has to be read against that background and here it has the added important context that people-smuggling is something that's addressed by the United Nations Convention and its transnational organised crime, an instrument which we've signed up to, and in terms of that instrument we've committed in Article 2 to co-operating with other countries, other States, signatories to the convention to combat and suppress people-smuggling. So the extradition imperative in this case is bound up with other commitments as well, other international commitments and effects the way that the Court will read the degree of risk here.

ELLEN FRANCE J:

Just on a slightly different aspect. In *Commonwealth of Australia v Mercer* [2016] NZCA 503, which is Mr Mansfield's bundle, and that's dealing with 8(1)(c) so that's discretionary restrictions on surrender, and the use of the phrase "oppression" in that context, so it is a different context, but there the Court referred to Lord Diplock's judgment and noted that the oppression limb was directed to hardship to the accused resulting from changes in his circumstances between the alleged offending, and my question is, is that what you say the oppression limb is related to here, because if that's so it will be less clear that this is that type of oppression.

MR LILLICO:

The oppression has to relate to the extradition, that's true, but it's not necessarily in this context tied to the change in time, whereas it had to be under 8(1).

ELLEN FRANCE J:

Right.

MR LILLICO:

There's no contest here that Mr Radhi can point to a compelling circumstance for the person. Apart from the matters that I've been tasked with in terms of the supplementary memo, which I should file first I think and perhaps Mr Mansfield reply to.

McGRATH J:

Just on that, do you really need a supplementary memo, I think in particular, I assumed, frankly, you might be able to while you're on your feet, or with a short adjournment, tell us whether there's a clause that prohibits judicial review.

MR LILLICO:

There is a clause, absolutely, that prohibits judicial review.

McGRATH J:

From, of Mr Radhi's, any application Mr Radhi might make after serving a sentence if he's convicted in Australia, trying to get back into New Zealand?

MR LILLICO:

Yes, there is, 187(8)(a).

McGRATH J:

And that's 187(8), and that relates to a residence visa does it?

MR LILLICO:

Yes, Sir, it does.

McGRATH J:

But is there not some way of coming back in, short of a residence visa, because after all that's the way he came back in originally.

WILLIAM YOUNG J:

But he wants a residence visa.

GLAZEBROOK J:

Yes, I think he is on a residence visa, it's just not a permanent residence visa.

MR LILLICO:

It's a, yes, I think the phrase is limited. He doesn't have a travel right.

WILLIAM YOUNG J:

So he wouldn't, I mean there's no point him getting in on a holiday visa.

MR LILLICO:

No but temporary entry visas are treated in the same way it seems, 186(3)(a), so no appeal or review –

McGRATH J:

186(3)(a)?

MR LILLICO:

Yes Sir. So that relates to temporary entry visas. So he couldn't say I want to take up my work as a mechanic for a limited period, please let me in, and if that was declined he wouldn't have a right of appeal on the plain words of the statute anyway.

McGRATH J:

Are you in a position to accept that any application he might make to get back into New Zealand after serving a sentence in Australia, the decision of the Minister in New Zealand would not be reviewable?

MR LILLICO:

That seems to be the claim of the statute, yes Sir. Those are really the matters I wish to raise unless I can assist any further?

GLAZEBROOK J:

I think it would be worth just having it in writing for myself I would like that.

McGRATH J:

Yes, but at least we've got what the position is going to be.

GLAZEBROOK J:

Yes.

MR LILLICO:

I think I've got character also in relation to refugee status and I think Mr Mansfield has addressed practical difficulties of the family coming to New Zealand, is that…

WILLIAM YOUNG J:

Going to Australia.

MR LILLICO:

Going to Australia, sorry Sir, yes.

GLAZEBROOK J:

There is evidence on that.

MR LILLICO:

Yes.

GLAZEBROOK J:

But of course it's likely to be very much in the future in any event and probably depends on whether he's indefinitely detained.

MR LILLICO:

Yes, and the Court of Appeal observed that practically it would be difficult for the family to get to Australia and the other matter was, well I think that was it, wasn't it? Reviewability, character in relation to refugee status, and practical obstacles to Mr Radhi's family travelling to Australia. As the Court pleases.

MR MANSFIELD:

Just while we're on section references, in my submission section 15 also seems to apply, which relates to excluded persons, certain convicted or deported persons not eligible for visa or entry permission to enter or be in New Zealand, and if you look at subparagraph 2 it would seem to apply. But I agree otherwise with what my learned friend regarding the ability to appeal and/or review from outside New Zealand, having had an opportunity to review that.

McGRATH J:

So that's section 15 of the Immigration legislation, or was it Extradition legislation?

MR MANSFIELD:

Sorry Sir, it's the Immigration Act 2009. Just returning to my learned friend's written submissions, page 16, paragraph 61.6, which is where we were really focusing, there really is no dispute between us in relation to the oppression test, I accept there needs to be a real risk, and I don't want to debate that with any submission to you that it needs to be lower. I simply say that it's met here because it was a concern that he could be permanently detained, and if we're focusing on paragraph 61.6, which I think is where we ended up, namely whether he would get what is commonly referred to as I understand it, a public interest visa in Australia from the Minister, we need to bear in mind that while that has been considered he would remain detained in a detention centre. There is no time limit for the Minister to make a decision and it's at the Minister's absolute discretion and it's non-reviewable. So given the political climate in Australia in relation to what is colloquially called boat people and people that seek to bring in such refugees, Mr Burnside QC has expressed an opinion on this at paragraph 613 and 614 of his affidavit where it's his assessment that Mr Radhi would be unlikely to remain – sorry he would be likely to remain in a detention centre having been declined such a public interest visa. But look I accept that such a decision would be very much for the Minister of the day and it would depend on the political climate of the day,

but there would need to be a public interest factor before the Minister could exercise that absolute or unfettered discretion.

So there is, and I would have thought it's hardly a matter of debate, a real risk that he could be permanently detained in a detention centre in Australia, which in my submission is an unacceptable position for New Zealand, and it simply requires the Court to be the gatekeeper in such a situation and refer it to the Minister for the Ministers to resolve it between themselves, if they can, and if they can't well then it will be for our Minister to decide whether he is released. So unless I can be of further assistance I would have thought that the real risk test has been met. May it please the Court.

WILLIAM YOUNG J:
Can I just add to the list of topics. Section 378 special directions, would it be possible for the Minister to give a special direction that Mr Radhi be permitted to return?

ELLEN FRANCE J:
Now do you mean?

WILLIAM YOUNG J:
Yes, pre-extradition, yes.

MR MANSFIELD:
Thank you, may it please the Court.

WILLIAM YOUNG J:
Those are your submissions I assume?

MR MANSFIELD:
Yes, unless I can be of further assistance.

WILLIAM YOUNG J:
Thank you. We'll reserve our decision and deliver it in writing in due course.

COURT ADJOURNS: 11.14 AM