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IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA562/2017
[2019] NZCA 209

BETWEEN	KYUNG YUP KIM Appellant
AND	MINISTER OF JUSTICE OF NEW ZEALAND First Respondent
	ATTORNEY-GENERAL OF NEW ZEALAND Second Respondent

Hearing:	17 July 2018
Court:	Cooper, Winkelmann and Williams JJ
Counsel:	A J Ellis, G K Edgeler and BJR Keith for Appellant A F Todd and G M Taylor for Respondents
Judgment:	11 June 2019 at 9 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The Minister of Justice's decision to surrender the appellant under s 30 of the Extradition Act 1999 is quashed.

C The Minister of Justice must reconsider whether the appellant is to be surrendered in accordance with the matters identified at [278] of this judgment.

D The respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band B basis and usual disbursements. We certify for second counsel.

E Costs in the High Court are to be dealt with by that Court having regard to this judgment.

REASONS OF THE COURT

(Given by Winkelmann J)

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Introduction

[1] Mr Kim is a citizen of the Republic of Korea. He came to New Zealand with his family in 1989, when he was 14 years old. He and his mother are permanent residents of New Zealand, while his father and younger brother are New Zealand citizens. Mr Kim is the father of two teenage children, for whom he is the principal caregiver.

[2] Chinese authorities allege that in 2009, Mr Kim killed a 20-year-old woman Pei Yun Chen in Shanghai. Chinese police have both forensic and circumstantial evidence linking Mr Kim to the homicide. On 25 May 2011 New Zealand received a request from the People's Republic of China (the PRC) seeking the extradition of Mr Kim on one count of intentional homicide. That request included an assurance that if convicted, Mr Kim would not be sentenced to death.

[3] In response to that request, Mr Kim was arrested in New Zealand and held in custody pending completion of extradition proceedings. He remained detained for over five years as the extradition proceedings made their way through the courts before

eventually being released on electronic bail. The proceedings in connection with this request for extradition have a lengthy and complex history, which we need only outline in part.[1] In the ensuing seven years since that initial arrest, Mr Kim has resisted surrender arguing that he will be at significant risk in the PRC of torture, extra-judicial killing or the imposition of the death penalty. He says his mental health is such that he should not be surrendered, and that if he is surrendered, he will receive inadequate treatment. He claims to have a defence to the charge but says he will not receive a fair trial if returned to the PRC because of systemic and fundamental flaws in its criminal justice system. Finally, Mr Kim argues that if convicted, he will be exposed to a disproportionately severe sentence.

[4] The Minister of Justice is responsible under the Extradition Act 1999 (the Extradition Act) for the decision to surrender Mr Kim. The Minister sought and received various assurances from the PRC to meet the concerns identified by Mr Kim and Ministry officials in connection with the risk of torture and Mr Kim's right to a fair trial. In late 2015, following receipt of those assurances, the then Minister of Justice, the Hon Amy Adams, determined that Mr Kim was to be surrendered. She concluded that Mr Kim was at risk of torture if surrendered but that assurances provided by the PRC which allowed extensive monitoring of Mr Kim's treatment adequately addressed this risk. In assessing the risk the assurances had to meet, the Minister proceeded on the basis that, as an ordinary criminal, Mr Kim was not at high risk of torture, and that other aspects of his case further reduced the risk. She was satisfied that recent reforms to criminal procedure, and assurances regarding access to a lawyer, met any risk that Mr Kim would not receive a fair trial on his return.

[5] Mr Kim applied successfully to judicially review that decision before Mallon J.[2] The Judge identified reviewable errors and directed the Minister to reconsider her decision.[3]

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1 CIV-2012-485-1918 (Habeas corpus); CRI-2013-404-000007 (Bail); CIV-2012-485-2506 (Judicial review of eligibility for surrender); CIV-2014-404-3107 (Habeas corpus); CIV-2014-404-3174 (Habeas corpus); CIV-2015-485-1009 (Bail); CIV-2015-485-1036 (Judicial review of Minister's decision); CIV-2016-485-843 (Judicial review of Minister's second decision).

2 *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 [*First judicial review*].

3 At [259]–[262].

[6] The Minister, having reconsidered whether to surrender Mr Kim, again decided that Mr Kim was to be surrendered. Mr Kim then applied to judicially review the Minister's second surrender decision, but on this second occasion, Mallon J refused the application.[4]

[7] Mr Kim now appeals that refusal of judicial review. He argues that in declining the second application for review, the Judge overlooked serious errors in the Minister's decision-making process and reasoning. Mr Kim's overall contention is that in deciding to surrender Mr Kim, the Minister failed to come to grips with the functioning of the PRC's legal system in which pre-trial torture and extra-judicial execution is endemic, and a fair trial is not possible. He argues the Minister underestimated the extent of the risks that Mr Kim faced, due to errors in her decision-making process and because she took a view of the facts not reasonably open to her. He contends that the Minister ought not to have relied upon diplomatic assurances because that practice undermines the standing of international conventions and the rule of law in the PRC, and because the assurances in this case are inadequate to meet the concerns they purport to address.

[8] The issues on this judicial review are difficult. Mr Kim's case is the first occasion on which New Zealand has been asked to extradite to the PRC. Extradition processes exist to ensure that those who commit crimes cannot escape consequences by fleeing the jurisdiction — that there should be no safe havens for those who commit serious crimes. And it is alleged that Mr Kim has committed a very serious crime, a crime in respect of which credible evidence has been gathered by the PRC. But on the other hand, the Minister of Justice is asked to return Mr Kim to a country that has a criminal justice system very different to our own, that has not committed to relevant international instruments in the way or to the extent that New Zealand has — a country in which, it is reliably reported, torture remains widespread (notwithstanding procedural reforms in the last 40 years which have reduced the incidence of torture) and in which the criminal justice system is subject to political influence. New Zealand has obligations under international law to refuse to return a person to a jurisdiction in

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4 *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823 at [157] [*Second judicial review*].

which they will be at substantial risk of torture, or where they will not receive a fair trial.

[9] It is in this context that the courts are asked to review the Minister's exercise of her decision-making power to surrender Mr Kim. On the view we have taken, the Minister must again re-visit the decision to surrender. We have summarised our reasons at [275] below.

Some necessary context as to the extradition process

The Minister's role in the extradition process

[10] There is no extradition treaty in force between New Zealand and the PRC. However, Part 5 of the Extradition Act allows extradition on an *ad hoc* basis to countries with which New Zealand does not have an extradition treaty. If the responsible Minister (the Minister of Justice) decides that a request for extradition should be dealt with under the Extradition Act, then the process under Part 3 of that Act applies.[5] The Minister must decide whether the request should proceed to the District Court for a decision on whether a person is eligible for surrender.[6] The District Court's consideration of eligibility for surrender includes determining whether a prima facie case exists against the person.[7]

The surrender decision and the relevance of international law and the New Zealand Bill of Rights Act 1990

[11] After the eligibility determination, the matter is then referred back to the Minister to make the final decision as to whether or not the person should be surrendered. The power to make that decision, the decision that is the subject of this review application, is contained in s 30 of the Extradition Act. It is a power constrained by mandatory and discretionary restrictions on surrender. Although set out in the Extradition Act, these restrictions derive from fundamental principles and rights contained within various international covenants ratified by New Zealand which

5 Extradition Act 1999, s 60(6).
6 Section 24.
7 Section 24(2)(d).

also underlie, to some extent, the rights and freedoms contained within the New Zealand Bill of Rights Act.

[12] In the case of Mr Kim, the relevant mandatory ground for declining surrender is that set out in s 30(2)(b), which provides that a Minister must not determine that a person is to be surrendered:

> if it appears to the Minister that there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country; …

This provision reflects New Zealand's commitments pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture).[8]

[13] There are also discretionary restrictions on surrender under which the Minister may decide not to surrender. The following are relevant to Mr Kim's case:

(a) section 30(3)(a): if the person may or has been sentenced to death;

(b) section 30(3)(d): if it appears to the Minister that there are compelling or extraordinary circumstances relating to the person, including their health, that would make it unjust or oppressive to surrender the person; and

(c) section 30(3)(e): if for any other reason the Minister considers that the person should not be surrendered.

[14] The Extradition Act does not expressly provide for consideration of whether the individual will receive a fair trial. But it is common ground, on the facts of this case, that s 30(3)(e) requires the Minister to address the issue of fair trial rights in the PRC when making the surrender decision. That is because that section and the powers conferred under it must be interpreted, to the extent its wording permits, in a manner consistent with New Zealand's obligations under international law.

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[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

Those obligations include the fundamental principles of criminal justice arising under the International Covenant on Civil and Political Rights (ICCPR)[9] and the Convention against Torture.

International law bearing upon exercise of s 30 discretion

[15] New Zealand ratified the ICCPR in 1978. In 1989, New Zealand ratified the First Optional Protocol under that Convention, which established a complaint mechanism for individuals.[10] And in 1990, New Zealand ratified the Second Optional Protocol, which concerned the abolition of the death penalty.[11]

[16] New Zealand ratified the Convention against Torture in 1989 and the Optional Protocol, which provides mechanisms for scrutiny of nations' compliance with that convention, in 2007.[12]

New Zealand Bill of Rights Act and exercise of s 30 discretion

[17] Section 30 of the Extradition Act is also to be given a meaning, to the extent it can be, consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act.[13] It is clear that the latter Act applies to actions taken by the Executive and the courts in New Zealand.[14] What is less clear is the effect of the New Zealand Bill of Rights Act on the Minister's assessment of whether surrender should be ordered in light of the situation Mr Kim would be returned to in the PRC.

[18] In *Zaoui v Attorney General (No 2)* Mr Zaoui had argued that he would be subject to the risk of torture and the arbitrary deprivation of life if returned to Algeria

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9 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

10 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

11 Second Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 414 (opened for signature 15 December 1989, entered into force 11 July 1991).

12 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (opened for signature 18 December 2002, entered into force 22 June 2006).

13 New Zealand Bill of Rights Act 1990, s 6. See also *Zaoui v Attorney General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91].

14 New Zealand Bill of Rights Act, s 3.

and that would be a breach of his rights under the New Zealand Bill of Rights Act.[15] Section 9 of the New Zealand Bill of Rights Act provides:

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment of punishment.

[19] The Supreme Court explained the principle against non-refoulement and its relationship to the s 9 right, and to the rights contained in the ICCPR as follows:[16]

> [79] Those provisions [ss 8 and 9 New Zealand Bill of Rights Act] do not expressly apply to actions taken outside New Zealand by other governments in breach of the rights stated in the Bill of Rights. That is also the case with arts 6.1 and 7 of the ICCPR. But those and comparable provisions have long been understood as applying to actions by a state party — here New Zealand — if that state proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life. The focus is not on the responsibility of the state to which the person may be sent. Rather it is on the obligation of the state considering whether to remove the person to respect the substantive rights in issue.

[20] This approach does not mean that, before deciding whether to allow surrender, the Minister must ensure that the requesting state complies with the New Zealand Bill of Rights Act; it cannot be given extraterritorial effect so as to govern how criminal proceedings in the requesting state are conducted. For example, a decision to surrender would not be unreasonable because the requesting state does not afford the individual a jury trial, even though if tried in New Zealand the person would have a right to a jury trial under s 24(e). As Ms Todd submits for the respondents, the extradition context requires some latitude and respect for difference in criminal justice processes.[17] But there must be limits to that, such that the Minister should refuse surrender where surrender would violate the fundamental principles of justice which underlie the rights relating to criminal procedure, treatment and detention contained within the New Zealand Bill of Rights Act and international treaties.[18]

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15 *Zaoui v Attorney General (No 2)*, above n 13.

16 *Zaoui v Attorney General (No 2)*, above n 13 (footnotes omitted).

17 *Canada (Justice) v Fischbacher* 2009 SCC 49, [2009] 3 SCR 170 at [51]; and *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at 844.

18 See *United States v Burns* 2001 SCC 7, [2001] 1 SCR 283 for the approach of the Canadian Supreme Court in the context of the significance of the Charter.

[21] In this case, there are no difficult issues as to the application of the New Zealand Bill of Rights Act to the decision to surrender, because the fair trial rights contained in that Act largely mirror the provisions of the ICCPR.

PRC's adoption of international covenants

[22] The PRC signed the Convention against Torture in 1986, ratifying it in 1988. But it has made a reservation to arts 20 and paragraph one of art 30 of that convention. Nor has the PRC signed the Optional Protocol. Together these articles provide for investigation by the United Nations Committee against Torture if it receives a well-founded indication that torture is being systematically practised in the territory of a state party. It also provides for the receipt of individual complaints made by any individual who alleges he or she has been subjected to torture. The PRC's position is that the "Chinese government believes that the promotion and protection of human rights is mainly realized through the efforts of countries themselves, not through the means of visits to state parties."[19]

[23] The PRC signed the ICCPR in 1998 but is yet to ratify it. It has not signed or ratified the ICCPR's First Optional Protocol. Nor has it signed and ratified the Second Optional Protocol on the abolition of the death penalty.

The process to extradite Mr Kim

[24] On 15 August 2011, the then Minister of Justice, the Hon Simon Power, decided the PRC's request to extradite Mr Kim should be dealt with under the Extradition Act. On 17 August 2011, the Minister notified the District Court that he had received the request for surrender and the matter was set down for an eligibility hearing.

[25] On 29 November 2013, the District Court decided that Mr Kim was eligible for surrender, pursuant to s 24 of the Extradition Act.[20] However, the Minister then delayed the decision under s 30 whether to surrender Mr Kim until challenges Mr Kim

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19 *Report of the Working Group on the Universal Periodic Review* UN Doc A/HRC/25/5/Add.1 (27 February 2014) at [186.16].

20 *Re Kim* DC Auckland CRI-2011-004-11056, 29 November 2013.

brought to the eligibility decision were exhausted. It was for that reason that an initial request for assurances (containing a draft script of proposed assurances) was not conveyed by the Ministry of Foreign Affairs and Trade (MFAT) to the PRC until 2014. These assurances had been drafted by the Ministry of Justice, in association with MFAT, and with the assistance of Professor Fu Hualing, a Professor of Law at the University of Hong Kong. They were then revised over the course of a series of meetings with the PRC's representatives. Finally, by 3 July 2015 the stage of seeking diplomatic assurances was completed and the assurances issued by the PRC.

[26] At the time the initial extradition request was made, the PRC provided an assurance that "according to The Supreme People's Court's decision, Kim Kyung Yup will not be sentenced to death after his extradition back to China". The additional diplomatic assurances obtained through the process we have outlined can be summarised as follows:

(a) As a state party to the Convention against Torture, the PRC will comply with that convention.

(b) Mr Kim will be brought to trial without undue delay.

(c) During all periods of his detention Mr Kim will be able to contact New Zealand diplomatic or consular representatives at all reasonable times.

(d) Those New Zealand representatives may visit Mr Kim and be accompanied by one or more of an interpreter, a medical professional or a legal expert licensed to practise law in the PRC. Visits are to be every 15 days although additional visits can be arranged. The visits will include the opportunity to:

(i) interview Mr Kim in private and without monitoring;

(ii) to have Mr Kim, if he consents, be examined by medical professionals chosen by New Zealand diplomatic or consular

officials (although the PRC would have the right to have a medical professional of their choice present); and

(iii) to access parts of the detention facility to which Mr Kim has access including his living quarters.

(e) For the purpose of getting information on Mr Kim's treatment, New Zealand representatives may meet in private with others including prison staff, procuratorate staff, medical professionals and, with Mr Kim's consent, his lawyer. If information is provided in good faith, there will be no reprisal against those who provide such information.

(f) Mr Kim will be entitled to retain a lawyer of his choosing and to receive legal aid in accordance with Chinese law.

(g) On request, New Zealand representatives are to be provided with full and unedited recordings of pre-trial interrogations of Mr Kim and also of court proceedings relating to him if the hearing is closed. If the hearing is open, those representatives may attend. If the hearing is closed, pursuant to Chinese law, those periods shall be as short as possible.

(h) Recordings of interrogations and court proceedings are to be used for the sole purpose of obtaining information on the treatment of Mr Kim and will not be otherwise disclosed to third parties.

(i) The PRC will comply with applicable international legal obligations and domestic requirements regarding fair trial.

(j) If there is any issue regarding the assurances, the PRC and New Zealand will immediately consult to resolve the issue.

[27] It is common ground that the diplomatic assurances provided in this case do not impose legally enforceable obligations upon the PRC. In the first judicial review proceeding, the respondents filed evidence from Mr John Adank, a public servant

employed by MFAT, concerning the use of diplomatic assurances in dealings between states.[21] His evidence was that in the course of diplomatic relations, states may agree to undertake, or to refrain from undertaking, certain actions. A range of instruments are available to record and formalise these agreements, from bilateral and multilateral treaties to arrangements, memoranda of understanding, Exchange of Notes and other forms of agreement. Diplomatic assurances are often used by states in the context of individual criminal cases, including extradition. They are not, in themselves, binding under international law unless the undertakings are set out in treaties. The undertakings may also acquire legal force if they engage in some way with pre-existing treaty obligations, but that is not the case here.

[28] Mr Adank says that it is a fundamental principle that states conduct their dealings with each other in good faith. Diplomatic assurances provided in good faith amount to moral and political obligations on the state providing them, so that a failure to observe those assurances gives rise to serious reputational risk. It can affect both the bilateral relationship *and* the country's standing in the international community.

Briefing to the Minister

[29] Once the additional assurances were issued by the PRC, Minister Adams was provided with extensive briefing materials to assist her in making her surrender decision. This included reports from United Nations Committees and various international non-governmental organisations as to the criminal justice system in the PRC, the prevalence of torture within that system, prison conditions, relevant New Zealand legislation and international conventions, as well as Chinese legislation and relevant decisions in the extradition context from other jurisdictions.

[30] The Minister received and considered submissions from Mr Ellis on behalf of Mr Kim, as well as material Mr Ellis provided to support Mr Kim's argument that he should not be extradited.

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21 *First judicial review*, above n 2.

Minister's first decision

[31] Mr Kim was notified of the Minister's first decision, through his counsel, on 30 November 2015. In the decision letter the Minister provided reasons for her decision.

[32] In relation to the risk of torture, the Minister directed herself that she:

> …must refuse to order …surrender if it appears to me that there are substantial grounds to believe that [Mr Kim] would be in danger of being subjected to an act of torture in the PRC (s 30(2)(b)).

She was satisfied that there were not substantial grounds to believe that Mr Kim would be in danger of an act of torture in the PRC. She said that there was evidence that torture was still a significant problem in the PRC and accepted that Mr Kim was at risk of torture. But she considered that he was not at high-risk of torture and other factors reduced his risk further. Moreover, the PRC had provided detailed and specific assurances which included provision for monitoring. She was satisfied that monitoring would provide a significant deterrent to any act of torture. She noted that New Zealand and other jurisdictions have experience whereby assurances given by the PRC have been honoured.

[33] As to fair trial rights, the Minister asked herself whether she was satisfied, on the available information (including assurances provided by the PRC) that Mr Kim would receive a trial in the PRC that to a reasonable extent accords with the fundamental principles of criminal justice reflected in art 14 of the ICCPR. She expressed herself so satisfied.

[34] The Minister was not satisfied that Mr Kim's mental health issues were sufficiently compelling or extraordinary to refuse surrender, and there was no suggestion he was not well enough to travel.

[35] Having determined that Mr Kim should be surrendered in accordance with s 30, the Minister noted that the next step was to issue a surrender order pursuant to s 31.

First judicial review

[36] Mr Kim brought judicial review proceedings in respect of the first decision, advancing multiple grounds of review.[22] He provided an affidavit from Mr Clive Ansley, a Canadian legal academic who has lectured in Chinese history and law, and has frequently provided expert evidence as to the operation of the PRC's legal system. Mr Ansley has direct experience of the PRC's criminal justice system, even if it is a little dated, having worked as a foreign lawyer in the PRC between 1984 and 2003, handling litigation before the courts. The Judge admitted Mr Ansley's evidence on the basis that it might be relevant to the extent it provided information the Minister did not have and which was material in the sense that it may have led to a different decision.[23]

[37] The Judge was satisfied that absent the assurances there was a substantial risk that Mr Kim would be tortured, and there were concerns regarding his ability to receive a fair trial.[24] The efficacy and enforceability of the assurances were therefore critical.[25] The Judge found a number of errors in the Minister's consideration of the adequacy of the assurances, and directed the Minister to reconsider the surrender order in light of three matters:

(a) The Minister had not explicitly considered the effectiveness of assurances obtained from the PRC given New Zealand's apparent inability under those assurances to disclose information about Mr Kim's treatment to third parties.[26] She noted that any issues that arose were left to be determined on a bilateral diplomatic basis. She said "[i]n view of New Zealand's limited experience with assurances from the PRC and the limited information from other countries about their experience with the PRC honouring assurances,

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22 *First judicial review*, above n 2.
23 At [14]; referring to Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [11-053].
24 At [260].
25 At [173].
26 At [259].

this may be inadequate to protect Mr Kim's rights."[27] The Judge said this issue needed explicit consideration by the Minister.

(b) The Minister had concluded that Mr Kim will receive a trial that to a reasonable extent complies with the rights in art 14 of the ICCPR.[28] But in reaching that conclusion the Minister had not explicitly addressed whether the assurances sufficiently protected Mr Kim from ill-treatment and his right to silence during pre-trial interrogations, when they do not provide for Mr Kim to have the right to a lawyer present for all pre-trial interrogations.[29] While the assurances provided that all interrogations would need to be recorded and provided on request to New Zealand representatives, the Minister had not addressed whether that was an adequate substitute for the presence of a lawyer in light of the authority exerted by public security officers (said recently by the UN Committee against Torture to wield excessive power and be without effective control) and when the presence of a lawyer when an accused is questioned by the police is a well-established right in this country. The Judge also noted the issue of whether Mr Kim would be compelled to answer questions in view of the PRC's apparently conflicting criminal procedure laws, a risk that had not been specifically addressed in the assurances.[30]

(c) The extent to which monitoring arrangements would be proactively undertaken.[31] The Judge said that on the information provided to the Court it was unclear what visits would actually occur (as opposed to what access is permitted).

[38] Mr Kim's application to review the order to surrender was accordingly granted. The Judge directed the Minister to reconsider her decision in light of the issues raised in the judgment and the particular matters set out above.[32]

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27 At [259].
28 At [260].
29 At [260].
30 At [260].
31 At [261].
32 At [262].

Minister's second decision

[39] On 19 September 2016, the Minister again decided that Mr Kim should be surrendered to the PRC. In the reasons provided she said she was satisfied, based on additional information she had received from MFAT, that:

(a) Mr Kim's treatment would be proactively monitored;

(b) New Zealand would be able to disclose information about Mr Kim's treatment to third parties in appropriate circumstances, and the effectiveness of those assurances would not be undermined;

(c) Mr Kim's rights would be sufficiently protected despite the absence of a lawyer during pre-trial interrogations; and

(d) Mr Kim could refuse to answer questions during pre-trial interrogations.

[40] She concluded that none of the mandatory restrictions on surrender applied and surrender was appropriate having regard to the relevant discretionary grounds.

[41] She advised Mr Ellis of her reasons on 3 October 2016. On that same day she sent a letter to the Minister of Foreign Affairs and Trade asking him to convey to his officials that, in addition to any visits sought by Mr Kim, MFAT should plan to visit him at least once every 48 hours during the investigation phase and no less than every 15 days from then until the completion of trial.

Second judicial review

[42] On the second judicial review application, Mr Kim challenged the Minister's reliance upon diplomatic assurances given the PRC's poor human rights record.[33] He argued there should be a blanket ban on the use and acceptance of such assurances until the PRC brings itself into compliance with those international standards that

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33 *Second judicial review*, above n 4, at [5].

New Zealand has obligated itself to uphold.[34] He also challenged the effectiveness of the assurances received in terms of Mr Kim's fair trial rights, and the risks of torture, exposure to the death penalty or extra judicial killing and Mr Kim's mental health.

[43] The Judge was satisfied that the additional information received by the Minister, and the Minister's reconsideration in light of that information, adequately addressed the deficiencies in decision-making identified in the first judicial review.[35] She concluded it was reasonably open to the Minister to determine that Mr Kim's rights would be protected by the assurances if he was surrendered to the PRC and to decide to surrender him accordingly.[36]

Grounds of appeal

[44] Mr Ellis, for Mr Kim, argues that on second judicial review the Judge erred in:

(a) holding that the Minister could lawfully and reasonably rely upon diplomatic assurances as a means of reducing the risk that Mr Kim would be tortured;

(b) rejecting arguments that the Minister took into account an irrelevant consideration, namely helping the PRC establish credibility in the international community;

(c) finding the Minister's decision that the assurances were an adequate protection against the risk of torture was reasonably open to her even though the Minister:

(i) took into account an irrelevant consideration, namely Mr Kim's risk of torture relative to other detainees in the PRC;

(ii) erred in finding that Mr Kim was not a member of a high-risk group;

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34 At [23].
35 At [154]–[157].
36 At [155].

(iii) repeated errors she had made in her assessment of that risk, errors which had been identified by the Judge in the first judicial review decision, but overlooked by her in the second; and

(iv) failed to address how the particular assurances could meet the risk of torture given the way in which torture is typically practiced in the PRC;

(d) finding that the Minister could reasonably rely upon assurances as an adequate protection against the risk of the imposition and carrying out of the death penalty;

(e) failing to address the absence of any assurance addressing the risk of extra-judicial killing;

(f) upholding the Minister's application of an incorrect legal standard in weighing Mr Kim' s right to a fair trial in the extradition context;

(g) upholding the Minister's decision that Mr Kim's surrender to the PRC would not result in a flagrant breach of his right to a fair trial although the Minister:

(i) reached views as to the PRC criminal justice system which were inconsistent with evidence before her; and

(ii) relied on vague and unenforceable assurances she had received which did not address the structural absence of fair trial protections;

(h) identifying the risk that Mr Kim would not receive credit for time spent in custody in New Zealand, yet nevertheless upholding the decision to surrender; and

(i) upholding the Minister's reliance upon advice from PRC officials as to Mr Kim's access to mental health care whilst in custody in the PRC,

given that such access is not the subject of any assurance and that provision for mentally ill prisoners is strongly criticised in material available to the Minister, and subsequent material before the Court.

Standard of review

[45] The standard of review is not in issue on this appeal. It is common ground between the parties that the Judge applied the appropriate standard of review in both the first and second judicial review. In the first judicial review decision, the Judge held that, due to the fundamental human rights at stake, the appropriate standard of judicial review of the Minister's decision is one of heightened scrutiny.[37] Whilst not amounting to a merits view, it requires the Court to: [38]

> …ensure the decision has been reached on sufficient evidence and has been fully justified, while recognising that Parliament has entrusted the Minister (not the courts) to undertake adequate enquiries and to exercise her judgment on whether surrender should be ordered.

This approach reflects that it is not for the court to decide whether the relevant risk exists,[39] but rather whether it was reasonable for the Minister to conclude that it does not.[40] In doing so, the court is entitled to subject the Minister's reasoning process to anxious or heightened scrutiny.

[46] In the second judicial review decision, the Judge accepted that heightened scrutiny required consideration of whether materially relevant information (including information the Minister knew or should have known existed) had been considered by the Minister.[41] Again, it is common ground that the Judge's approach on this aspect of review was correct.

[47] We are satisfied that the standard of review applied by the Judge was appropriate. It is argued for Mr Kim that if he is surrendered to the PRC he will be

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37 *First judicial review*, above n 2, at [7].
38 At [7] (footnotes omitted).
39 In this case, the risks Mr Kim has asked the Minister to address are the risks of torture, extra-judicial killing, of failure to provide a fair trial or to adequately treat Mr Kim's mental health issues, and finally, the risk of disproportionately severe punishment.
40 *India v Badesha* 2017 SCC 44, [2017] 2 SCR 127 at [62].
41 *Second judicial review*, above 4, at [17].

denied the most fundamental of human rights; the right to be free of torture and the right to a fair trial. All parties have proceeded on the basis that there are good grounds for concern as to the observance and protection of human rights in the PRC. It is therefore right that when the Minister makes a decision in connection with Mr Kim's extradition the Minister is guided by a correct understanding of the law, and makes decisions properly grounded in evidence and only after consideration of all relevant evidence.

FIRST GROUND OF APPEAL

Is reliance upon diplomatic assurances consistent with New Zealand's international obligations?

Submissions

[48] We address at this point Mr Ellis' submission that as a matter of international law, assurances may not be accepted to meet a risk that a person will be tortured should they be extradited to the requesting state. We address issues raised for Mr Kim as to the effectiveness and enforceability of the assurances provided as they arise in connection with the other grounds of appeal.

[49] Mr Ellis argues that the Minister could not lawfully rely upon diplomatic assurances as a means of reducing risks of breach of the appellant's fundamental rights. He argues that accepting unenforceable private assurances, in preference to relying on the Convention against Torture and the ICCPR, both of which prohibit torture, undermines those international instruments, and is therefore inconsistent with New Zealand's obligations under international law. Such assurances are not legally binding upon a requesting state, occurring outside the context of a binding international extradition agreement, and the binding effect of international law. Accepting such assurances associates New Zealand with the proposition that the PRC can avoid the consequences of its non-compliance with the Convention against Torture and the ICCPR by entering into bilateral arrangements. It therefore ignores, and indirectly supports, systematic torture of detainees regularly.

[50] Mr Ellis advances a further argument. He says that given the PRC's overall human rights record, the Minister was obliged to ask herself whether she should accept

assurances from the PRC. This is a question arising before consideration of the adequacy of assurances. At least notionally, it is a question which arises before assurances are sought. Mr Ellis argues that the Minister did not address herself to this question, and therefore erred in law.

[51] These are largely the same arguments made by Mr Ellis in the first and second judicial review. Mr Ellis contends that the Judge erred in rejecting them. The respondents support the reasons provided by the Judge for rejecting these arguments in the High Court.

First judicial review

[52] In the first judicial review, the Judge noted widespread concern within the international community about the practice of obtaining assurances.[42] Nevertheless, she was satisfied that whether New Zealand's commitment to the international obligations is better served by seeking assurances and ensuring they are adhered to, or by not seeking bilateral assurances at all and declining an extradition until the PRC's commitment to the prohibition on torture is demonstrated, is a political question.[43]

[53] She said it was not apparent that the Minister considered whether she should decline to rely on assurances in principle (in light of the widespread criticism of their use) when deciding to make a surrender order.[44] The decision to seek assurances had already been made by the time she came to make her first and her second decision (it was made on 11 November 2014). The briefings in respect of those earlier decisions to seek assurances were not before the Judge and they are not before us.

[54] In any case, the Judge was satisfied the Minister was not required to respond to that point.[45] It was a decision for the Minister, not the court, whether to seek and rely on diplomatic assurances.[46] The Extradition Act permits the use of assurances and does not exclude them in respect of torture. No legal error arose because

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42 *First judicial review*, above n 2, at [145].
43 At [160].
44 At [159].
45 At [160].
46 At [160].

the Minister decided to seek assurances. The Judge said the court's role on the judicial review was "to determine whether the Minister's decision to order surrender was within her power under the [Extradition] Act in light of the assurances that were obtained".[47]

[55] As to Mr Ellis' second argument, the Judge accepted that although the decision to seek assurances was in principle a political one, there may be some circumstances where the general situation in a country is such that no reliance can be placed on assurances. The Judge noted that the Minister was briefed on that issue, and that she accepted her official's advice. Her decision as advised to Mr Kim stated that she had considered the general situation regarding torture in the PRC, and against that background had considered Mr Kim's particular circumstances, including the nature and quality of the assurances.[48]

Second judicial review

[56] Mr Ellis advanced the same arguments in support of the second application for judicial review. The Judge reached the same conclusion.[49]

Analysis

(a) Can New Zealand lawfully accept assurances to meet a risk of torture?

[57] There is nothing in the Extradition Act or in New Zealand's international law commitments, that precludes reliance upon assurances where the risk to be addressed is that of torture.

Statutory framework

[58] The Extradition Act clearly contemplates that when considering a request for extradition, the Minister may seek undertakings. Section 30(3)(a) contemplates that assurances may be sought or provided if the death penalty is a possibility. Section 30(6) provides:

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47 At [160].
48 At [170].
49 *Second judicial review*, above n 4, at [40].

> For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit.

[59] These statutory provisions are not a complete answer to Mr Ellis' point, as they are to be interpreted, to the extent consistent with their language, with New Zealand's obligations under international law. While there is no prohibition on return contained in the ICCPR, we consider that it may be a breach of a state party's obligations under that convention to return a party to a requesting state knowing that such return exposes them to a real risk of a breach of a right under the ICCPR.[50]

International obligations

[60] Relevant also is art 3 of the Convention against Torture, which provides:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

[61] The art 3 obligation is absolute in the sense that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion.[51] Nevertheless art 3 does not purport to prohibit extradition to a state where torture is known to occur. Rather, it focuses upon the nature of the risk that the individual will be tortured. Nor does it preclude taking diplomatic assurances into account when assessing that risk. The issue in assessing risk, as we shortly address, is the effectiveness of those assurances.

Human rights commentary

[62] As the Judge noted, there is widespread concern in the international community about the practice of obtaining assurances. The basis for this view is well set out in the following comment from a Joint Report of the Human Rights Watch, Amnesty International and the International Commission of Jurists:[52]

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50 See discussion above at [17]–[21].

51 *Saadi v Italy* ECHR 37201/06, 28 February 2008 at [125]–[126] and [138].

52 Amnesty International, Human Rights Watch and International Commission of Jurists "Reject rather than regulate: Call on Council of Europe member States not to establish minimum standards for use of diplomatic assurances in transfers to risk of torture and other ill-treatment" (2 December 2005) (footnotes omitted); cited in *Lai v Canada (Minister of Citizenship and Immigration)* 2007 FC 361, [2008] 2 FCR 3 at [133].

> As noted by the Council of Europe's Commissioner for Human Rights "…the weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment". The value of signing an "understanding" or accepting an "assurance" from a state that does not respect even legally-binding multi-lateral agreements prohibiting torture and other ill-treatment is necessarily cheap. Promises to take measures detailed in diplomatic assurances are mere repetitions — indeed, pale echoes — of treaty and other international obligations which receiving states have already promised but failed to respect in the past.
>
> The reliance on such non-binding agreements to enforce legally binding obligations may, in fact, undercut the credibility and integrity of universally binding legal norms and their system of enforcement. This is particularly the case if authorities in a country have persistently refused access to existing international mechanisms.

[63] Mr Ellis also relies upon a similar position taken by the United Nations Human Rights Committee:[53]

> **Diplomatic assurances and non-refoulement**
>
> 19. The Committee is concerned that the State party continues to rely on its "deportation with assurances" policy to justify the deportation of foreign nationals suspected of terrorism-related offenses to countries where it is reported that they may face a real risk of torture or other forms of ill-treatment and notes that, while there are no plans to abandon the policy, its framework is under review by the Independent Reviewer of Terrorism Legislation. Despite the memorandums of understanding on deportation with assurances that have been concluded with a number of countries and the arrangements for post-transfer monitoring, the Committee remains concerned that these measures may not ensure that the individuals affected will not be subjected to treatment contrary to articles 6 and 7 of the Covenant (arts. 2, 6 and 7).
>
> The Committee recalls its previous recommendation (see CCPR/C/GBR/CO/6, para. 12) and recommends that the State party strictly apply the absolute prohibition on refoulement under articles 6 and 7 of the Covenant; continue to exercise the utmost care in evaluating diplomatic assurances; ensure that appropriate, effective and independent post-transfer monitoring of individuals who are transferred pursuant to diplomatic assurances is in place; refrain from relying on such assurances where the State party is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries; and take appropriate remedial action when assurances are not fulfilled.

[64] Mr Ellis refers also to the most recent pronouncement of the Convention against Torture, contained in its General Comment No 4 (issued February 2018, which

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53 *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland* UN Doc CCPR/C/GBR/CO/7 (17 August 2015) (emphasis omitted).

was not before the Minister but was placed, in its draft form, before the Judge).[54] This states:

> 20. The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.
>
> (footnotes omitted)

[65] While there is undoubtedly concern regarding the acceptance of assurances from States where torture is known to be used, this material does not support Mr Ellis' argument that assurances may not be accepted in any circumstances from such state, consistent with New Zealand's international obligations.

Case law

[66] Nor does his argument find support in the case law. Rather, the cases we were referred to support the proposition that it is not a breach of New Zealand's international obligations to accept assurances from a country in which there is systemic use of torture if there are reasonable grounds to believe that the assurances provided will meet that risk.

[67] This issue was addressed in *Othman (Abu Qatada) v United Kingdom*.[55] In that case the applicant argued that the state party could not proceed to deport in reliance upon assurances from Jordan that it would not torture the applicant, because Jordan did not abide by its legally binding multilateral international obligations not to torture. The applicant argued that a state party could never lawfully rely upon assurances where there is a systemic problem of torture and ill-treatment.[56] The European Court of Human Rights rejected those arguments, saying:[57]

> …the Court has never laid down an absolute rule that a State which does not comply with multilateral obligations cannot be relied on to comply with bilateral assurances; the extent to which a State has failed to comply with its multilateral obligations is, at most, a factor in determining whether its bilateral

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54 *General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (Advanced unedited version)* (9 February 2018).
55 *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1 (ECHR).
56 At [168].
57 At [193].

> assurances are sufficient. Equally there is no prohibition on seeking assurances where there is a systematic problem of torture or ill-treatment in the receiving State; otherwise, as Lord Phillips observed …, it would be paradoxical if the very fact of having to seek assurances meant that one could not rely on them.

[68] The Court said it was not for it to rule upon the propriety of seeking assurances or to assess the long-term consequences of doing so; its only task was "to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment".[58] The Court said that the examination of that risk required consideration of both the general human rights situation in the relevant country and the particular characteristics of the applicant.[59] In a case where assurances have been provided by the receiving state, those assurances constitute a further relevant factor which can be considered in assessing that risk. In such a situation, the obligation is "to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment".[60]

[69] The issue of the reliance on assurances to protect against torture was also considered by the Supreme Court of Canada in *India v Badesha*.[61] The Court said that, to be acceptable, such assurances need not eliminate the risk of torture but "must simply form a reasonable basis for the Minister's finding that there is no substantial risk of torture or mistreatment".[62] The task for the reviewing court was to consider whether the Minister had reasonably concluded that there was no substantial risk of murder or ill-treatment.[63]

Conclusion

[70] We conclude therefore, that even if there is evidence of systemic ill-treatment of defendants and prisoners in the PRC (evidence which we address below) New Zealand is not prohibited by international law from accepting and relying upon diplomatic assurances when assessing whether there is a substantial risk that Mr Kim will be tortured or subjected to extra-judicial killing or the carrying out of the death

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58 At [186].
59 At [187].
60 At [187].
61 *India v Badesha*, above n 40.
62 At [46].
63 At [46].

penalty. The issue of whether or not assurances should be accepted requires an evaluative assessment of the facts by the Minister.[64]

(b) Did the Minister err in failing to address a preliminary question whether assurances should be accepted in this case?

Assessing the general human rights situation

[71] The decision of *Othman* is also relevant to Mr Ellis' second argument. In *Othman*, the Court said that before assessing risk in light of assurances received, the state must address a preliminary question.[65] That question was whether the general human rights situation in the receiving state excludes accepting any assurances whatsoever. But, the Court added, it would only be in rare cases that the general situation of a country would mean that no weight at all could be given to assurances.[66] Usually, it said, the court will assess first the quality of assurances given and second, whether, in light of the receiving state's practices they can be relied upon.[67]

[72] The Court cited a number of its own decisions in which the general situation in the requesting state was such that diplomatic assurances were not in themselves sufficient to provide adequate protection against the risk of ill-treatment, each involving proposed extradition to Uzbekistan.[68] In *Ismoilov v Russia* the practice of torture in Uzbekistan was said to be systematic and indiscriminate such that the Court was not persuaded that assurances offered a reliable guarantee against the risk of ill-treatment.[69] The same decision was reached in *Yuldashev v Russia.*[70]

[73] We are satisfied that the "preliminary question" requirement identified in *Othman* should form part of the law of New Zealand. Therefore, the Minister was obliged, before determining whether to accept assurances in this case, to first address

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64 See *Lai v Canada (Minister of Citizenship and Immigration)*, above n 52, at [135]–[143].
65 *Othman (Abu Qatada) v United Kingdom*, above n 55, at [188].
66 At [188].
67 At [189].
68 *Gaforov v Russia* ECHR 25404/09, 21 October 2010; *Sultanov v Russia* ECHR 15303/09, 4 November 2010; *Yuldashev v Russia* ECHR 1248/09, 8 July 2010; and *Ismoilov v Russia* [2009] ECHR 348, (2008) 49 EHRR 42.
69 *Ismoilov v Russia*, above n 68, at [127].
70 *Yuldashev v Russia*, above n 68, at [85]. See also *Saadi v Italy*, above n 51, at [147]–[148] where the European Court of Human Rights expressed the same view in respect of diplomatic assurances, despite no such assurance being provided on the facts of the case.

whether the *general* human rights situation in the PRC was such that diplomatic assurances could not be relied upon. Although the reason for the preliminary question is not outlined in the case law, it is in our view a necessary inquiry for the following reason. The fact that serious breaches of human rights occur regularly in a state may be evidence that the importance of human rights is not understood or valued, or alternatively that the rule of law is not sufficient in the requesting state to secure to the defendant the benefit of those assurances. In either circumstance, it would not be reasonable to rely upon diplomatic assurances that the applicant's human rights will not be breached on return.

[74] This preliminary question is an important one. Skipping this step in the process risks that a decision will be taken focusing upon a series of isolated risks without taking the broader human rights and rule of law context into account, which is an essential part of any risk assessment. Broken up, the process could produce a falsely reassuring picture as to the effectiveness of assurances.

Did the Minister address this preliminary question?

[75] In the Ministry's briefing paper provided before the first decision, the Minister was advised that it was appropriate to consider the general situation in the receiving state regarding the subject matter of the assurances. Following the heading "Does the general human rights situation in PRC preclude assurances?", which in turn followed a discussion of the case law, the Minister was advised:

> Based on the analysis of the human rights situation in the PRC in the sections on torture and fair trial below, particularly the recent improvements, as well as the experience of NZ, [Country A] and [Country B] with assurances from the PRC […], the Ministry does not consider that the human rights situation in the PRC is such that New Zealand is precluded from relying on assurances from the PRC in this case.

[76] This advice was again referred to in the briefing paper produced in 2016 to assist the Minister with her second decision. We see then that the Minister was advised to address this issue. But we think the advice was obscure. The issues for the Minister should have been explicitly outlined as we have done at [73]. We mean no criticism of the officials in saying this, as little assistance is available from the authorities. They do not explicitly describe the considerations which arise at the point of this

preliminary issue, or the nature of the values or interests it is directed to protect or address.

[77] We differ from the Judge as to whether the Minister addressed this preliminary question.[71] We do not read the Minister's reasons as indicating that she had done so. She referred to the "general situation" in the PRC but only with regards to torture and only as a part of her reasoning as to the nature of the risk of torture faced by Mr Kim. The Minister did not address as a separate and preliminary question whether the human rights situation in the PRC more generally is such that assurances should not be sought or accepted. Indeed, as the Judge observed, by the time Minister Adams was seized of the issue, assurances had already been sought.

[78] Given the subject matter of this proceeding and applying the heightened standard of review we have identified, we do not assume that because the issue is referred to in the briefing paper, it has been addressed by the Minister. The Minister has taken care to record the basis of her decision but has not mentioned this issue in those reasons. This is reason to doubt that she has addressed it.

[79] While we agree with the Judge that it was open to the Minister to seek assurances to meet the risk of torture, we find error in the Minister's failure to expressly address the preliminary question of the general human rights situation in the PRC. Accordingly, this ground of appeal succeeds in part.

SECOND GROUND OF APPEAL

Did the Minister take into account a consideration irrelevant to the surrender decision?

Submissions

[80] Mr Ellis also argues that the assurances provided in this instance were in part directed and accepted by the Minister with a view to establishing the credibility of the PRC government for other cases and overcoming widespread refusal of extradition to the PRC — an impermissible and irrelevant consideration.

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71 *Second judicial review*, above n 4, at [66]–[67].

Analysis

[81] We agree that if the Minister had indeed had regard to such a consideration, it would be a reviewable error on her part as it would be an irrelevant consideration. But Mr Ellis did not refer us to any evidence to substantiate that allegation. Our own consideration of the briefings provided to the Minister reveals the following. In the Ministry's briefing prior to the second decision, comment was made that the PRC was highly motivated to comply with assurances given. Reference was made to MFAT advice as to the serious consequences for the bilateral relationship as well as the PRC's international reputation, should the assurances not be adhered to. The Ministry also referred to advice obtained from Professor Fu that:

> China needs, desperately, international cooperation in mutual legal assistance in criminal matters so that China can seek extradition of its fugitive offenders. To secure cooperation from other countries and achieve China's policy goal of effective extradition, China needs to be credible in the eyes of the international communities and Mr Kim's case offers an opportunity for China to do so.

[82] This does not however provide evidence that the Minister intended to secure these outcomes for the PRC through the surrender of Mr Kim. Rather the material was presented as evidence that the PRC would be motivated to honour its assurances. This material was clearly relevant to the Minister's assessment of how likely it was that the PRC would comply with its undertakings.

[83] We see nothing in this ground of appeal.

THIRD GROUND OF APPEAL

Did the Minister err in accepting assurances in relation to torture as adequate to protect Mr Kim on return to the PRC?

Submissions

[84] It is common ground that:

(a) The Minister must not surrender Mr Kim if there are substantial grounds for believing he will be subjected to torture in the PRC.

(b) The Minister directed herself that this was the test to be applied.

(c) The Minister was satisfied that there was a risk that Mr Kim would be tortured if returned to the PRC.

(d) The Minister was satisfied that the assurances met that risk of torture.

[85] Mr Ellis argues first that the Minister did not apply the test she identified, but rather asked herself what Mr Kim's risk was relative to other detainees in the PRC. This argument seems to be a re-formulation of the argument rejected by the Judge that the Minister had applied the wrong legal test: whether Mr Kim was at "high risk" of torture.[72]

[86] It is also argued that the Minister wrongly assessed the extent and nature of the risk that Mr Kim faced. There are two aspects to this argument. First, Mr Ellis submits that the Minister could not reasonably conclude that Mr Kim was not in a high-risk group. Mr Ellis submits that the Judge noted, but did not adequately address, expert evidence from Mr Ansley that torture in China is so routine it would be "astonishing if a person accused of homicide were not subject to torture".[73] Secondly, it is contended for Mr Kim that the Minister was wrong to take into account as reassuring both the fact Mr Kim would be detained in Shanghai, and the stage of the investigation in connection with Mr Kim, as reducing the risk he would be tortured. In taking these matters into account, the Minister repeated factual errors identified by the Judge in the first judicial review but, it is argued, wrongly overlooked by the Judge in the second judicial review.

[87] Finally, Mr Ellis submits that the Judge did not adequately address the Minister's failure, in turn, to properly assess the effectiveness of the PRC's assurances directed to the risk of torture. Neither the Minister nor the Judge addressed evidence as to the following:

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72 The Judge rejected this submission in the first judicial review, see *First judicial review*, above n 2, at [65]. This submission was not addressed by the Judge in the second judicial review.

73 *Second judicial review*, above n 4, at [58].

(a) The extent to which evidence obtained under torture is readily admitted in Chinese courts. Whilst the Criminal Procedure Law of the People's Republic of China (2012) provides in principle for the exclusion of evidence obtained by torture, such exclusion is rare and, even in such cases, does not result in acquittal for the victim or other remedy or sanction.

(b) The absence of lawyers during interrogations.

(c) The persecution of defence lawyers to an extent that they are unlikely to raise concerns about the admissibility of evidence.

(d) The way the system operates to prevent "whistle-blowing" on torture.

(e) The consensus amongst commentators and respected non-governmental bodies that monitoring cannot be effective to prevent torture in individual cases.

[88] In these circumstances, Mr Ellis argues, the assurances could not reasonably protect Mr Kim against torture should he be returned to the PRC — monitoring by New Zealand consular officials, filming of interrogations and seeking reports from participants in the system can never be adequate to protect against systemic or widespread torture, given the inherent nature of torture.[74] Mr Ellis argues that the Minister failed to address this issue and the Judge wrongly failed to find error in the Minister's omission in this regard.

Evidence before the Minister in connection with use of torture and extra-judicial killings in the PRC

[89] Ministry officials had provided extensive briefing materials to the Minister on the practice and prevalence of torture in the PRC. The first briefing paper summarised the views of the consensus of commentators and the United Nations that there is overwhelming credible evidence of routine use of torture and ill-treatment in the PRC, particularly to extract confessions. The briefing paper also noted consensus that

[74] See discussion at [132] of this judgment.

the initial period following detention or arrest is the time that suspects are most at risk of torture or ill-treatment. The Minister was briefed that the criminal justice system is heavily dependent upon confessions for proof of guilt, with a confession viewed as the "king of evidence".

[90] The Minister was briefed as to various reforms in the PRC criminal justice system. Since the enactment of the Criminal Procedure Law and the Criminal Law of the People's Republic of China in 1979, it has been illegal to obtain confessions by torture in the PRC.[75] Procedural reforms in 1996 made clear that a confession is neither necessary nor sufficient for a conviction.[76] Finally, further procedural reforms in 2012 required the filming of interrogations, and provided that statements from defendants obtained through illegal means must be excluded as evidence.[77]

[91] The Minister was advised that while the incidence of torture and ill-treatment appears to have reduced after these reforms, particularly in urban areas, commentators and the United Nations still consider it a significant problem. This was particularly in cases involving well known high-risk groups, such as religious and political dissidents. However, while the risk of torture is especially high for political or religious dissidents, that risk is also present for those accused of murder in ordinary criminal cases. The Minister was briefed that, with the exception of high profile cases or crackdowns, police officers are rarely held responsible for abuse, and receive light penalties if they are. She was referred to the following passage from Human Rights Watch:[78]

> The Chinese law enforcement system is structured in ways that require the police, the procuratorate, and the court to "mutually cooperate" with each other to solve crimes under the leadership and coordination of the CCP's [Chinese Communist Party] Political and Legal Committee at the same level (art 7 [Criminal Procedure Law]). This is especially true in political cases and during campaigns targeting particular types of crime. Because the procuratorate and the courts are required to cooperate with the police, which is more powerful than they are, under the leadership of the CCP Political and Legal Committee, it is difficult for them to check police abuse.

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75 The relevant provisions are now found in the Criminal Procedure Law of the People's Republic of China (2012) [Criminal Procedure Law], art 50; and Criminal Law of the People's Republic of China (2015) [Criminal Law], art 247.

76 Criminal Procedure Law, art 53.

77 Articles 54, 58 and 121.

78 Human Rights Watch "Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China" (13 May 2015) <hrw.org> at 92 (footnotes omitted).

> The reluctance to hold police officers accountable is also likely because police play an important role in enabling the CCP to retain its grip on power.

[92] She was referred to reports issued by the Special Rapporteur on Torture, one in 2006 following visits to the PRC and a follow up report issued in 2010.[79] In the 2006 report the Rapporteur said that based on the considerable number of allegations he and his predecessors had received, as well as those received by other governmental and non-governmental organisations, and his own fact finding, he was of the view that, though on the decline in urban areas, torture remained widespread in the PRC.[80] The Minister was also referred to the United Kingdom's Home Office *Operational Guidance Note*, which is a guidance note published periodically for caseworkers when considering claims for asylum and humanitarian protection.[81] In connection with prison conditions, the *Operational Guidance Note* states:[82]

> There is objective evidence of security officials severely ill-treating prisoners and detainees, that the use of torture to extract forced confessions is widespread and the number of deaths in custody, some due to torture, is a matter for concern.

[93] The Minister was also referred to a report of the Human Rights Watch group, issued in 2015, which supported the view that ordinary criminals remained at risk of torture and that murder suspects are at high-risk of torture.[83] The Ministry noted however, that no other report identified those accused of murder as being at higher risk of torture. And, the Ministry stressed, the Human Rights Watch report did not address Mr Kim's particular circumstance, a foreign national, the subject of formal assurances and diplomatic monitoring.

[94] In the Ministry's advice to the Minister for the first decision, the Ministry undertook an analysis of the assurances against factors the Court in *Othman* listed as relevant to an assessment of assurances:

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79 Manfred Nowak *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment: Mission to China* UN Doc E/CN.4/2006/6/Add.6 (10 March 2006) [Nowak Report]; and Manfred Nowak *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Follow-up to the recommendations made by the Special Rapporteur* UN Doc A/HRC/13/39/Add.6 (26 February 2010) [Nowak follow-up].

80 Nowak Report, above n 79, at [72].

81 United Kingdom Home Office *Operational Guidance Note: China* (October 2013).

82 At [3.16.17].

83 Human Rights Watch, above n 78, at 33.

(a) **Whether the general characteristics of the person to be extradited are such that he is at particular risk of ill-treatment?** The Ministry considered Mr Kim was not a member of any well-known high-risk group however accepted that he is charged with murder, which the Human Rights Watch identified as a high-risk group.

(b) **Whether the general human rights situation in the PRC precludes the use of assurances?** The Ministry did not consider that the human rights situation in the PRC was such to preclude the use of assurances in this case.

(c) **Whether the assurances are specific or are general and vague?** The Ministry assessed the assurances as appropriately focused.

(d) **Can the entity giving the assurances bind the receiving state?** While the assurances are not binding, the Ministry said the entities who had given the assurances were mandated to do so, and the PRC would be aware of the adverse consequences to its bilateral and multilateral relationships.

(e) **If the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them?** The Ministry said that since Mr Kim will be detained and tried in Shanghai, New Zealand can expect the local authorities to abide by the assurances.

(f) **Whether the assurances concern treatment which is legal or illegal in the receiving state?** In respect of torture, the Ministry noted that the assurances in relation to torture concerned treatment which was illegal in the PRC.

(g) **The length and strength of the bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances.** The Ministry reported that

MFAT's advice was that the PRC have a long standing diplomatic relationship (since 1972) and frequent high-level contact. The Ministry noted there was an additional dimension of Mr Kim being a South Korean citizen. MFAT advised that South Korea and the PRC have a very strong bilateral relationship.

(h) **Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers?** The Ministry noted that diplomatic and consular personnel may visit Mr Kim and the assurances include provision for him to be examined by independent medical professionals.

(i) **Whether there is an effective system of protection against torture in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGO's) and whether it is willing to investigate allegations of torture and to punish those responsible?** The Ministry advised that while there have been significant improvements in recent years, the PRC does not have a system of protection against torture that would be considered effective by international standards.

(j) **Whether the applicant has previously been ill-treated in the receiving state?** Mr Kim makes no such claim.

(k) **Whether MFAT obtained information of other countries experiences with assurances from the PRC?** The Ministry confirmed it received information from [Country A] and [Country B], with both countries confirming the PRC's adherence to the relevant assurance.[84]

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[84] The identity of the countries that have provided details about their dealing with the PRC has been suppressed on the basis this information is diplomatically sensitive. See: *First judicial review*, above n 2, at [58].

(l) **Whether the reliability of the assurances has been examined by the domestic courts of the sending/contracting state?** The Ministry noted that this was an issue Mr Kim could raise on judicial review.

Minister's first decision

[95] The Minister accepted that there was evidence that torture is still an issue in the PRC but was satisfied there were not substantial grounds to believe that Mr Kim would be in danger of an act of torture if returned with the benefit of the assurances. This was because there were significant factors which differentiated Mr Kim from those likely to be at risk of torture:

(a) The PRC provided detailed and specific assurances about Mr Kim's treatment which would also provide a significant deterrent to the PRC committing any act of torture. The Minister referred to experience that New Zealand and other countries have of assurances given by the PRC being honoured.

(b) The assurances will be proactively monitored, in a timely manner with sufficient resources committed to that. There will also be prompt provision of interrogation recordings. She was satisfied there were effective mechanisms to ensure compliance and to deal with breaches.

(c) Mr Kim is an ordinary criminal suspect, and not a member of a well-known high-risk group such as political or religious dissidents, ethnic minorities or human rights defenders. Although she accepted Human Rights Watch recently identified murder suspects as "high risk", she was not clear how reliable that finding was and considered the presence of assurances and other differentiating factors in Mr Kim's circumstances meant he was personally not at high-risk.

(d) The prima facie case against Mr Kim appears relatively strong and includes scientific evidence which has been reviewed in New Zealand. This means that Mr Kim is at a lesser risk of the use of torture to extract his confession.

(e) Mr Kim's alleged offending has been investigated, meaning that he will spend less time in pre-trial detention. Commentators consider that pre-trial detention is the time a suspect is most at risk of torture. Professor Fu's opinion was that the time of highest risk is interrogation at a police station, which would not occur in Mr Kim's case as he would go straight to a detention facility. The Minister noted that torture in detention facilities in ordinary criminal cases had rarely been reported in recent years.

(f) The Minister took into account that Mr Kim would be tried in Shanghai where commentators suggest incidences of torture are on the decline.

[96] While accepting that Mr Kim would not be allowed legal representation during interrogation, which is regarded as a good protection against torture, the Minister was nevertheless satisfied that assurances provided by the PRC, MFAT's proactive monitoring of them, and Mr Kim's legal rights in the PRC would together be sufficient to protect Mr Kim's rights.

First judicial review

[97] The Judge recorded the respondents' acceptance that if Mr Kim is to be extradited, assurances from the PRC about his treatment and fair trial rights are necessary because of the evidence of widespread torture in the PRC.[85]

[98] She noted however that there was only limited information about whether the PRC had honoured assurances in the past — this was the first occasion on which New Zealand had been asked to extradite a person to the PRC and the first occasion on which New Zealand has negotiated assurances.[86] Nevertheless she said "Mr Kim's extradition takes place against this backdrop".[87]

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85 *First judicial review*, above n 2, at [49]–[57] and [254].
86 At [254].
87 At [254].

[99] The Judge rejected an argument that the Minister had asked herself the wrong question; whether Mr Kim was at "high-risk" of torture.[88] She said that the Minister set out the correct test, whether there were substantial grounds to believe Mr Kim would be at risk of torture. In referring to "high-risk" the Minister was explaining her view that Mr Kim was not in any group well-known as being at risk of torture.[89]

[100] She noted the PRC system relies heavily on confessions, yet Mr Kim had not confessed to killing the victim.[90] He maintained that he was being framed and raised the possibility that his girlfriend, whose father is said to be a high-ranking official in the Communist Party, may be responsible.[91] Therefore the apparent strength of the case against Mr Kim did not appear to materially reduce his risk of ill-treatment in pre-trial detention when interrogated by police.[92] She noted also that there was some information, even if limited, that murder suspects are more at risk of torture or ill-treatment than those accused of some other crimes.[93]

[101] The Judge said that the Minister did not have adequate information on which to conclude that Mr Kim's likely detention in Shanghai would materially reduce his risk.[94] The Judge concluded that Mr Kim was therefore potentially at personal risk, even if not at the highest level, and the critical issue was whether the assurances would adequately protect Mr Kim.[95]

[102] The Judge rejected Mr Ellis' arguments that the Minister had failed to address the consensus of opinion that assurances can never protect against the risk of wide-spread torture, holding as follows:

> [215] The assurances endeavour to protect against torture and ill-treatment through the extensive access which New Zealand representatives (together with an interpreter, a medical profession and a legal expert) are permitted. I do not consider the Minister was wrong to place reliance on the monitoring components of the assurance because they do not provide for an independent expert on torture to carry out monitoring. As the Minister said, Mr Kim was not within a group recognised as being at a particularly high risk

88 At [65].
89 At [65].
90 At [68].
91 At [71] and [255].
92 At [255].
93 At [255].
94 At [255].
95 At [255].

> of torture. The Minister was entitled to consider that the extensive access permitted by the assurances would provide a measure of protection for Mr Kim. It will of course be necessary that New Zealand representatives carry out the visits that are contemplated.
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> …
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> [221] Notwithstanding the concern expressed by the UK Select Committee that consular services fall well below what is necessary, the information provided in the briefing paper indicates that New Zealand has some experience in monitoring the treatment of New Zealanders detained in Chinese prisons. It also, however, illustrates there are difficulties. Despite the monitoring provided by New Zealand officials it seems that in one case a complaint was made only following the detainee's return from the PRC. It is not known from the information provided whether that complaint had validity. It is also not clear if the assistance referred to in the briefing paper is proactively provided or whether it depends on a request from the detainee.
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> (footnotes omitted)

[103] She directed reconsideration of that decision as noted above.[96]

Briefing prior to the second decision

[104] In her affidavit filed in this second judicial review proceeding, the Minister said she remained concerned that there could be a delay of as much as two months between an interrogation and New Zealand representatives being given access to interrogation recordings (based on the maximum period of time of the investigation phase, and the time under PRC law at which such information becomes available to a defendant's lawyer). She therefore instructed her officials to explore this issue further. Her officials also made inquiry of MFAT in connection with the other issues identified by the Judge.

[105] As to the inability to disclose information to third parties, MFAT advised that disclosure to third parties of information about Mr Kim's treatment was within the scope of the assurances received, if that disclosure was consistent with the objectives of monitoring and ensuring proper treatment. MFAT expressed the view that the limitation the PRC imposed on disclosure of information was not unreasonable, noting that New Zealand would seek similar confidentiality protections were New Zealand to give such an undertaking in similar circumstances. It said:

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96 At [223].

> Although the assurances preclude disclosure of specific details obtained by diplomatic or consular representative through their contact with Mr Kim, the assurances do not prevent New Zealand from sharing comments of a general nature with other countries or third parties on our experience with the PRC in respect of diplomatic assurances. New Zealand was able to obtain such information from other countries in the context of this case.

[106] MFAT also addressed the Judge's concern as to the effectiveness of bilateral diplomatic relations in protecting Mr Kim should issues arise with the assurances. It advised that if a serious issue arose that could not be resolved through bilateral mechanism to New Zealand's satisfaction, the assurances could be regarded as having broken down. At that point, New Zealand would be entitled to consider its own commitments under the assurances as of no further effect. In such a case, the assurances would not preclude New Zealand from taking any action outside the bilateral mechanism. MFAT continued:

> In light of the serious repercussions of such an occurrence for the bilateral relationship between the PRC and New Zealand (and potentially the PRC and South Korea), as well as the PRC's international reputation, we continue to regard such an eventuality as very unlikely.

[107] The Minister also received updated briefings on the Convention against Torture's *Concluding observations on the fifth periodic report on China* published 3 February 2016, to the effect that the practice of torture and ill-treatment is still deeply entrenched in the criminal justice system, which overly relies on confessions as the basis for conviction.[97] The majority of allegations of torture and ill-treatment take place during pre-trial and extra-legal detention and involve public security officers, who wield excessive power during the criminal investigation without effective control including by the judiciary.[98] Although the PRC's Criminal Procedure Law provides that evidence obtained through torture is not admissible, the report records information that courts often shift the burden of proof back to defendants during the exclusionary procedures and dismiss lawyers' requests to exclude the admissibility of confessions.[99]

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97 Committee against Torture *Concluding observations on the fifth periodic report of China* UN Doc CAT/C/CHN/CO/5 (3 February 2016).

98 At [20].

99 At [32].

[108] The Committee against Torture referred to reports that meetings between lawyers and suspects are often monitored despite prohibition by law.[100] The Committee also expressed concern that human rights defendants and lawyers, petitioners, political dissidents and members of religious or ethnic minorities continue to be charged with broadly-defined offences as a form of intimidation, such as "picking quarrels and provoking troubles".[101] Finally, of relevance to the present, the Committee said that while it appreciated the amended provisions of the Criminal Procedure Law requiring the video recording of interrogations in major criminal cases, it had received concerning reports about the system for recording which is carried out by the legal department of the public security organ.[102]

[109] The Ministry obtained advice from Professor Fu about whether Mr Kim was at risk of torture during the pre-trial detention phase, particularly given that it seemed he had no right to a lawyer during interrogation and it was unclear if he had a right to silence. The Professor's advice traversed a number of matters, including the incidence of torture. Professor Fu said that while torture has always been a concern in the Chinese criminal process, recent allegations had been made in two types of case — where the offence endangers national security in some way or where there are allegations of corruption.

[110] As to the place of torture, Professor Fu said that torture "traditionally" occurs inside police stations where investigators have complete control. Therefore, to prevent torture, the 2012 amendments to the Criminal Procedure Law included a requirement that detainees be taken to a detention facility within 24 hours of detention. Detention centres have an instruction not to allow torture to take place. Professor Fu said that torture within regular detention facilities in relation to ordinary criminal cases, including murder, has been rarely reported since 2012.

[111] Professor Fu was also asked if there was any risk that the recordings of Mr Kim's interrogations would be manipulated to conceal torture. He did not squarely answer that question, but rather narrated the rules and regulations setting out

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100 At [34].
101 At [18].
102 At [34].

the requirements for recordings, which include a requirement that they not be selective recordings and cannot be edited or altered. Professor Fu said that the Supreme People's Court has "sent out strong signals that exclusion of confession statement[s] obtained through torture is a judicial duty and is politically possible". He also said that there is a changing culture against torture in the criminal process. That is because China needs international cooperation and mutual legal assistance in criminal matters, so that it can seek extradition of its economic fugitives. The Professor went on to say:

> It will be highly unlikely that Mr Kim will be tortured to confess his crime given the reputational cost and given the evidence that the police have gathered. As a result, there will be no need at all to manipulate recording to disguise torture or ill-treatment.

[112] Finally, the Minister considered submissions provided on behalf of Mr Kim. The Minister also had before her the affidavit of Mr Clive Ansley, which referred to "an escalating campaign of terror" against the criminal defence and human rights bar. Mr Ansley's evidence was that torture of murder suspects was so widespread that he would be surprised if Mr Kim was not tortured.

[113] The Minister confirmed her decision to surrender Mr Kim.

Second judicial review

[114] On the second judicial review, the Judge rejected arguments that the absence of international monitoring by independent agencies meant the assurances were inadequate.[103] She noted the additional information the Minister had about New Zealand's ability and intention to monitor Mr Kim, which included details about the available resources.[104] The Judge was satisfied it was reasonably open to the Minister to conclude that New Zealand was able to carry out the necessary monitoring on the basis of the information.[105]

[115] In her judgment on the first judicial review, the Judge said this of the assurances:

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103 *Second judicial review*, above n 4, at [64]–[67].
104 At [64].
105 At [64].

> [214] Taken at face value the assurances appear to provide substantial protections for Mr Kim's benefit. Whether they will do so depends upon whether there can be confidence that they will be honoured in their full spirit. In considering this it is important to keep in mind that torture is a systemic problem in the PRC, a person is particularly at risk during pre-trial detention because the criminal justice system continues to rely heavily on confessions, the period of detention before a person must be brought before a Judge is too long, it is not always easy to detect when torture has occurred, and lawyers who raise human rights concerns may thereby put themselves at risk.

[116] In the second judicial review proceeding, the Judge concluded as follows:

> [65] I do not accept that the Minister failed to consider that a disclosure of any breach after the event does not prevent torture and ill-treatment. It is apparent from the Minister's process and from the Minister's Reasons that she was alive to this issue. This is why there was such a focus on ensuring effective proactive monitoring would take place.
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> …
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> [67] Against these matters the focus of the Minister's reconsideration was placed squarely on the effectiveness of the assurances to protect Mr Kim from torture and ill-treatment. The further information she received after the first judicial review was directed to Mr Kim's risks during pre-trial detention and whether the assurances would protect Mr Kim. This included advice that China would want to demonstrate to the international community its proper treatment of Mr Kim because it needed cooperation in order to extradite economic fugitives. It was reasonably open to the Minister to conclude, in light of the information before her, that the assurances would protect Mr Kim from torture and ill-treatment and that accordingly this mandatory restriction on surrender did not apply.

Analysis

(a) *Did the Minister take into account an irrelevant consideration, namely relative risk?*

[117] We do not consider that it was irrelevant for the Minister to address whether Mr Kim was a member of a high-risk group. Nor has Mr Ellis persuaded us that the Minister relied upon her finding that Mr Kim was not a member of a high-risk group as the basis for her finding that he was not at risk of torture if surrendered with the assurances in place. It was relevant to the assessment of the magnitude of risk faced by Mr Kim to address whether he fell within one of the groups at the highest risk of torture. That was not an irrelevant consideration. If the Minister had moved directly from the conclusion Mr Kim was not in a high-risk group to the conclusion that Mr Kim was not at risk of torture for the purposes of the Convention, there would

be more strength in Mr Ellis' submissions. But she did not. She took into account all of the other matters she said reduced his risk, including where he would be held, the case against him, and the existence of assurances.

(b) Did the Minister err in assessing the magnitude of the risk that Mr Kim would be tortured?

[118] The first aspect to this ground is the argument that the Judge could not reasonably conclude that Mr Kim was not at high-risk of torture. The evidence relevant to this issue is as follows. Both Mr Ansley's affidavit and the Human Rights Watch report contained assertions that those accused of murder were at high-risk of torture. The Minister was entitled to question the significance of the evidence of the Human Rights Watch report as she did on the basis that its evidential foundation for those assertions was not extensive. However both the report and the evidence of Mr Ansley were corroborated, at least to some extent, by the material in the briefing papers which explained that the reforms in 2010 to 2012 occurred against the backdrop of a high-profile murder case, where the accused was ultimately found to have been wrongly convicted on the basis of a coerced confession. The Minister could reasonably conclude, based on her concerns regarding the evidential basis for this material and evidence, that further inquiry was required. She could not however, reasonably conclude that it could be put to one side.

[119] The Minister also had before her Professor Fu's statement that allegations of torture have seldom been reported since 2012 by ordinary criminal accused, including those accused of murder. Professor Fu did not however, go so far as to conclude on this basis that murder accused were not at high-risk of torture. Professor Fu's evidence only went so far as to suggest that a new anti-torture culture has emerged in the PRC and that allegations of torture are usually only made in cases involving political dissent or serious corruption. In Professor Fu's view, Mr Kim's murder charge was an "ordinary criminal case". Professor Fu did not make any reference to senior Communist Party members' alleged interest in convicting Mr Kim which could make this case outside of the run of "ordinary criminal cases". In assessing the significance of Professor Fu's statement about reports of torture, the Minister had also to take into account the material before her that those who remain detained seldom complain of

torture, for fear of recrimination and because such a complaint will be unlikely to result in any disciplinary action.

[120] The material before the Minister was therefore sufficient to raise a serious issue as to whether murder accused are at high risk of torture. Professor Fu's opinion, limited as it was, did not meet this point. The Minister's conclusion that Mr Kim was not in a high-risk group was, on the material before her, a view of the facts that could not "reasonably be entertained" and amounted to an error of law.[106] If she considered the material on the issue incomplete, further inquiry was required.

(c) Did the Minister err in concluding that other factors reduced Mr Kim's risk?

[121] In the first judicial review judgment, the Judge found that the Minister had erred when assessing the risk Mr Kim faced. She did so in relying on the stage of the investigation and the strength of the case against Mr Kim because that gave no weight to a relevant factor, the heavy reliance the PRC's criminal justice system places on confessions.[107] She also held that the Minister's reliance upon Shanghai as the place where Mr Kim would be tried could not reasonably be given much weight given the limited information upon which that was based.[108] She said that for Mr Kim "[t]he key differentiating factor was the assurances".[109]

[122] Although the Judge identified these errors in the first judicial review she did not list them among the "principal" reasons for allowing the review.[110] It may be that this is why the Minister overlooked these findings when she came to reconsider her decision.

[123] In her second decision the Minister again referred to the fact that Mr Kim would be tried in Shanghai as reducing the risk he would be tortured. The Minister again failed to address the extent to which the PRC criminal justice system depends upon confession. As she did in her first decision, she regarded as reducing Mr Kim's

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106 *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 (PC) at 388; citing *Edwards v Bairstow* [1956] AC 14 (HL) at 29.
107 *First judicial review*, above n 2, at [84].
108 At [84].
109 At [84].
110 At [259].

risk that the prima facie case against him appears to be relatively strong and that his role in the alleged offending has been investigated but failed to note the significance of the fact that he maintains his innocence and has not confessed.

[124] The Minister did not receive evidence in the period between the first and second decision to provide any firmer foundation for her conclusion that the location of the trial reduced the risk of torture. While it is true that the Minister had material from the United Nations to suggest the incidence of torture is on the decline in Shanghai, that told her nothing in absolute terms as to how prevalent torture is in Shanghai — only that it is less prevalent than it once was. The evidence before her was that torture remains widespread in the PRC.

[125] The Judge did not address these errors in the second judicial review judgment, focusing only on whether the three issues identified with the assurances had been adequately addressed. We are uncertain as to whether this argument was made for Mr Kim at the second judicial review hearing. The pleadings do not clearly identify these errors as a ground of review — we say clearly as the pleadings are confused and difficult to follow. But no issue was taken by the respondents to this argument being raised on appeal.

[126] We regard the deficiency in evidence of these issues as material, because both the nature and extent of the risk the assurances must meet are critical to assessing the adequacy of the diplomatic assurances. Yet in making her second decision, the Minister has continued to rely upon these factors (along with others) as reducing Mr Kim's risk — in other words she has taken them into account in assessing the size and nature of the risk Mr Kim will face on return, absent the reassurances. Reviewing this matter to the standard that we have identified, we consider that in this she was in error. Both limbs of this argument lead us to conclude that the Minister's assessment of the magnitude of the risk that any assurances must address was flawed.

(d) Was the Minister's conclusion that the assurances were adequate to protect Mr Kim reasonable?

[127] The Minister proceeded upon the assumption that the following provided adequate protection for Mr Kim against any risk of torture he faced:

(a) the PRC undertook to comply with applicable domestic and international law;

(b) Mr Kim would have access to legal representation before and after interrogation;

(c) Mr Kim's interrogations would be filmed;

(d) torture would be detected through consular visits and the ability to have Mr Kim examined; and/or

(e) Mr Kim or others to whom the officials have access would report that torture.

The Judge found no error in this assessment.

[128] We assess the reasonableness of the Minister's conclusion in the following context. Torture is illegal, and the law provides that statements obtained by torture are to be excluded. A cultural shift away from torture in the PRC is underway. Nevertheless, torture remains widespread and confessions obtained through torture are regularly admitted in evidence. It logically follows, we consider, that there are inadequate systems in the PRC to prevent torture.

[129] In advising the Minister, the Ministry failed to grapple with the implications of these facts. The Ministry's advice, as Mr Ellis argues, placed reliance upon the illegality of torture and various procedural reforms. For instance, instructions to detention centres that there should not be torture. It may be that in this, they were reassured by the opinions of Professor Fu set out above. But Professor Fu's opinion seems to conflict in this respect with the opinions of international commentators and Mr Ansley. Whilst there is no challenge to the expertise of the international bodies or the expertise of Mr Ansley (rightly so it seems to us), it is unclear what qualified Professor Fu to be treated by the Ministry as an expert on how the law is implemented in practice.

[130] There was reliable information before the Minister (such as in the Home Office *Operational Guidance Note*) that torture regularly occurs at detention centres. This suggests that torture occurs when the state says it should not, which raises an obvious issue as to the effectiveness of an undertaking by the state that Mr Kim will not be tortured.

[131] Similar issues were discussed by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship & Immigration).*[111] In that case the Court addressed the proposed deportation of a Convention refugee to Sri Lanka on the grounds that the refugee was a security risk to Canada. Commenting on the effectiveness of assurances to protect the proposed deportee, the Court said:[112]

> A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

[132] In this case, the Minister placed reliance upon the skill and experience of those monitoring Mr Kim. But the consensus from international bodies is that there are very real difficulties in monitoring individual cases to detect torture. We highlight the following reasons why even regular visits by skilled monitors might not be adequate protection. Those who torture, do so outside the law. It can be expected that they take steps to ensure that what they do is not recorded or detected. Forms of torture as utilised in the PRC may, or may not, leave visible marks upon the detained person. The Special Rapporteur noted a wide array of torture methods including beating, use of electric shock, submersion in water or sewage, deprivation of sleep, food, water, prolonged solitary confinement, and enforced holding of stress positions.[113]

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111 *Suresh v Canada (Minister of Citizenship & Immigration)* 2002 SCC 1, [2002] 1 SCR 3.
112 At [124].
113 Nowak Report, above n 79, at [45].

[133] The assurances do not allow without notice, or even short notice, visits by consular staff. Visits will need to be scheduled. A requirement that visits be scheduled naturally makes it easier for signs of torture to be concealed.

[134] Reliance was placed by the Minister upon the recording of interrogations. But the Minister did not address the material before her that showed this means of monitoring had significant limitations. Recording the formal interrogation does not address the risk of torture occurring when the cameras are not turned on. There was extensive material before the Minister that interrogations in the PRC are selectively recorded, and that notwithstanding rules in connection with recording interrogations, torture does take place outside video surveillance. Professor Fu was asked, but did not address, whether there was a risk of selective recording, or tampering with the recording.

[135] The assurances rely upon Mr Kim, and others associated with the incarceration of Mr Kim, being free to blow the whistle on any torture. But the Minister does not appear to have turned her mind to the systemic disincentives to complain of torture identified in the material before her. Were Mr Kim to complain, he would nevertheless remain under the control of those who had perpetrated the torture. There is nothing in the assurances to provide otherwise. There was also information before the Minister that those who torture seldom face consequences for so doing. A co-worker is unlikely to blow the whistle on torture, if they know they will probably have to continue to work with the wrong-doer. Mr Ansley's evidence was that a Chinese doctor would not ever report torture by prison staff, police or prosecutor.

[136] As to reliance upon Mr Kim's access to a lawyer, there was also evidence that lawyers are not free to represent their clients without fear of retribution. And even if the presence of a lawyer could provide adequate protection for Mr Kim, the assurances do not give him the right to a lawyer during interrogation.

[137] In his advice to the Minister, Professor Fu referred to the emerging culture against torture in the Chinese criminal justice system. But there was material before the Minister to suggest that the "exclusionary rule", the rule that statements obtained by torture will not be admitted in evidence, is not being consistently or successfully

implemented. In its briefing paper provided before the second decision, the Ministry quoted Professor Fu's statement to Amnesty International:[114]

> The court has not been able to apply the exclusionary rules effectively. Part of the reason is the lack of experience. Judges do not have the know-how and there does not seem to be any systematic training. A larger problem is still the power of the police.

[138] To conclude on this point, applying the relevant standard of review, we consider that the Minister erred in failing to address how the assurances could protect against torture when:

(a) torture is already against the law, yet persists;

(b) the practice of torture in the PRC is concealed and its use can be difficult to detect in particular cases;

(c) videotaping of interrogations is selective and torture often occurs outside the recorded session;

(d) evidence obtained by torture is regularly admitted in court; and

(e) there are substantial disincentives for anyone, especially the detained person, reporting the practice of torture.

[139] We consider that these are deficiencies in the Minister's decision-making process that should have been identified by the Judge. We consider she erred in this respect. Having upheld a number of arguments advanced by Mr Ellis, this ground of appeal must succeed.

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[114] Amnesty International communication exchange with Professor Fu on 1 October 2015, as published in Amnesty International "No End in Sight; Torture and Forced Confessions in China" (11 November 2015) <www.amnesty.org> at 29.

FOURTH GROUND OF APPEAL

Did the Minister err in relying upon diplomatic assurances as an adequate protection against the imposition of the death penalty?

Exposure to death penalty

[140] Mr Kim is suspected of intentional homicide which, under art 232 of the Criminal Law, is punishable by death or lesser penalty. As earlier noted, s 30(3)(a) of the Extradition Act provides that a Minister may decide not to surrender if the person may be or has been sentenced to death. Therefore this is a discretionary restriction on surrender, seemingly contemplating that there *may* be situations in which extradition to face the possibility of capital punishment will be allowed. We understand that New Zealand has not extradited in such circumstances, and that as a matter of course assurances are sought to ensure that the person subject of the extradition request will not be sentenced to death.[115]

[141] The text of the Supreme People's Court determination presented along with the request for Mr Kim's extradition was as follows:

> According to Article 50 of *Extradition Law of the People's Republic of China,* it is hereby decided that,
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> when Kyungyup Kim is extradited from New Zealand to the People's Republic of China, if he is convicted after trial and the crime for which he is convicted is punishable by the death penalty according to *Criminal Law*, the trial court will not impose the death penalty on him, including death penalty with a two-year reprieve.

Submissions

[142] Mr Ellis argues that the Minister failed to conduct adequate inquiries into the PRC's compliance with diplomatic assurances provided by it. He says that proper inquiry would have revealed that at least one assurance, given by the PRC to support an extradition request from Ireland to the PRC, was breached. Mr Ellis argues that once the Minister was informed of that breach, raised by him at the first judicial review

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[115] In Canada, the Minister is required in all but "exceptional cases" to seek assurances: *United States v Burns,* above n 18, at [8].

hearing, she could not reasonably proceed upon the assumption that the PRC would honour the death penalty assurance.

[143] He argues further that, in contrast to the other assurances given, the death penalty assurance is supported by a statement of the Supreme People's Court. Whilst accepting that in most contexts this would be reassuring, he argues that "it begs the question of that Court's unquestioned lack of independence from the Chinese government".

Minister's first decision

[144] In her letter notifying her first decision on surrender, the Minister said she had asked herself whether the PRC had sufficiently assured her that the death penalty would not be imposed, or if imposed, would not be carried out.

[145] The Minister said:

> I am satisfied the PRC will not impose the death penalty given the assurance in relation to you and the previous experience of NZ with such an assurance, and so this discretionary ground is not made out.
>
> The PRC has given an assurance that the death penalty will not be imposed if you are found guilty, which appears to be in compliance with PRC law. I consider the assurance to be reliable, having had regard to the *Othman* principles and your particular case. NZ has previously received an assurance not to impose the death penalty from the PRC, which was honoured.
>
> The PRC is well aware of NZ's longstanding opposition to the death penalty. The PRC is aware that NZ (and potentially South Korea) will be monitoring your case and that non-compliance with the death penalty assurance will have repercussions for the bilateral relationship between the PRC and NZ (and potentially the PRC and South Korea), and the PRC's international reputation.

[146] That decision reflected the material contained in the briefing. The officials briefed the Minister that on one previous occasion New Zealand had received assurances from the PRC the death penalty would not be imposed, and that assurance had been complied with.[116] She was advised that the determination of the Supreme People's Court seemed to be in accordance with the Extradition Law of the PRC,

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[116] We note that this previous assurance obtained by New Zealand was in the deportation context and not extradition.

which provides that assurances with regard to sentencing are subject to decision by that Court.[117] In addition, her officials outlined as a further relevant consideration that Mr Kim is an "ordinary criminal offender" and so not a member of any of the groups known to face a high risk of interference in the proceedings by the Government or Chinese Communist Party.

Judicial review decisions

[147] The Judge was satisfied that the assurance was adequately specific and given by the body with the authority to provide it.[118] She said the only issue was whether the Minister had sufficient information to conclude it would be honoured.[119] As to that, Mr Ellis relied on the fact that the Ministry had obtained information from only two other countries in connection with the PRC's compliance with assurances.

[148] Mr Ellis also relied upon the information he had uncovered, that the PRC had breached a similar undertaking given to Ireland, and that Ireland had subsequently struggled to secure compliance with the undertaking. During the hearing of the first judicial review, Mr Ellis produced a report from the Irish Times which described a case in which the PRC had sought the assistance of Irish authorities to bring a group of Chinese men, suspected of having committed a murder in Dublin, to justice in the PRC.[120] Assurances were provided that none of the convicted would be executed. Nevertheless, the newspaper reported that one of the seven men had been sentenced to death. The newspaper also reported comments from a senior Irish Government source that the PRC had broken the agreement reached and would not engage with discussions in connection with that breach.

[149] Following the hearing of the first application for judicial review, the respondents produced an affidavit from MFAT detailing inquiries made of Ireland in connection with this case.[121] MFAT were advised by the Irish Department of Foreign Affairs that since the newspaper report, and following a period of engagement

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117 Extradition Law of the People's Republic of China (2000), art 50.
118 *First judicial review*, above n 2, at [186].
119 At [186].
120 At [238].
121 At [239].

over the case between the Irish officials and the Chinese Embassy in Dublin, the sentence had been officially commuted to one of life imprisonment.[122]

[150] In the first judicial review judgment, the Judge said that the information the Minister relied upon as to experience of compliance with assurances was limited, and the information in connection with the Irish case was potentially materially relevant to the Minister's decision.[123] She continued:[124]

> It does suggest that relying on information from just two countries about their experience with assurances from the PRC may be a misleading indicator of whether the assurances will be honoured in this case. It shows the importance of taking active steps to ensure the assurances are kept.

[151] The Judge concluded:[125]

> …the information obtained about other countries' experience was limited. This is relevant to the weight the Minister could place on this information in being satisfied that the PRC would honour the assurances.

[152] The Minister's view on this issue remained unchanged in her second decision; she was satisfied that she could rely upon the determination. On Mr Kim's second application for judicial review, the Judge confirmed her view that it was reasonably open to the Minister to accept the assurances in relation to the imposition of the death penalty.[126]

Analysis

[153] We are satisfied there was sufficient information on the basis of which the Minister could reasonably conclude that the assurances as to the death penalty would be complied with. Along with the information provided by Country A and Country B that assurances provided by the PRC had been complied with, the Minister had information that the PRC had previously provided a diplomatic assurance to New Zealand regarding the imposition and carrying out of the death penalty, which had been complied with.

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122 At [239].
123 At [240].
124 At [240].
125 At [241].
126 *Second judicial review*, above n 4, at [125].

[154] As to the information regarding the breach of assurances provided to Ireland, the Minister was entitled to take into account, as she did, that compliance with assurances would be monitored through trial and sentence. It will not therefore be a matter of chance whether a breach of this particular assurance would be detected, as it seems to have been in the case relied upon for Mr Kim. We are of the view that it was reassuring that the breach of the assurance provided to Ireland was resolved satisfactorily when the Government of Ireland took this issue up with the PRC.

[155] Accordingly we see no error in the Judge's conclusion that the Minister was entitled to rely on the assurances given in respect of the death penalty. This ground of appeal is dismissed.

FIFTH GROUND OF APPEAL

Did the Minister fail to address the risk of extra-judicial killing?

[156] Mr Ellis contends that the Judge was wrong to find no error in the Minister's approach to this issue. No assurance was provided that Mr Kim will not face an extrajudicial, summary or arbitrary killing outside of the legal process in breach of art 6 of the ICCPR and s 8 of the New Zealand Bill of Rights Act.

[157] Article 6 provides:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
>
> …

[158] Mr Ellis also contends that the Judge was wrong to uphold the Minister's decision to treat the issue as one of torture, dealt with under those assurances.

[159] Mr Ansley provided an affidavit for the second judicial review hearing attaching a report which claims to provide evidence of high levels of unlawful organ extraction from Falun Gong.[127] This is based on a number of threads of evidence including abnormally high numbers of organs available for transplant in the PRC and individual reports received. Mr Ellis submits that on the basis of this, the Minister had before her evidence that somewhere between 60,000 to 100,000 people from Falun Dafa (who are political detainees) have their organs harvested alive, which then leads to their death. Mr Ansley also referred to evidence of Tibetans, Uighurs and house-Christians also being used for organ harvesting.

[160] Mr Ellis argues that irrespective of any specific assurance that Mr Kim would not be subject to extra-judicial killing, these state-sponsored gross violations of human rights ought to have been sufficient for the Minister, and the Judge, to conclude that Mr Kim cannot be extradited.

Relevant background

[161] The Minister did not address, separate to the risk of torture, the risk of extra-judicial killing.

[162] In the first judicial review judgment, the Judge saw no error in that.[128] She said that if Mr Kim was not personally at risk of torture it follows that he was not personally at risk of death by torture of any of the particular kinds of torture that are used.[129]

[163] She maintained the same view in the second judicial review judgment.[130] She also said that Mr Ansley's evidence concerning unexplained deaths of inmates are more relevant the torture restriction on surrender than they are to the death penalty restriction.[131]

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127 David Kilgour, Ethan Gutmann and David Matas *Bloody Harvest / The Slaughter: An update* (22 June 2016).
128 *First judicial review*, above n 2, at [64].
129 At [64].
130 *Second judicial review*, above n 4, at [66]–[67].
131 At [123].

Analysis

[164] We accept the argument that the risk of extra-judicial killing is to be addressed separately from the risk of torture. Article 6(1) of the ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." And the principal risk relied upon for Mr Kim was death arising from organ extraction, not death caused by torture. The risk of extra-judicial killing is factually and legally distinct in this case.

[165] Nevertheless, we still see nothing in this point in terms of the personal risk for Mr Kim. The evidence proffered by Mr Ellis on Mr Kim's behalf about organ transplanting did not show any risk for Mr Kim of extra-judicial killing above and beyond that inherent in the risk of torture. The evidence relied upon shows that unlawful organ extraction is targeted at specific groups and Mr Kim is not part of those groups.

[166] We do consider however, that this information forms part of the overall human rights situation, material to the preliminary question whether assurances should be sought or relied upon.

SIXTH GROUND OF APPEAL

Did the Minister apply an incorrect legal standard in determining whether Mr Kim' s right to a fair trial would be upheld?

[167] The grounds of appeal relating to fair trial right were argued for Mr Kim by Mr Keith.

[168] Mr Keith contends that the Judge erred in finding no error of the Minister in applying the "reasonable extent standard" in assessing whether Mr Kim was at risk of being denied his right to a fair trial under the Chinese legal system. Rather, he submits, the Minister was obliged to consider whether Mr Kim was at a real risk of a trial that would constitute a "flagrant denial of justice".[132]

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[132] See *Othman (Abu Qatada) v United Kingdom*, above n 55, at [259]–[260].

Legal framework

[169] It will be recalled that the PRC has signed but not ratified the ICCPR, and that it has neither signed nor ratified the First Optional Protocol which provides for the Human Rights Committee to receive and consider complaints from individuals claiming to be victims of violations of rights set out in the ICCPR. Nevertheless, the Minister's decision under s 30 had to be consistent with New Zealand's obligations under the ICCPR.

[170] Article 14 of the ICCPR provides:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

…

[171] Relevant provisions under the New Zealand Bill of Rights Act are as follows:

23 Rights of persons arrested or detained

(1) Everyone who is arrested or who is detained under any enactment—

(a) shall be informed at the time of the arrest or detention of the reason for it; and

(b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

…

(4) Everyone who is—

(a) arrested; or

(b) detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24 Rights of persons charged

Everyone who is charged with an offence—

(a) shall be informed promptly and in detail of the nature and cause of the charge; and

…

(c) shall have the right to consult and instruct a lawyer; and

(d) shall have the right to adequate time and facilities to prepare a defence; and

…

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) the right to a fair and public hearing by an independent and impartial court:

(b) the right to be tried without undue delay:

(c) the right to be presumed innocent until proved guilty according to law:

> (d) the right not to be compelled to be a witness or to confess guilt:
>
> (e) the right to be present at the trial and to present a defence:
>
> (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
>
> …

[172] It is common ground that the Minister should not order Mr Kim's surrender if he would not have the following fair trial rights when surrendered:[133]

(a) the right to a fair and public hearing by a competent, independent and impartial tribunal;[134]

(b) the right to be presumed innocent until proved guilty by law;[135]

(c) the right not to be compelled to be a witness or to confess guilt;[136]

(d) the right to examine witnesses;[137]

(e) the right to be tried without undue delay;[138] and

(f) the right to a lawyer.[139]

Submissions

[173] Mr Keith argues that, acting on Crown advice, the then responsible Minister did not apply the correct legal test of whether Mr Kim is at a "real risk" of a trial that would constitute a flagrant denial of justice. Instead, the Minister sought to assess whether such a trial would "to a reasonable extent, [accord] with the fundamental principles of criminal justice reflected in article 14 of the [ICCPR]", which Mr Keith maintains was in error.

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133 Extradition Act, s 30(3)(e).
134 ICCPR, art 14(1); and New Zealand Bill of Rights Act, s 25(a).
135 ICCPR, art 14(2); and New Zealand Bill of Rights Act, s 25(c).
136 ICCPR, art 14(3)(g); and New Zealand Bill of Rights Act, s 25(d).
137 ICCPR, art 14(3)(e); and New Zealand Bill of Rights Act, s 25(f).
138 ICCPR, art 14(3)(c); and New Zealand Bill of Rights Act, s 25(b).
139 ICCPR, art 14(3)(b) and (d); and New Zealand Bill of Rights Act, s 24(c).

[174] In the first briefing paper for the Minister, Crown Law advised the Minister as follows:

> Crown Law considers, and the Ministry and MFAT agree, that for present purposes the question you should ask yourself is:
>
> > Am I satisfied on all the information available, including the assurances provided by the PRC, that Mr Kim will receive a trial in the PRC that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14 of the ICCPR?
>
> In answering this question, you need not apply the standards in article 14 as they are applied in NZ. For example, the courts in the PRC do not appear to have the constitutional independence from the state that would be required by the doctrine of the separation of powers in NZ and other similar democracies. What you must determine is whether the differences are so significant that Mr Kim will not get a trial that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in article 14.

[175] As she was advised, the Minister applied the 'accords to a reasonable extent' test. The Judge was satisfied that the Minister did not err in doing so.[140] She considered that the Minister proceeded in a way that was beneficial to Mr Kim because she did not adopt the higher test of "flagrant denial of justice".[141] The use of the word "reasonable" allowed for the possibility of some differences in approach and potentially some irregularities, providing that they did not render the trial unfair. She said:[142]

> If surrender was to be declined on the basis of compliance with art 14, there would need to be sufficient evidence that Mr Kim fair trial rights would not be reasonably protected. … That was the approach the Minister took. There was no error in her approach in this respect.

Analysis

[176] The parties agree that the inquiry for the Minister and for this Court, is whether Mr Kim is at a "real risk" of a trial that would constitute a flagrant denial of justice.

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140 *First judicial review*, above n 2, at [110]–[112]; and *Second judicial review*, above n 4, at [83].
141 *First judicial review*, above n 2, at [112].
142 At [112].

[177] The concept of a flagrant denial of justice comes from jurisprudence in connection with the European Convention. The European Court of Human Rights in *Othman* described it in the following way:[143]

> …a trial which is manifestly contrary to the provisions of Article 6 [of the Convention for the Protection of Human Rights and Fundamental Freedom] or the principles embodied therein…
>
> … A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

[178] Counsel in this case referred to the test as a "very high" test. However we do not think that language of "high test" should be used, as it deflects from the critical inquiry. We see some force in the observations of William Young J in *Radhi v District Court at Manukau* that the word "flagrant" may also tend to confuse, because "flagrant" is a word usually denoting high-handed, brazen or scandalous conduct.[144] Its use may suggest the applicant must show high-handed, brazen of scandalous conduct to make out a case that surrender should be refused on fair trial grounds.

[179] We also have reservations as to the explanation of the test offered in *Othman*, that a "flagrant denial of justice" involves such a departure from standards so as to amount to a nullification or destruction of the right guaranteed by art 14 (in this case). It is true that, as discussed by this Court in *Bujak v Minister of Justice,* the threshold permits some degree of difference between countries' legal systems, appropriate in light of the public interest in extradition.[145] But the language of nullification or destruction expresses the matter in such absolute terms that it errs on the side of setting the threshold too high. We consider that the appropriate threshold is whether there is a real risk of a departure from the standard such as to deprive the defendant of a key benefit of the right in question.

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143 *Othman (Abu Qatada) v United Kingdom*, above n 55, at [259]–[260]; endorsed by *Harkins v United Kingdom* [2017] ECHR 1182 (Grand Chamber) at [64]. See also *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at [24].

144 *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 at [45].

145 See *Bujak v Minister of Justice* [2009] NZCA 570 at [36]–[43].

[180] "Real risk" does not mean proof on the balance of probabilities. It means a risk which is real and not merely fanciful; so that it may be established by something less than a 51 per cent probability. The prospect of unfairness may arise in respect of an individual or categories of individual — for example, political dissidents or those charged with certain offences, or if the unfairness is systemic can arise for every individual.[146] Once the person can show that there is a real risk of a trial that might be unfair in this sense, it is for the requesting state to "dispel any doubts" about that risk.[147]

[181] We agree with the Judge that the test applied by the Minister probably favoured Mr Kim. We say probably because there is something in Mr Keith's point that the word "reasonable" has no content unless it is attached to some other descriptor. The Minister erred in applying that test.

[182] As a consequence of this judgment the Minister will have to revisit the decision to surrender. When the Minister does so, the test as outlined at [179] above should be applied.

SEVENTH GROUND OF APPEAL

Did the Minister err in concluding that there was no risk of departure from fair trial standards justifying refusal of surrender?

[183] Mr Keith argues that Mr Kim had shown a real risk that the essence of the procedural and substantive protection contained in art 14 would be denied to Mr Kim, and that the Judge erred in finding that the Minister could reasonably conclude that the assurances met those concerns. He submits that Mr Kim had shown departures from art 14 rights such as to constitute a negation of the essence of the following rights:

(a) The right to a fair and public hearing by a competent, independent and impartial tribunal.[148]

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146 *Kapri v Lord Advocate* [2013] UKSC 48, [2013] 1 WLR 2324; and *Kapri v Her Majesty's Advocate (for the Republic of Albania)* [2014] HCJAC 33.

147 *Othman (Abu Qatada) v United Kingdom*, above n 55, at [261].

148 ICCPR, art 14(1).

(b) The right to be presumed innocent until proved guilty by law.[149]

(c) The right not to be compelled to be a witness or to confess guilt.[150]

(d) The right to examine witnesses.[151]

(e) The right to a lawyer.[152]

[184] Mr Keith argues that the Judge was wrong not to find error in the Minister's approach when the Minister did not squarely address the departures from fundamental principles of justice which underlie art 14, and reached a view not reasonably open to her that the assurances provided met any kind of risk that Mr Kim would not receive a fair trial.

[185] Secondly, Mr Keith submits that the Judge erred in finding that the departures from fundamental principles were not systemic and structural, inevitably affecting all accused in the criminal justice system and incapable of being addressed by assurances. She was wrong to find that the Minister could focus narrowly on the risk to Mr Kim. On the facts, that approach was not reasonably open to the Minister, and the Judge erred in finding that it was.

[186] As with other grounds, the respondents support the Judge's reasoning.

[187] Before addressing these grounds of appeal, it is necessary first to set out some background to the PRC's criminal justice system.

PRC's criminal justice system[153]

[188] The criminal justice system in the PRC is essentially inquisitorial but has incorporated an increasing number of adversarial components through amendments in 1996 and 2012 to its Criminal Procedure Law. Prior to those amendments the law did

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149 Article 14(2).
150 Article 14(3)(g).
151 Article 14(3)(e).
152 Article 14(3)(b).
153 This material comes from the Ministry of Justice briefings to the Minister and the advice of Professor Fu. The basic structure of the PRC criminal justice system is not in dispute.

not provide a right to be presumed innocent until proved guilty, a right not to be compelled to testify or confess guilt, and a right to challenge the evidence of a witness.

[189] As we understand it, there are three component parts to the criminal justice system. The "public security organ", the police, have responsibility for the investigation of crime. If the police consider the accused should be prosecuted, they send the case to the procuracy.[154] The procuracy examines the case and assesses whether the evidence is reliable and sufficient. It may also interrogate the accused. If the procuracy decides to prosecute it transfers all materials and evidence, including that favourable to the accused, to the court. If it considers more investigation is needed, it may remand the case back to the police or conduct the investigation itself.

[190] There is a hierarchy of procuratorates, with the Supreme People's Procuratorate being the highest. Procuratorates at the higher levels direct the work of those at the lower levels. The Supreme People's Procuracy is responsible to the National People's Congress (NPC) and its Standing Committee. The National People's Congress is the national legislature of the PRC. The Constitution of the PRC provides for most of its power to be exercised on a day-to-day basis by the Standing Committee of 150 members. It is the state organ for legal supervision, charged with investigating crimes committed by state functionaries (such as corruption offences), public prosecutions and supervising the application and enforcement of law by other legal institutions (including the police and the courts).

[191] The hierarchy of courts correspond to the hierarchy of procuracies with the Supreme People's Court being the highest. The Supreme People's Court is also responsible to the NPC and its Standing Committee. Judges are appointed and removed by various committees of the People's Congress. Selection is on the basis of ability and political integrity.

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154 The terms "procuracy" and "procuratorate" both mean the office of a procurator (or prosecutor).

(a) Right to a hearing before an independent and public tribunal

Initial briefing to the Minister

[192] The Ministry advised the Minister that although the Constitution of the PRC states that procuratorates and the courts exercise their powers independently, "it is well known that there is political oversight in the PRC's criminal justice system".[155] The Ministry cited statements of the US Department of State and expert David Matas as authority for the proposition that the Communist Party's Law and Politics Committee has the authority to review and influence court operations, although noting that it is more likely to become involved in politically sensitive cases.[156]

[193] The Ministry also noted a very high conviction rate — around 98 to 99 per cent. However it considered the high conviction rate might be partially explained by the following quote from a former judge:

> If the court really wants to acquit the defendant, the court's adjudication committee gets the police and the procuratorate together to get them psychologically prepared for what the court is thinking and why it thinks that way. If the police are okay with it, the procuratorate usually withdraws the prosecution and there wouldn't be a verdict. Because if there is an acquittal, it means acknowledging that the police wrongly arrested someone, that the procuratorate wrongly indicted someone, and that there will be a need for state compensation.

Minister's first decision

[194] Whilst the Minister accepted that the courts in the PRC are subject to a different constitutional structure than the courts in New Zealand, she was satisfied that Mr Kim would receive a trial in the PRC that, to a reasonably extent, would accord with the fundamental principles of justice reflected in art 14 of the ICCPR. She said:

> The standards in article 14 are applied differently in the PRC than in NZ. For example, the courts in the PRC do not appear to have the constitutional independence from the state that would be required by the doctrine of the separation of powers in NZ and other similar democracies. However, what I must determine is whether you will get a trial that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in

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155 Referring to Freedom House "Freedom in the World: China" (2014) <freedomhouse.org> at F. Rule of Law; and Amnesty International "Briefing on China's 2013 Criminal Procedure Law: In line with International Standards?" (2013) <amnesty.org.nz> at 5.

156 See US Department of State "China (Includes Tibet, Hong Kong, and Macau) 2013 Human Rights Report" (2014) <www.state.gov> at 14.

> article 14, as opposed to one which mirrors NZ's application of those principles.

[195] The Minister noted that the Criminal Procedure Law, as originally enacted in 1979, did not include a number of the internationally recognised fair trial protections contained in art 14 of the ICCPR. But commentators and the UN consider that 1996 and 2012 reforms of the Criminal Procedure Law have addressed most of the fair trial deficiencies. Whilst the UN and other commentators remained concerned about judicial independence and potential state interference, she did not consider those risks prevented surrender in Mr Kim's case. First, the PRC had provided detailed and specific assurances about the matters relating to Mr Kim's trial. Secondly, Mr Kim is an ordinary criminal suspect, so he is not at high-risk of political interference. Thirdly, New Zealand will be monitoring Mr Kim's case and compliance with fair trial rights. And finally, the prima facie case against Mr Kim appears to be relatively strong, which may decrease the risk of non-compliance with fair trial rights or state intervention.

[196] The Minister was therefore satisfied that Mr Kim will receive a trial in the PRC that, to a reasonable extent, accords with the fundamental principles of criminal justice reflected in art 14 of the ICCPR.

Evidence for first judicial review

[197] Mr Ansley provided evidence for the first judicial review hearing, expressing his opinion that there is no such thing as a fair trial in the PRC — that the process of proving guilt and arriving at an adjudication of guilt is so "fundamentally flawed, corrupt, and deficient, that there is no way of evaluating whether a convicted person is one of the guilty or whether he is an innocent victim of an inherently unfair process".

[198] As to the independence of the judiciary, Mr Ansley's evidence is that the criminal justice system is subject to control by the Chinese Communist Party. He characterises criminal trials as theatre with no impact on the outcome, with witnesses seldom seen or heard. Mr Ansley says that the judgment is not usually rendered by judges who have presided at the trial: "[t]hose who have heard the case do not make the judgement; those who make the judgment have not heard the case." He cites as one of the ways in which political influence operates, that while a tribunal

of three judges will hear a case, they only have the power to make a recommendation to the Judicial Committee. The Committee is the body that, in reality, decides the case:

> The Judicial Committee is a completely invisible group of "judges", meeting in a back room and making "judgments" on batches of cases collectively, without ever having heard the evidence in any of them.
>
> …
>
> The real reason for the existence of the Judicial Committees has always been to facilitate the control of the courts by the Party, and to do it invisibly…all the members of the Committee are Party members. But even more importantly, the driving force within the Committee is always the judge who serves as Party Secretary within the court. Also, the President of the court is always a member of the Committee and for historical reasons the President is usually the least legally qualified of any judge in the court. In fact, very often the only credential the President holds is his Party membership.

First judicial review

[199] The Judge was satisfied that the Minister had considered the overall issue of political interference in the Chinese criminal justice system.[157] She said that on the material before the Minister there was no evidential basis for concluding that state intervention was such that no criminal trial could be regarded as fair.[158] The Judge had regard to the evidence of Mr Ansley. While she acknowledged that the evidence suggested that lack of judicial independence and potential state interference is a systemic issue, she saw it as significant that Mr Ansley did not say that state intervention occurs in every case.[159] Rather his concern was that the system allows the state to intervene. The Minister was therefore not wrong to consider whether it would occur in Mr Kim's case.[160]

[200] The Judge considered that the Minister properly took into account the fact that Mr Kim was not a member of a high-risk group.[161] The Minister was also advised that "the extradition dimension", referring to the monitoring of Mr Kim by New Zealand,

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157 *First judicial review*, above n 2, at [118] and [120].
158 At [121].
159 At [121].
160 At [122].
161 At [119]–[120].

put Mr Kim in a different position from most other criminal suspects.[162] The Judge said:[163]

> The Minister has therefore explained why she concluded there would be compliance with Mr Kim's right to a "fair and public hearing by a competent, independent and impartial tribunal" notwithstanding the position of the judiciary in the PRC and the political oversight to which it is subject.

[201] The Judge noted that Mr Ansley's evidence on the involvement of the Judicial Committee was new material not before the Minister, but was not persuaded it was significant.[164] The Judge discounted Mr Ansley's assertion that the case would be decided by an invisible or faceless group of judges, the Judicial Committee.[165] She said her understanding was that a defendant could determine who the members of the Judicial Committee were so that they are not "faceless".[166]

[202] She also thought it unclear whether the evidence about the input of the Judicial Committee provided an accurate picture of the present situation, noting it came from an article Mr Ansley had published in 2007.[167] And she said, even on Mr Ansley's evidence, the court which hears the case makes a recommendation to the Judicial Committee.[168] Following the meeting of the Judicial Committee a judgment is issued. Therefore, whatever the private input of the Committee behind closed doors, a public judgment results. The Judge did not consider that Mr Ansley's evidence on the topic was likely to have led the Minister to reach a different conclusion.[169]

[203] The Judge also addressed the assurance that the PRC "will, in its dealings with Mr. Kim Kyung Yup, comply with applicable international legal obligations and domestic requirements regarding fair trial".[170] She referred to Mr Kim's argument that this assurance was meaningless as there were no "applicable international

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162 At [119].
163 At [120].
164 At [123].
165 At [123]–[125].
166 At [124].
167 At [124].
168 At [124].
169 At [125].
170 At [210].

obligations" given that the PRC had not ratified the ICCPR.[171] But she considered that the weight that could be placed upon the assurances depended upon the adequacy of the monitoring arrangements, evidence the PRC had previously complied with assurances, and whether there were adequate grounds for believing that the PRC would honour assurances to New Zealand.[172]

Minister's second decision

[204] Prior to making her second decision the Minister received a further briefing from officials, which drew heavily on advice obtained from Professor Fu. Professor Fu said there was a combination of legal, political and cultural reasons for the very high conviction rates in the PRC. Legally, China does not have a guilty-plea system and all defendants are found guilty through a full criminal trial. Culturally, the Chinese criminal process emphasises the ethos of mutual cooperation among different institutions. A not-guilty verdict is an open challenge to the prosecutorial and police authority and is used with caution. Many of the cases where a not guilty verdict may be available are withdrawn by the prosecution at trial. Alternatively, the prosecution may be given "direct or subtle pressure so at to compel'" a withdrawal. There is no data on these withdrawals, but a rough estimate would be about five per cent of prosecution cases. He continued:

> Politically all of the above takes place in a larger circumstance that prioritizes crime control. The objectives of procedural protection of rights in the criminal process, while having received significantly more attention in the recent years, still pales in comparison with the objective of maintaining stability through punishing crime. The court is largely an integral part of this larger system that is geared toward crime control.

[205] Professor Fu agreed with Mr Ellis' contention in the first judicial review that the PRC, along with Japan and Korea, has a conviction rate of over 99 per cent. In comparison, the domestic conviction rate in New Zealand is 82.5 per cent (or 90.7 per cent if you include diversions and discharges without conviction).

[206] As to Mr Ansley's evidence, the Ministry noted that he did not address the specifics of Mr Kim's case or the adequacy of the assurances. It said much of

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171 At [211].
172 At [211].

the material relied upon by Mr Ansley is not up to date: "Mr Ansley does not address the 2012 reforms to the [Criminal Procedure Law] and does not appear to have worked in the PRC for some time".

[207] In her second decision, the Minister asked herself the same question of whether she is satisfied, on all the available information, that Mr Kim will receive a fair trial in the PRC "that, to a reasonable extent, accords with the fundamental principles of the criminal justice system reflected in article 14". Although she accepted the evidence about the PRC's lack of judicial independence and potential state interference, the Minister remained satisfied that the risks identified by Mr Ellis and Mr Ansley were not likely to eventuate in the particular circumstances of Mr Kim's case. In reaching that conclusion, the Minister specifically referred to the additional assurances obtained after the first judicial review.

Second judicial review

[208] The Judge characterised the evidence relied upon by Mr Kim as placing the institutional structure of the judiciary at issue.[173] It was open to the Minister to conclude that Mr Kim's trial was not at risk of state interference because of Mr Kim's particular circumstances. She noted that other courts had approached this issue by considering whether, despite a systemic issue in the receiving country, the country surrendering the individual can be satisfied the individual will receive a fair trial from a court that is subject to political interference.[174] She referred to the decision of Scotland's High Court of Judiciary in *Kapri v Her Majesty's Advocate (for the Republic of Albania)* as an example of that approach.[175]

[209] The Judge acknowledged reported comments allegedly made by the President and Party Secretary of China's Supreme People's Court Party Group, in an address to the National Conference of Courts' Presidents on 14 January 2017, that Western ideologies of judicial independence must be rejected and the road of Socialist Rule of Law with Chinese characteristics must be followed.[176] The Judge said that those

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173 *Second judicial review*, above n 4, at [94].
174 At [94].
175 At [94]; referring to *Kapri v Her Majesty's Advocate (for the Republic of Albania)*, above n 146, a case we discuss below.
176 At [90].

reported comments,[177] along with Professor Fu's comments on the political factors at play in the courts, gave her pause.[178] Nevertheless, she said, it was Mr Kim's particular circumstances that were of importance.[179]

[210] The Judge maintained her view that the critical factor was the assurances.[180] The further information obtained by the Minister following the first judgment addressed the deficiencies identified. The Judge concluded it was reasonably open to the Minister to be satisfied the PRC would uphold the assurances.[181]

Analysis

[211] The essence of the right at issue here is the right to be tried before a tribunal that decides the case on the evidence before it, free of political pressure to decide the case other than on the basis of the law and those facts. We differ from the Judge as to whether there is a real risk Mr Kim would receive a trial other than in accordance with that standard. On the material before the Minister by the time of the second decision, it was not reasonably open to her, at least without further inquiry, to conclude the assurances provided met the fair trial concerns raised on Mr Kim's behalf in respect of the lack of independence of the judiciary.

[212] We were not referred to any evidence that contradicts Mr Ansley's account of the operation of the PRC's criminal justice system as it relates to the involvement of the Judicial Committee. Nor does it seem reasonable to regard those concerns, and others he addresses, as out of date since information he provided was consistent with the Ministry's own material. For example, the briefing provided to the Minister before the first decision contained the following statement:

> If the collegial panel [hearing the case] considers it difficult to make a decision, the president of the court may submit the case to the judicial committee for determination.

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177 These were comments reported in the media. The Judge did not have a transcript of them, nor evidence as to context, matters relied upon for the respondents as to no weight should be attached to the comments.

178 *Second judicial review*, above n 4, at [94].

179 At [94].

180 At [95].

181 At [95].

[213] This evidence is echoed in the opinion provided to the Ministry by Professor Fu. Professor Fu refers to the exclusion by the courts of confession evidence obtained by torture as being "politically possible".

[214] We are also concerned that the Minister was encouraged to discount Mr Ansley's evidence on the basis that it did not address the specifics of Mr Kim's case, the adequacy of the assurances and the effects of the 2012 reforms. Mr Ansley did not address in detail the specifics of Mr Kim's case or the assurances because it was his evidence that the nature of the PRC criminal justice system is such that a fair trial is not possible. And contrary to the Ministry's advice, Mr Ansley did address the impact of the 2012 reforms. His evidence was that things had not materially changed since those reforms.

[215] While ultimately this issue is not determinative, we do detect differing treatment of the evidence of Mr Ansley and the report provided by Professor Fu. For example, Mr Ansley's evidence is criticised on the basis that he has not recently worked in the PRC. But it is not clear on the material before us that Professor Fu has ever worked inside the PRC's criminal justice system. The Ministry criticises the currency of the research Mr Ansley uses to support his assertions, yet Professor Fu does not refer to any published research or studies to support his assertions.

[216] We also consider this case is distinguishable from *Kapri v Her Majesty's Advocate (for the Republic of Albania)*, a case relied upon by the Judge.[182] In *Kapri* the issue was judicial corruption, which is by definition a failure of the system to operate as it is designed. Moreover, Scotland's High Court of Justiciary concluded that while there was a high level of perception in Albania that corruption existed in the judicial system, the extent of corruption was entirely uncertain.[183] The evidence relied on by the applicant was so general and repetitive that it established:[184]

> At best for the appellant, there may have been undue influence of one sort or another in criminal cases involving a single judge on matters of procedure. It may be more frequent than this, but there is simply no adequate material upon which it could be held that there are substantial grounds for believing

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182 *Kapri v Her Majesty's Advocate (for the Republic of Albania)*, above n 146.
183 At [132].
184 At [132].

> that it exists at such a level as will necessarily involve a flagrant denial of justice in all, or even most, cases.

[217] The Judge was of course correct that the issue is whether Mr Kim will receive a fair trial. It is also true that Mr Kim's case is not a "political" one, such as a case involving human rights protestors. But the point of Mr Ansley's evidence was that everybody is at risk of not receiving a fair trial in the PRC in accordance with the fundamental principles set out in art 14 for a number of reasons, including the lack of independence of the judiciary. We accept Mr Keith's argument that the evidence before the Minister supported the conclusion that political influence in general, and the role of the Judicial Committee in particular, are pervasive in the PRC's criminal justice system. This political influence prioritises social policy objectives over individual procedural protections. The lack of independence of the judiciary is systemic. It is also structural in the sense that it is how the system is designed to operate, rather than being the consequence of poorly controlled human behaviour undermining the intended operation of the system, which was the issue in *Kapri*.

[218] While it is correct that the issue for the Minister was departure from the relevant standard in Mr Kim's case, the evidence before the Minister supported the conclusion that Mr Kim would not be tried before an independent tribunal. There was no evidence on which the Minister could reasonably conclude otherwise. We have no doubt that a trial before a tribunal subject to direct political influence by reason of the design of the system within which it operates would amount to a departure from the relevant ICCPR standard, constituting a denial of justice.

[219] Could the Minister reasonably conclude that the assurances met this concern? The only assurance provided of any substance on this point is that Mr Kim's case will be dealt with in accordance with domestic law. That does not meet the concern. The system operates in a way which, on Professor Fu's own evidence, prioritises stability and crime control over procedural rights and which enables a decision to be made by a body other than the body that heard the case. The procedural rights do not alter the fundamental structure of the system. As we come to, those procedural rights are largely discretionary and, as Professor Fu says, pale in comparison with the objective of maintaining stability through punishing crime.

[220] The assurances regarding compliance with international law provide little comfort, since the PRC has not ratified the ICCPR so that there are no "applicable international legal obligations".

[221] In the context of a system of criminal justice subject to political control as we have outlined, the assurances cannot reasonably be seen as providing reassurance that Mr Kim's case will be dealt with in some different way. We do not consider it was reasonably open to the Minister to conclude, on the information before her, that the risk that Mr Kim would not be tried before an independent tribunal was addressed by these assurances. We stress that this view is based on the material before the Minister. We cannot exclude the possibility that further inquiry will show a different picture of the judiciary to that which emerges from the evidence and briefing material to date. That inquiry would be directed to ascertaining the extent to which the judiciary is subject to political control, and the extent to which a body that did not hear the case could control or influence decisions of guilt or innocence.

(b) Right to legal representation

[222] We group together under this heading the right to present a defence, receive legal assistance, to have adequate time and facilities to prepare a defence and to examine witnesses.

[223] Mr Keith argues that the Minister did not address adequately, or at all, very substantial gaps in necessary procedural protections for all accused in the PRC. He argues that the Minister and subsequently the Judge were wrong to put to one side defects as identified by Mr Ansley on the grounds that they were systemic issues not tied to Mr Kim, when the effect of Mr Ansley's evidence was that, because the system operated in this way, there was no such thing as a fair trial in the PRC. Mr Keith contends that the Minister and the Judge were wrong to discount Mr Ansley's evidence as out of date when there was no proper basis for that, and when both proceeded on the mistaken assumption he had not addressed the 2012 reforms. Finally, Mr Keith argues that the Minister and the Judge failed to turn their minds to two critical defects: the imperilled position of defence counsel in the PRC; and the substantial procedural disadvantages caused by a lack of disclosure and an inability to examine witnesses.

First briefing paper

[224] In relation to the right to present a defence and to legal assistance (contained in art 14(3) of the ICCPR and ss 24(c), 24(f) and 25(e) of the New Zealand Bill of Rights Act), the Ministry advised that Mr Kim would be able to instruct a lawyer immediately on his return. A defendant in custody is entitled to meet his lawyer, and the Criminal Procedure Law provides that those meetings must not be monitored.[185] A meeting, if requested, must occur within 48 hours.[186]

[225] The lawyer may apply to the procuratorate for disclosure by the prosecution of evidence helpful to the defence.[187] However, the Ministry recorded the view of one commentator, David Matas, that the defence has no way of knowing what information is available to enable such an application to be made. The Ministry noted that the provision of disclosure in response to such an application is discretionary.

[226] The Ministry also addressed the right to examine witnesses for the prosecution and to obtain for the defence the attendance and examination of witnesses under the same conditions as the prosecution (art 14(3)(e) of the ICCPR and s 25(f) of the New Zealand Bill of Rights Act). The officials advised the Minister that evidence of witnesses is usually provided by formal written statement although the defendant's lawyer can request the court to instruct a witness to appear in court and give testimony. The 2012 reforms provided that a witness shall appear before the court if the prosecutor or defendant's lawyer has objections to the testimony, the testimony has a material impact on the case, and the people's court deems it necessary to ask the witness to appear before the court.[188]

[227] The Ministry recorded concerns that aspects of the 1996 and 2012 reforms were not being followed in practice, citing as a recent example the mass detention of some 230 human rights lawyers and associates. The very high conviction rates were noted in this regard.

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185 Criminal Procedure Law, art 37.
186 Article 37.
187 Article 39.
188 Article 187.

[228] However, with respect to Mr Kim's case, the Ministry again emphasised that Mr Kim is an "ordinary criminal offender". He is not a member of any of the well-known groups subject to high-risk of interference by the Government or Communist Party in the judicial proceedings. It also said that Mr Kim's situation is significantly different from that of other criminal suspects because of "the extradition dimension". His situation will be monitored by New Zealand and possibly South Korea. The PRC authorities will know that. Any non-compliance is more likely to be detected and will have repercussions for the bilateral relationship between the PRC and New Zealand, and its international relationships. Further, the evidence against Mr Kim appears relatively strong, reducing the risk of non-compliance with fair trial rights.

Mr Ansley's evidence for first judicial review

[229] As noted earlier, Mr Ansley's opinion is that a fair trial is not possible in the PRC. He says that virtually all accused parties are found guilty. The system is heavily dependent on confession, and torture is regularly employed to extract confessions. The Criminal Procedure Law is routinely ignored by investigators, police and the courts. Defence lawyers are denied access to clients, harassed, beaten, intimidated and often incarcerated simply for being too vigorous in acting on behalf of their clients. He claims that the Chinese Communist Party has conducted a steadily escalating campaign of terror against the criminal defence and human rights bars in China. Article 306 of the Criminal Law of the People's Republic of China makes it an offence for defence counsel to falsify or suppress evidence, or to suborn perjury on the part of a client. It is an offence that applies only to defence counsel. He claims that a "disturbingly large number of Chinese defence counsel are now incarcerated as a result of conviction under Article 306".

[230] Mr Ansley said that detained people are not allowed access to a lawyer until the police and prosecutors have completed their investigation, by which time the accused has usually confessed. Although the law requires that lawyers be able to meet with their clients without monitoring, in practice meetings are monitored. Lawyers are not allowed to go beyond advising the person of the nature of the charge and if they attempt to do so, they are stopped. Police, prosecutors and the judges meet

to discuss the evidence, but defence counsel are excluded from these meetings and never allowed to see anything in the file which might help their client. Mr Ansley says the lack of access to prosecution evidence for defence counsel means that counsel will not know what the accused has confessed to. This creates a risk for defence counsel if they lead evidence from their client. If that evidence differs from the client's confession, "the court normally interprets this as evidence that the lawyer has induced the accused to change his evidence and the lawyer is therefore convicted under Article 306 for suborning perjury".

[231] As to the ability to question witnesses, although art 59 of the Criminal Procedure Law stipulates that no accused may be convicted on the basis of witness evidence unless the witness has attended in open court and has been cross-examined by both sides, witnesses seldom do attend and accused are regularly convicted on the basis of hearsay evidence.

First judicial review

[232] The Judge said that Mr Ansley's evidence relates to the general situation, while the briefing paper correctly advised the Minister to consider Mr Kim's specific situation.[189]

[233] With regards to access to lawyers, the Judge noted the seventh assurance:[190]

> Mr Kim Kyung Yup will be entitled to retain a lawyer licensed to practise law in the PRC to defend him. He shall also have the right to dismiss that lawyer and retain another of his choosing. Mr. Kim Kyung Yup shall be entitled to meet with his lawyer in private without being monitored. In addition, he has the right to receive legal aid according to Chinese law.

[234] The Judge was satisfied that assurance addressed concerns that a detained person's consultation with his or her lawyer is monitored, and that the lawyer is not permitted to go beyond advising the person of the nature of the charge.[191]

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189 *First judicial review*, above n 2, at [128].
190 At [200].
191 At [203].

Minister's second decision

[235] We have outlined the relevant parts of the Ministry's second briefing and Second Ministerial decision above.

Second judicial review

[236] The Judge acknowledged that the assurances did not provide for a lawyer to be present during all pre-trial interrogations.[192] However, art 14 does not provide for this. The Judge considered that it was not for the court to question what other assurances could have been sought, but rather whether the Minister could be satisfied that the assurances obtained protected Mr Kim's rights to legal representation.[193] The Judge considered that the Minister took into account relevant considerations in deciding Mr Kim's fair trial rights would be protected despite the absence of a lawyer during interrogations.[194] No issue was found with the Minister's second decision.

Analysis

[237] The Ministry's briefing material identified concerns amongst commentators that reforms to the Criminal Procedure Law designed to address procedural deficiencies were not being consistently or fully implemented. It was open to the Minister, to accept the assurances that those protections would be afforded to Mr Kim in compliance with domestic law. But the briefing material also identified features of the operation of the system which should have been, but were not, addressed by the Minister before the decision to surrender was made. The issues raised in the briefing paper were given further substance by the evidence of Mr Ansley. These concerns are not addressed, or not adequately addressed by the assurances.

[238] The right to prepare and present a defence requires that the accused and his representatives understand the case they will have to meet. Mr Ansley's account is of a system in which the prosecution, police and judges have access to the evidence well in advance of the defence. The Ministry noted the existence of procedural rules allowing the defence to apply for disclosure of evidence held by the prosecution

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192 *Second judicial review*, above n 4, at [107].
193 At [111].
194 At [112].

helpful to their case. But it also recorded David Matas' view that the right is difficult to exercise when the defence does not know what evidence the prosecution holds and when the grant of the application for disclosure is discretionary. There was no evidence as to how that discretion is exercised, a relevant inquiry given the material just traversed as to the lack of independence of the judiciary. We consider that the Minister could have, but did not, seek specific assurances regarding the timing and content of disclosure of the case to Mr Kim.

[239] More troubling is the position of the defence bar in the PRC. Defence counsel must be able to honestly and responsibly represent an accused person without fear of repercussion, if the procedural right is to operate in accordance with its purpose. However, the Ministry's briefing contained sufficient material that at least required further inquiry as to the position of the defence bar in the PRC before a decision to surrender could be made. The Ministry referred to the rounding up of lawyers involved in human rights cases. Mr Ansley's evidence provided further detail which, we consider, could not simply be ignored. Further inquiry was needed as to the impact of the art 306 offence, an offence for defence counsel but not prosecution. Does it have, as Mr Ansley claims, a chilling effect on counsel's representation of an accused? If the defence bar does operate in an environment where they fear prosecution for their representation of their client, we have no doubt that would have the effect of depriving defendants of the benefit of legal representation.

[240] This issue cannot be dismissed on the basis that it is a systemic issue and does not necessarily relate to Mr Kim's case. The point being made for Mr Kim is that this is the system in which all defence counsel operates. Assurances cannot address the jeopardy all counsel face by virtue of the provisions of art 306, and in particular the culture of fear that creates.

[241] The evidence as to the ability to examine witnesses also suggests that the norm in the PRC is that witnesses do not appear, and so will not be available for cross-examination. Professor Fu put the matter thus:

> A trial is not only a judge-led event with lawyers playing a relatively minor role, but also relies extensively on documents, rendering a trial virtually a trial by affidavits. As it happens, few witnesses testify in courts in China.

[242] This may be the product of the fact that the procedural right to examine witnesses depends upon the making of an application, which a judge has a discretion whether or not to grant. It may be a cultural phenomenon. However, the evidence that witnesses seldom appear suggests further inquiry is justified. When Mr Kim's case is re-considered by the Minister, we would expect there to be closer consideration as to how the procedural right to examine witnesses operates in practice, and whether there is in substance a right for the accused to examine witnesses. We also expect consideration to be given to whether a specific assurance can be provided to ensure witnesses will be available for cross-examination.

[243] We consider that each of these issues requires further investigation: disclosure of the case against the defendant, the status of the defence bar, and the right to examine witnesses for the prosecution. The issues of disclosure and examination of witnesses should have been the subject of specific assurances. On the material before the Minister it was not open to her to conclude that the assurances met the fair trial concerns in connection with these rights under the ICCPR.

(c) Right not to be compelled to testify or confess guilt

First briefing paper

[244] In relation to the right not to be compelled to testify or confess guilt, (under art 14(3)(g) of the ICCPR and s 25(d) of the New Zealand Bill of Rights Act), the Ministry referred to art 50 of the Criminal Procedure Law, which since 2012 has provided that "Judges, procuratorial personnel and investigators … are strictly prohibited from … forcing anyone to provide evidence proving his/her own guilt".

[245] However, the Ministry noted that Amnesty International and Human Rights Watch questioned the effectiveness of the new provision because art 118 of the Criminal Procedure Law remained unchanged. That article states that "[t]he criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case". Amnesty International and Human Rights Watch considered the effect of the provision was that the defendant must answer a relevant question truthfully. Nevertheless, the Ministry advised the Minister that when asked, Chinese Officials said that

a defendant has a right to refuse to answer a question and there are no adverse consequences for doing so.

First judicial review

[246] The Judge said that the inability to have a lawyer present during interrogations diminished the protection the assurances provided against pre-trial torture or ill-treatment to obtain a confession.[195] She continued:[196]

> It is also contrary to what is well established in our criminal justice system that an accused person may have their lawyer present for any police questioning if they wish to do so. This ensures an accused person understands their rights "chief among which is his right to silence".

[247] As previously noted, in allowing the judicial review, the Judge found that the Minister had failed to explicitly consider whether the assurances adequately protected Mr Kim from ill-treatment and his right to silence during pre-trial interrogations, when the assurances do not provide for Mr Kim to have the right to a lawyer present for all pre-trial interrogations.[197] While the assurances provided for recording of interrogations, the Minister had not specifically addressed whether this was an adequate substitute for the presence of a lawyer in light of the power exerted by public security officers, and when the presence of a lawyer during police questioning is a well-established right in this country.

Briefing before second decision

[248] The Minister was provided with advice from Professor Fu as to whether Mr Kim was required to make a statement about his involvement in the alleged crime. Professor Fu said that the art 118 obligation was qualified by the following:

(a) Article 12; which provides "[n]o person shall be found guilty without being judged so by the people's court according to law."

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195 *First judicial review*, above n 2, at [203].
196 At [203] (footnotes omitted).
197 At [260].

(b) Article 49; which provides that the burden to prove guilt rests on the prosecution.

(c) Article 53; which provides that the prosecution must produce sufficient, effective and lawfully obtained evidence to prove guilt beyond reasonable doubt.

(d) Articles 56 to 58; which provides that the Court is duty bound to exclude evidence unlawfully obtained.

(e) Article 53; which provides that confession is not sufficient for a conviction and a court may convict without a confession statement.

[249] The Professor concluded that art 118 is not consequential in the sense that refusal to answer questions does not constitute a crime and is not an aggravating factor in sentencing.

[250] As earlier noted, Professor Fu was asked but did not address the risk that recordings of interrogations would be selective or could be tampered with in some way.

[251] In the briefing paper the Ministry again repeated the view that the greatest risk of torture and ill-treatment in the PRC is immediately after arrest, when the suspect is detained in the police station. The Ministry however considered that would not apply to Mr Kim who will be held in custody in a detention centre. It advised the Minister that Mr Kim will be in a different category to most who are detained and questioned, because Mr Kim already has detailed knowledge of the case against him and, as a result of the current proceedings, will also know that there are no consequences in PRC law if he refuses to answer questions. Nevertheless, the Ministry advised the Minister she would have to weigh that Mr Kim would not have a lawyer present with him to remind him of his rights when he is being questioned.

Minister's second decision

[252] The Minister addressed this issue in short order. She said that although Mr Kim would not have a lawyer present during interrogations, there are no legal consequences under PRC law if Mr Kim fails to answer the questions.

Second judicial review

[253] The Judge noted that Mr Kim will have access to his lawyer and to New Zealand representatives before and after he is interrogated. Moreover, New Zealand will receive recordings of interrogation within 48 hours of the interrogation. On that basis the Judge was satisfied that it was open to the Minister to conclude these would adequately protect Mr Kim's fair trial rights.

Analysis

[254] We agree that the Minister could place some reliance upon the recording of the interrogations, although that is subject to our comments above in connection with the issue of torture — that those who torture can be expected to be sure that torture and its aftermath is not detected by such monitoring systems as there are, and that the recording of interrogations gives no comfort as to what happens outside the formal interrogation.

[255] But even were the monitoring of the interrogations effective, we do not think that this meets the concern that Mr Kim will be questioned in the absence of counsel. As Professor Fu notes, the questioning could extend over a period of months. And as is common ground, Mr Kim is obliged under the Criminal Procedure Law to answer questions relevant to the inquiry. It may be that although legally obliged to answer he will not face legal consequences for failing to do so, a fact of which he is now aware. But such legal niceties are very likely to be lost sight of within the human dynamic of an interrogation, especially when that interrogation may extend on and off over a period of months.

[256] In our legal system, the right to legal representation is seen as a necessary incident of the right to silence. We accept that it is conceivable that the right not to be

compelled to confess guilt can be secured in other ways. But here, given the provisions of art 118, we do not consider that access to a lawyer before and after interrogation, and even the filming of the interrogation, is sufficient for this purpose. We are satisfied that the Minister should require an assurance that Mr Kim has the opportunity to have a legal representative present during interrogation. There is also an issue as to who that legal representative should be, give the information as to pressures brought to bear upon the legal profession in the PRC. That is another matter the Minister will have to address.

Conclusion

[257] Accordingly, for the reasons set out above, we are satisfied that the Judge erred in finding no reviewable error in the Minister's decision when she concluded there was no risk of departure from the fair trial standards justifying refusal of surrender.

EIGHTH GROUND OF APPEAL

Did the Minister err in making the decision to surrender Mr Kim notwithstanding the absence of assurance addressing the risk of disproportionate punishment?

Relevant background

[258] It is argued that a whole life sentence of imprisonment for Mr Kim would be disproportionate and cruel, yet that is the likely sentence if he is convicted. It is also argued for Mr Kim that the Judge erred in finding no reviewable error by the Minister notwithstanding also finding a risk that Mr Kim might receive no credit for time spent in custody in New Zealand.[198]

[259] The issue of whether a whole of life sentence of imprisonment is cruel or disproportionate does not seem to have been argued in the High Court in the first judicial review. The issue of credit for time spent in custody prior to trial was however before the Judge in this proceeding.

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198 *Second judicial review*, above n 4, at [144]–[153].

[260] At the second judicial review hearing, the Judge asked counsel whether the five years that Mr Kim had spent in custody in New Zealand would be taken into account in the PRC.[199] Counsel for the respondents undertook inquiries of Chinese officials and provided an updating memorandum to the Court. The Judge summarised the effect of that memorandum, which we set out below:

> [146] In summary, if convicted of intentional homicide Mr Kim may be sentenced to life imprisonment or a fixed term of imprisonment (given the assurance the death penalty will not be imposed). If life imprisonment is imposed, the time spent detained in New Zealand will not be relevant because there is no parole in China for intentional homicide. It may, however, be relevant to the choice between a determinate sentence and life imprisonment, or to the length of a determinate sentence if a determinate sentence is imposed. The respondents submit that, because Mr Kim's detention in New Zealand may be taken into account as a factor for imposing a lighter punishment, his time in custody in this country will not result in a disproportionately severe sentence.

[261] The Judge was troubled by the fact that there is no guarantee that the five years Mr Kim has spent in custody will be taken into account in sentencing him if he is surrendered and convicted.[200] She noted the Minister had not been asked to consider this matter when she gave her decision, as it had not been raised by Mr Kim at an earlier point.[201] Nevertheless, the Judge was satisfied that surrender would not be unjust or oppressive because MFAT had committed to monitoring Mr Kim's case, and would be able to ensure that if he was convicted the period of Mr Kim's detention in New Zealand is before the Supreme People's Court. The PRC's law allows for time spent in pre-trial detention to be taken into account.[202]

[262] On appeal Ms Todd, for the respondents, accepts that since Mr Kim is charged with intentional homicide, that could attract a sentence of life imprisonment or a fixed term of imprisonment (given the assurances that the death penalty would not be imposed). She argues that a whole of life sentence is not disproportionately severe for an offence of this nature.

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199 At [144].
200 At [149].
201 At [150].
202 At [152].

[263] As to the issue of credit for pre-trial detention, she submits that since time served may be considered by the sentencing court as part of the sentencing discretion, the resulting sentence of imprisonment would not be grossly disproportionate even if no account is taken of that time. It is argued that the speculative risk that a sentencing court may not credit Mr Kim for time spent in custody in New Zealand cannot render the surrender decision unlawful on the basis there is a real risk of severely degrading treatment or punishment.

Analysis

[264] The Judge considered the issue of sentencing credit for pre-trial detention as relevant to whether it would be unjust or oppressive to order Mr Kim's surrender under s 8(1)(c) (because of the passage of time since the alleged offence was committed and having regard to all the circumstances of the case), or s 30(3)(e), (because of any other reason the Minister considers the person should not be surrendered) of the Extradition Act.

[265] We accept the respondents' submission that this issue is best addressed under s 30(3)(e) in that the Minister was required to exercise her discretion in a manner consistent with New Zealand's international obligations. But in any case, whichever ground this is analysed under, it does not impact upon the basic issue for the Minister or the Court. The relevant international covenant is art 7 of the ICCPR "[n]o-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In New Zealand that right is encapsulated in s 9 of the New Zealand Bill of Rights Act, which reads "[e]veryone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment."

[266] The question is, is it disproportionately severe punishment, or cruel or degrading punishment if there is no absolute requirement that time spent in custody prior to conviction be treated as time served on any definite term of imprisonment imposed? We formulate the issue this way since, on the material available, there is undoubtedly a discretion to take the five years into account on sentence.[203]

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[203] Criminal Law, arts 61–63 and 232.

[267] We consider that it would be a disproportionately severe punishment should time already spent in custody not be taken into account when fixing a finite sentence. That is simply a matter of sentencing methodology. It seems to us reasonable to seek an assurance on the point when the time at issue is five years. Officials from the PRC advised the Judge that in extradition treaties the PRC had concluded with other countries, there are provisions expressly requiring the length of time served in custody by the person extradited to be deducted from the time of imprisonment in the PRC.[204] We consider the Minister should have sought an assurance on this point.

[268] As to the other ground advanced on appeal, it would be fair to say that the argument that the imposition of a whole of life sentence of imprisonment without parole would be in breach of art 7 is only raised in passing in the written submissions. We were not referred to any evidence as to whether or not a sentence of life imprisonment without parole in the PRC is as a matter of fact law and fact irreducible; there may be rights of commutation contained in Chinese legislation. In the absence of a proper evidential basis for the argument, we do not propose to address it.

NINTH GROUND OF APPEAL

Did the Minister err in relying on advice from PRC officials as to Mr Kim's access to mental health care in custody in the PRC?

[269] Mr Kim has been diagnosed with some mental health issues. It is argued for Mr Kim that the Minister could not reasonably rely upon advice from PRC officials as to Mr Kim's access to mental health services when access is not the subject of any assurance and when the provision for mentally ill prisoners is strongly criticised in material available to the Minister.

[270] Beyond making this submission, counsel for Mr Kim provided no further assistance on this point. We do not therefore propose to address this ground of appeal further.

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[204] *Second judicial review*, above n 4, at [145].

SUMMARY OF CONCLUSIONS

[271] At [10]–[21] of this judgment we set out the legal framework and procedural steps which must be taken when an application is made to surrender a person resident in New Zealand to stand trial for a crime they are alleged to have committed in another country.

[272] As noted at [11], under this framework Parliament has entrusted the Minister (not the courts) to make the final decision as to whether or not the person should be surrendered. However, the power to make that decision, which is the subject of this review application, is constrained by mandatory and discretionary restrictions. These restrictions derive from fundamental principles and rights contained within various international covenants ratified by New Zealand which also underlie, to some extent, the rights and freedoms contained within the New Zealand Bill of Rights Act. All parties in this matter have proceeded on the basis that there are good grounds for concern as to the observance and protection of human rights in the PRC.

[273] On judicial review, the Court is required to ensure the Minister's decision was guided by a correct understanding of the law, was reached with sufficient evidence, and was fully and accurately reasoned on the basis of the evidence before her. We have applied heightened scrutiny to the Minister's decision as the standard of judicial review. This is because of the importance of the rights alleged to be at risk. Mr Kim has argued that if he is surrendered to the PRC he will be denied the most fundamental human rights; the right to be free from torture and the right to a fair trial.

[274] The concerns we have identified are wide-ranging. Some of the matters we have identified raise serious issues as to whether a decision to surrender Mr Kim could be made in a manner which is compliant with New Zealand's international obligations. We have identified the difficulty that exists in obtaining assurances adequate to meet the risk of torture in a country where torture is illegal yet remains widespread because of cultural and systemic features of the PRC criminal justice system. Other issues may be still more difficult to address: the existence of direct political influence in the criminal justice system and the evidence of harassment, and even persecution, of criminal defence lawyers. We do not exclude the possibility however that further

inquiry may produce information on these matters of which we are unaware, and which show a different picture of the PRC criminal justice system.

[275] Applying this standard of review of the Minister's decision, we have found that the Judge erred in some respects in refusing Mr Kim's application for judicial review, but not in others. We summarise our conclusions as follows:

First ground — diplomatic assurances

(a) The Judge did not err in finding that it was open to the Minister to seek diplomatic assurances to meet the risk of torture. New Zealand's international obligations provide no absolute prohibition on relying on assurances as relevant to an assessment of the risk of torture.

(b) The Judge correctly found that before relying upon assurances, the Minister was required to address the preliminary question, whether the general human rights situation in the PRC was such that assurances should be sought. The reason for addressing this issue is that such an inquiry may reveal whether the value of human rights is recognised in the requesting state, and whether the rule of law as it exists in that state is sufficient to secure those rights to the person the subject of the request. However, we consider that the Judge erred in concluding that the Minister did address that preliminary question. The Minister referred to the "general situation" in the PRC but only with regards to torture and only as part of her reasoning as to the risk of torture faced by Mr Kim. The Minister did not address as a separate and preliminary question whether the human rights situation in the PRC more generally is such that assurances should not be sought or accepted.

Second ground — irrelevant considerations

(c) The Judge did not err in rejecting an argument that the Minister took into account an irrelevant consideration, namely helping the PRC establish credibility in the international community. The briefings

provided to the Minister did not put the matter on that basis. Rather, officials highlighted that the PRC would be motivated to honour its assurances because of the serious consequences for the bilateral relationship as well as the PRC's international reputation should the assurances not be honoured. This material was clearly relevant to the Minister's assessment of the likelihood of whether the PRC would comply with its undertakings.

Third ground — torture

(d) The Judge was correct to conclude that it was relevant for the Minister to ascertain whether Mr Kim was in one of the classes of people at high risk of torture in the PRC. However, the Judge erred in concluding that on the material before the Minister it was open to her to find that Mr Kim, as a murder accused, is not at high-risk. Relevant evidence asserting that murder accused were at a high-risk of torture could not reasonably be put to one side and no evidence before the Minister went so far as to conclude that murder accused were not at a high-risk of torture.

(e) The Judge erred in upholding the Minister's reliance on the fact that Mr Kim could be tried in Shanghai, the stage of the investigation, and the strength of the case against Mr Kim, as reducing the risk of torture. There was insufficient evidence for treating those factors as reducing the risk of torture in this case.

(f) The Judge erred in failing to identify the following deficiency in the Minister's consideration of the adequacy of the assurances against torture. The Minister erred in failing to address how the assurances (which depended upon opportunities being created for Mr Kim and others to report torture, and upon monitoring) could protect against torture when:

(i) torture is already against the law, yet persists;

(ii) the practice of torture in the PRC is concealed, and its use can be difficult to detect;

(iii) videotaping of interrogations is selective and torture often occurs outside the recorded session;

(iv) evidence obtained by torture is frequently admitted in court; and

(v) there are substantial disincentives for anyone, including the detained person, reporting the practice of torture.

Fourth ground — death penalty

(g) The Judge did not err in upholding the Minister's reliance upon the assurance received that Mr Kim would not be sentenced to death. The Minister obtained evidence of the PRC's previous compliance with similar assurances from New Zealand (in the context of deportation) and other countries.

Fifth ground — extra-judicial killings

(h) The Judge did not err in upholding the Minister's approach to the risk of extra-judicial killings. However, the material provided for Mr Kim in respect of extra-judicial killing, while not bearing on the risk for him, is nevertheless relevant to the preliminary question identified at [275](b)] above; whether, in light of the general human rights situation, assurances should be sought or relied upon in the case of Mr Kim.

Sixth ground — legal standard

(i) The Judge erred in finding the Minister applied the correct legal test to determining whether the risk to Mr Kim's right to a fair trial was such that he should not be surrendered. The inquiry for the Minister is whether Mr Kim is at a real and not merely fanciful risk of a departure from the standard such as to deprive him of a key benefit of a procedural

right under the ICCPR, which are procedural rights designed to secure the right to a fair trial. When revisiting the decision whether or not to surrender Mr Kim, the Minister should apply the test as articulated at [179] above.

Seventh ground — fair trial

(j) The Judge erred in finding it was reasonably open to the Minister to be satisfied that the assurances met the risk that Mr Kim would not receive a fair trial if surrendered to the PRC. We have identified the following issues in connection with the following fair trial rights that were not adequately addressed by the assurances:

(i) The right to a hearing before an independent panel or public tribunal: Mr Kim has a right to be tried before a tribunal that decides cases on the evidence before it and free from political pressure. There was material before the Minister to suggest that political influence is pervasive in the PRC's criminal justice system and this is how the system is designed to work. There was also material to suggest that the political influence prioritises social policy objectives over individual procedural protections.

(ii) The right to legal representation, including the right to present a defence, receive legal assistance, adequately prepare a defence and to examine witnesses: there were a number issues in connection with this right including the discretionary nature of disclosure to the defence and the fact that witnesses for the prosecution rarely give evidence with trial mostly being conducted on the papers. More troubling is the position of the defence bar in the PRC. Defence counsel must be able to honestly and responsibly represent an accused person without fear of repercussion if the procedural right is to operate in accordance with its purpose. There was material before

the Minister to suggest that defence counsel operate in an environment in which they fear persecution for their representation of their client.

(iii) The right not to be compelled to testify or confess guilt: there was material before the Minister to suggest that Mr Kim could be interrogated for a period of months in the absence of a lawyer.

Eighth ground — disproportionate punishment

(k) The Judge erred in finding the Minister made no error in failing to seek a specific assurance that the five years spent in custody in New Zealand would be deducted from any finite sentence of imprisonment in the PRC. As a matter of sentencing methodology, and considering New Zealand's international obligations, to not account for the time Mr Kim spent in custody would lead to a disproportionately severe punishment.

Ninth ground — access to mental health care

(l) We do not consider it appropriate to address the issue of Mr Kim's access to mental health services on the basis of the material before the Court.

RESULT

[276] We therefore allow the appeal.

[277] The Minister's decision to surrender Mr Kim under s 30 of the Extradition Act is quashed.

[278] The Minister of Justice must reconsider the issue of Mr Kim's surrender. In particular, the Minister should address the following matters:

(a) Whether the general human rights situation in the PRC suggests that the value of the human rights recognised under the ICCPR and the Convention against Torture are not understood and/or valued, and further, if they are, whether the rule of law in the PRC is sufficient to secure those rights.

(b) The Minister is to make further inquiry as to whether murder accused are at high-risk, or higher risk, than the notional ordinary criminal.

(c) The Minister should not treat the fact that Mr Kim will be tried in Shanghai, the stage of the investigation, or the strength of the case against Mr Kim as reducing the risk of torture, unless further inquiries provide a sufficient evidential basis for proceeding on that basis.

(d) In assessing the effectiveness of the assurances to address the risk of torture, the Minister must address such evidence as there is that:

(i) torture is already against the law, yet persists;

(ii) the evidence is that practice of torture in the PRC is concealed and that its use can be difficult to detect;

(iii) videotaping of interrogations is selective and torture often occurs outside the recorded sessions;

(iv) evidence obtained by torture is regularly admitted in court; and

(v) there are substantial disincentives for anyone, including the detained person, reporting the practice of torture.

(e) When addressing the issue of the risk that Mr Kim will not receive a fair trial in the PRC should he be surrendered, the Minister should:

(i) seek further information in connection with the extent to which the judiciary is subject to political control, and the extent to

which tribunals that did not hear persons, or groups, or tribunals that did not hear the case, control or influence decisions of guilt or innocence;

(ii) seek further information as to the position of the defence bar in the PRC, the right the defence has to disclosure of the case to be met, and the right to examine witnesses; and

(iii) seek further assurances that Mr Kim will be entitled to disclosure of the case against him (detailed as to timing and content), that he will have the right, through counsel, to question all witnesses, and the right to the presence of effective defence counsel during all interrogation.

(f) The Minister should address the risk that Mr Kim will be sentenced to a finite term of imprisonment and receive no credit for time already served in New Zealand. Relevant to consideration of this issue will be any assurances the Minister is able to obtain in relation to this.

COSTS

[279] Mr Kim has been successful on this appeal. Accordingly, the respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band B basis and usual disbursements. We certify for second counsel.

[280] Costs in the High Court are to be dealt with by that Court having regard to this judgment.

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