



**Supreme Court of New Zealand
Te Kōti Mana Nui**

21 DECEMBER 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**MAYTHEM KAMIL RADHI v THE DISTRICT COURT AT MANUKAU
AND THE COMMONWEALTH OF AUSTRALIA**

(SC 57/2017) [2017] NZSC 198

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The Court of Appeal order prohibiting publication of names or identifying particulars of Mr Radhi’s wife and children remains in force.

Mr Radhi is a 41-year-old refugee from Iraq. He has lived in New Zealand with his wife and three children since 2009 when they were accepted for resettlement in this country.

The Commonwealth of Australia alleges that in 2001 Mr Radhi was involved in helping asylum seekers sail from Indonesia to Australia in a vessel known as the SIEV-X. The vessel sank and an estimated 300 lives were lost. The Commonwealth seek Mr Radhi’s extradition to stand trial for people-smuggling. Two others have been tried and convicted for their involvement in these events, one in Egypt and the other in Australia.

In 2014, after a defended hearing in the District Court and subsequent appeals, the Commonwealth obtained an order from the District Court that Mr Radhi was eligible for surrender. Mr Radhi then applied to the District Court for an order under s 48(4)(a)(ii) of the Extradition Act 1999 that his case be referred to the Minister of Justice. That subsection provides for referral if:

85 Lambton Quay, Wellington
P O Box 61 DX SX 11224
Telephone 64 4 918 8222 Facsimile 64 4 471 6924

“because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period”

If Mr Radhi’s case is not referred to the Minister, he will be extradited to Australia to stand trial.

The District Court declined to refer Mr Radhi’s case to the Minister. Mr Radhi’s application for judicial review in the High Court was unsuccessful, as was his appeal to the Court of Appeal.

The Supreme Court granted Mr Radhi leave to appeal on the question whether the Court of Appeal was correct to conclude that the circumstances of Mr Radhi did not warrant a reference to the Minister under s 48(4)(a)(ii) of the Extradition Act.

The Supreme Court has, by a majority comprising William Young, Glazebrook and O’Regan JJ, allowed Mr Radhi’s appeal and decided to refer his case to the Minister.

If Mr Radhi is found guilty and sentenced to a term of imprisonment of 12 months or more, he would be classed as an “excluded person” under the New Zealand Immigration Act 2009. In that event, there is no room for confidence that he would be permitted to return to New Zealand. He would not be returned to Iraq because of Australia’s non-refoulment obligations.¹ But although practically unable to leave Australia, he would have no legal entitlement to remain there and would thus be subject to mandatory detention until he is either granted a visa or removed from Australia. Such detention would be open-ended in duration and there would be no right of access to the Australian courts to challenge it other than on formal grounds of illegality. It would, in all probability, last for a number of years.

Removal from home and separation from family are part and parcel of the extradition process. So too is the risk of being subject to imprisonment following trial. But in almost all instances of extradition, the extradited person will be free to pick up his or her life either at the end of the trial (if acquitted) or, at worst, at the conclusion of any sentence imposed following conviction. It is not customary for such persons, once free of the criminal justice system, to be subject to the risks of immigration limbo of the kind postulated.

The risks of immigration limbo could be avoided by the New Zealand Minister of Immigration granting Mr Radhi a visa which would permit him to return to New Zealand once the criminal justice process in Australia has finished.

¹ A principle of international law that protects refugees or asylum seekers from being returned to a country in which they are liable to be subjected to persecution.

In the majority's view, the circumstances of Mr Radhi which render this outcome possible are "compelling or extraordinary" and mean that it would be unjust or oppressive to surrender him to Australia before the New Zealand Minister of Immigration has had the opportunity to consider the immigration limbo issue.

Ellen France and McGrath JJ dissented. They considered that s 48(4)(a)(ii) had a narrower focus, applying only to immediate circumstances of the person which would make it unjust or oppressive to surrender them before "the expiration of a particular period". They did not consider that Mr Radhi's circumstances comprised a condition of the sort envisaged in s 48(4)(a)(ii).

Contact person:

Kieron McCarron, Supreme Court Registrar (04) 471 6921