

(Minister Of Justice v Kyung Yup Kim, 2022)

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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 57/2019
[2022] NZSC 44

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

Hearing: 4 February 2022

Court: Glazebrook, O'Regan, Ellen France, Arnold and French JJ

Counsel: U R Jagose QC and A F Todd for Appellants
A J Ellis, B J R Keith and G K Edgeler for Respondent

Judgment: 13 April 2022

JUDGMENT OF THE COURT

- A The application for leave to adduce the expert reports annexed to the parties' joint report dated 3 December 2021 is granted.
 - B The appeal is allowed. The decision of the Court of Appeal is set aside.
 - C The Minister of Justice's decision of 19 September 2016 to surrender the respondent under s 30 of the Extradition Act 1999 is reinstated.
 - D Costs are reserved.
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REASONS

	Para No
Glazebrook, Ellen France and Arnold JJ	[1]
O'Regan and French JJ	[82]

GLAZEBROOK, ELLEN FRANCE AND ARNOLD JJ (Given by Ellen France J)

Table of Contents

	Para No
Introduction	[1]
Steps undertaken following delivery of the 4 June 2021 judgment	[4]
Summary of the parties' positions on the responses	[10]
Torture	[17]
<i>Background</i>	[18]
<i>The need for two further inquiries and the PRC response</i>	[24]
<i>The sufficiency of the two further assurances on torture</i>	[26]
The risk to Mr Kim	[27]
The quality of the assurances	[32]
Whether the assurances will be honoured	[34]
<i>Conclusion on risk of torture</i>	[40]
Fair trial	[41]
<i>Judicial committees</i>	[43]
The operational aspects and the 2019 Opinions	[48]
Equality of arms	[58]
Outside influence	[63]
<i>Disclosure</i>	[70]
<i>Delay</i>	[74]
<i>Conclusion on fair trial</i>	[76]
Mr Kim's health	[77]
Result	[78]
New evidence	[79]
Costs	[80]

Introduction

[1] In a judgment delivered on 4 June 2021¹ the Court, by majority, adjourned the appeal by the appellants, the Minister of Justice and the Attorney-General, against a decision of the Court of Appeal.² The Court of Appeal had allowed an appeal by the respondent, Mr Kim, in his judicial review of the 19 September 2016 decision of the then Minister of Justice (Hon Amy Adams) under s 30 of the Extradition Act 1999 that

¹ *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 [SC judgment].

² *Kim v Minister of Justice of New Zealand* [2019] NZCA 209, [2019] 3 NZLR 173 (Cooper, Winkelmann and Williams JJ).

he should be surrendered to the People's Republic of China (PRC) to face trial on one count of intentional homicide. The Court of Appeal quashed the Minister's decision on the basis of the risks to Mr Kim in terms of torture and fair trial, among other things.

[2] In adjourning the appeal the Court held that, assuming some specific issues relating to aspects of the analysis of the risks to Mr Kim were satisfactorily resolved, there would be no substantial grounds (no real risk) of Mr Kim being subjected to torture or of an unfair trial if surrendered to the PRC.³ The appeal was adjourned to give the appellants the opportunity to make further inquiries, seek further assurances from the PRC Government on the specific issues identified and consider any submissions made by Mr Kim.⁴ These steps have been taken.

[3] The issue for us now is whether the responses provided by the PRC satisfactorily resolve the outstanding issues identified by the Court in the earlier judgment. We address that issue after saying a little more about the principal steps undertaken since delivery of the earlier judgment.

Steps undertaken following delivery of the 4 June 2021 judgment

[4] In the earlier judgment the Court directed the parties to submit a joint report setting out the result of the further inquiries made and any further assurances received, as well as the proposed disposition of the appeal and any other relevant circumstances.⁵ The parties were also directed to describe any differences between them and whether a further hearing was sought. The joint report dated 3 December 2021 filed by the parties helpfully summarises the steps taken since the delivery of the earlier judgment and we adopt that summary in the description which follows.

[5] On 9 July 2021, the Ministry of Foreign Affairs and Trade (MFAT) on behalf of the appellants put a number of questions and requests for further assurances to the Government of the PRC. The PRC Government replied on 1 September 2021. In addition, the Minister of Justice made a request to the Minister of Foreign Affairs on

³ SC judgment, above n 1, at [471].

⁴ At [472].

⁵ At [474].

would be a “test case” for the PRC which the international community was watching closely. The PRC has a “significant interest in being able to extradite individuals to face criminal charges”. Publicity by New Zealand about any non-compliance with the assurances would “seriously jeopardise” the PRC’s law enforcement cooperation with other countries. Second, she explained why she saw Mr Kim’s case as in a different category from that of the two Canadians and from the situations in Hong Kong and that in Xinjiang. The two Canadians were targeted because they were Canadian citizens “as part of broader bilateral issues” between Canada and the PRC. Mr Kim is not a New Zealand citizen and has a “serious and legitimate allegation of criminality to face”. Finally, Mr Kim’s case had no link to Hong Kong or Xinjiang. The violations in those places were “strongly tied” to the PRC’s political aspirations in relation to those two regions. While the Minister did not refer to the expert reports Mr Kim provided to the Minister of Justice, in her later letter of 15 November 2021, she

- P. addressed the representations made by Amnesty International Aotearoa New Zealand, Human Rights Watch and the Inter-Parliamentary Alliance on China. All three of those
- Q. organisations submitted that diplomatic assurances were not a reliable protection against the risk of torture in detention, noting the PRC’s adverse record in these matters. The Minister reiterated that the “criminal and non-political character of Mr Kim’s case” underpinned her advice that the assurances would be kept. She also placed some weight on the content of the assurances.

[39] It was possible that the position had changed to such an extent that the assurances could no longer be seen as providing the protection that was the case at the time of the Minister’s decision to extradite Mr Kim and our review of that in the earlier judgment. Whether that was so has been carefully considered by the Minister of Foreign Affairs in the areas of her expertise.³⁷ By expertise in this context we mean the Minister’s expertise in relation to matters of international and bilateral diplomatic relations as well as incentives for cooperation internationally. That understanding extends to general transnational criminal matters. The Minister has carefully

³⁷ In the earlier judgment the Court noted that the Minister of Justice was entitled to rely on the expertise of the Minister of Foreign Affairs and that the latter Minister’s “assessment of the state of the bilateral relationship is ‘evidence’ like any other evidence. Nor [did] we consider that it [was] improper for the courts to take that expertise into account.”: at [49], n 53. The Court also made the point that contrary evidence about the state of bilateral relations would be evaluated in the usual way: at [49], n 53. Assessment of the contrary evidence was also within the expertise of the Minister.

explained her assessment and there is no evidential basis on which the Court should not accept it. The Minister was plainly aware of the factors that militated against accepting the assurances here, such as the case of the two Canadians, and must have been aware of the resultant delay in resolving that case.

Conclusion on risk of torture

- P. [40] For these reasons, we are satisfied the further assurances provided a reasonable
- Q. basis on which the Minister of Justice could be satisfied that there was no real risk that Mr Kim would be subject to an act of torture on surrender to the PRC. We reiterate the point made in the earlier judgment that, while the prohibition on torture is absolute, if no substantial grounds exist for believing an individual accused is at risk of torture because of the assurances provided, the individual should not avoid prosecution for a serious crime.³⁸ As we noted in that context, there are other rights involved: “the rights of individual victims of crime and their families and the rights of society generally to ensure” those accused of crimes are tried and, if convicted, suitable sanctions are imposed.³⁹ The ability to extradite an accused “serves those ends in the sense that it ensures that a person against whom there is a prima facie case is returned for trial”.⁴⁰

Fair trial

[41] The outstanding concerns about Mr Kim not receiving a fair trial broadly fall into two groups. The first group of concerns relates to the likelihood that Mr Kim’s case would be referred to a judicial committee.⁴¹ As the Court noted in the earlier judgment, each People’s Court establishes its own judicial committee.⁴² While a collegial panel tries the case, certain categories of cases may be referred to the judicial committee for determination. The collegial panel then executes the decision of the judicial committee. The second group of concerns relates to uncertainty as to the approach to disclosure to the defence.

³⁸ At [135].

³⁹ At [135].

⁴⁰ At [135].

⁴¹ The possibility of referral to a judicial committee was a matter on which the Court sought and received further submissions following the hearing leading to the Court’s earlier judgment.

⁴² At [303].

process. Mr Kim relies in this respect on a decision of the United Nations Human Rights Committee under the ICCPR in *Cagas v Philippines*.⁶⁸

[75] There are a number of difficulties with this submission. First, delay was a matter relied on by Mr Kim in support of his argument on his cross-appeal that no reasonable Minister could ever decide to extradite Mr Kim.⁶⁹ The Court did not accept that argument and the cross-appeal was dismissed.⁷⁰ The issue is no longer live and Mr Kim cannot seek to re-litigate it now. Second, in this context it is hard to see this as anything other than effectively an argument there should be something equating to a statute of limitations for murder. Finally, in any event, we do not consider *Cagas v Philippines* supports the proposition Mr Kim advances. That case was not an extradition case but rather related to lengthy pre-trial detention after bail had been declined.⁷¹

Conclusion on fair trial

- P. [76] For these reasons, we are satisfied the further assurances provided a reasonable basis on which the Minister could be satisfied that there was no real risk Mr Kim would face an unfair trial on surrender to the PRC.
- Q.

Mr Kim's health

[77] The final issue to which we briefly refer relates to the effect of further material provided about Mr Kim's health. Again, the question of Mr Kim's health was raised in support of the cross-appeal.⁷² The issue is not before us, as Mr Kim accepted.

Result

[78] In accordance with the view of the majority, the appeal is allowed. The decision of the Court of Appeal is set aside. The Minister of Justice's decision of

⁶⁸ Human Rights Committee *Views: Communication No 788/1997* UN Doc CCPR/C/73/D/788/1997 (31 January 2002) [*Cagas v Philippines*].

⁶⁹ SC judgment, above n 1, at [467].

⁷⁰ At [468].

⁷¹ *Cagas v Philippines*, above n 68, at [3.1]–[3.3].

⁷² SC judgment, above n 1, at [467].

should be surrendered, taking into account the matters set out in the reasons given by Glazebrook J in the 4 June 2021 judgment.⁷⁵

[83] Our view has not been altered by the steps that have been taken since the adjournment of the appeal, as described in the majority judgment. We consider that the reasons that led us to conclude that the matter should be reconsidered by the Minister in light of the 4 June 2021 judgment continue to apply.⁷⁶

[84] We therefore dissent from the decision to set aside the decision of the Court of Appeal and reinstate the decision of the Minister of Justice to surrender Mr Kim under s 30 of the Extradition Act 1999.

Solicitors:
Crown Law Office, Wellington for Appellants
Marshall Bird & Curtis, Auckland for Respondent

⁷⁵ At [479]. We considered the present case could be distinguished from *R (on the application of Aswat) v Secretary of State for Home Department* [2014] EWHC 1216 (Admin): see SC judgment, above n 74, at [480].

⁷⁶ At [481] and [482].