

(Ortmann v The United States  
Of America, 2021b)

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 88/2021

[2021] NZSC 187

BETWEEN

MATHIAS ORTMANN  
First Applicant

BRAM VAN DER KOLK  
Second Applicant

AND

UNITED STATES OF AMERICA  
First Respondent

DISTRICT COURT AT NORTH SHORE  
Second Respondent

SC 90/2021

BETWEEN

KIM DOTCOM  
Applicant

AND

UNITED STATES OF AMERICA  
First Respondent

DISTRICT COURT AT NORTH SHORE  
Second Respondent

Court: Winkelmann CJ, O'Regan and Ellen France JJ

Counsel: G M Illingworth QC, P J K Spring and A K Hyde for Messrs  
Ortmann and van der Kolk  
R M Mansfield QC and S L Cogan for Mr Dotcom  
D J Boldt, F R J Sinclair and Z A Fuhr for United States of  
America  
D Sothieson for District Court at North Shore

Judgment: 21 December 2021

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JUDGMENT OF THE COURT

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A **The applications for leave to appeal are dismissed.**

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**B The applicants must pay the first respondent one set of costs of \$2,500.**

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**REASONS**

**Introduction**

[1] The applicants seek leave to appeal from a decision of the Court of Appeal in which the Court dismissed their appeals, declined applications by Messrs Ortmann and van der Kolk to adduce further evidence, and declined Mr Dotcom's application for orders enforcing requests made under the Privacy Act 1993.<sup>1</sup>

**Background**

[2] The applicants have been found eligible to be extradited to the United States of America to face trial for criminal copyright infringement and other related charges.<sup>2</sup> In the context of considering the applicants' appeals by way of case stated on the eligibility decision, this Court also dealt with appeals relating to parallel judicial review proceedings challenging the eligibility decision.<sup>3</sup> This Court allowed the judicial review appeals, but the judicial review aspect of the appeals was limited to determining whether the Court of Appeal, in its 2018 judgment,<sup>4</sup> had erred in holding the judicial review proceedings were an abuse of process. After considering further submissions, we remitted the matter to the Court of Appeal "for the identification and resolution of any outstanding issues in relation to the judicial review appeals".<sup>5</sup>

[3] On remittal back to the Court of Appeal, the appeals were considered by the same panel which had dismissed the appeals in 2018. Prior to the hearing, the panel declined an application that the panel members should recuse themselves.

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<sup>1</sup> *Ortmann v The United States States of America* [2021] NZCA 310 (Kós P, French and Miller JJ) [CA judgment]. The second respondent abides the decision of this Court on the leave applications.

<sup>2</sup> The United States is no longer seeking the extradition of the fourth of the appellants in that case, Finn Batato, due to ill-health. Mr Batato has been formally discharged.

<sup>3</sup> *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 [SC judgment].

<sup>4</sup> *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 [CA 2018 judgment].

<sup>5</sup> *Ortmann v United States of America* [2021] NZSC 9 at [8].

appearance of a miscarriage of justice in the Court of Appeal's factual assessment. Nor do we see any error in the approach of the Court of Appeal to the question relating to the enforcement of Mr Dotcom's Privacy Act requests or Messrs Ortmann and van der Kolk's application to adduce further evidence on the remitted appeal.

[19] We acknowledge that there are a range of other matters the applicants raise within the broad headings we have discussed. However, we see the arguments the applicants wish to make about these matters and about the procedural approach of the Court of Appeal, including the recusal decision, as having insufficient prospects of success to justify an appeal to this Court.

[20] We add that this Court in its initial judgment on the appeal was concerned at the finding of the Court of Appeal that the judicial review proceedings were an abuse of process, which may have meant that the merits of the judicial review appeals had not been considered. The Court of Appeal has now confirmed in its remittal back judgment that it would have come to the same conclusion on all the issues if it had considered these issues under the judicial review heading.<sup>22</sup> That being the case, we do not consider there is anything more that this Court needs to do in relation to the proposed appeals, given our conclusion that no miscarriage has arisen.

## **Result**

[21] For these reasons, the applications for leave to appeal are dismissed. The applicants must pay the first respondent one set of costs of \$2,500.

Solicitors:  
Keegan Alexander, Auckland for Messrs Ortmann and van der Kolk  
Mackenzie Elvin, Tauranga for Mr Dotcom  
Crown Law Office, Wellington for United States of America  
D Sothieson, Ministry of Justice, Wellington for District Court at North Shore

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<sup>22</sup> CA judgment, above n 1, at [76].