[2021] NZLJ 226

Diplomatic assurances as a basis for extradition to the People's Republic of China

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Minister of Justice v Kim [2021] NZSC 57

China human rights experts have responded with scepticism to a "troubling precedent" handed down by the New Zealand Supreme Court in June (Donald Clarke "New Zealand's Troubling Precedent for China Extradition", Lawfare, 15 June 2021; Michael Caster "To the Supreme Court: Diplomatic Assurances from China are Meaningless" *Stuff.co.nz* (online ed, 12 June 2021). The decision, *Minister of Justice v Kim* [2021] NZSC 57, concerns Kyung Yup Kim — a South Korean citizen who moved to Aotearoa at the age of fourteen, more than thirty years ago. Kim is wanted on a murder charge in the People's Republic of China (PRC), a capital offence in China; he is accused of killing Ms Peiyun Chen in Shanghai in 2009. New Zealand received an extradition request from the PRC in 2011, which included assurances that Kim would not be subject to the death penalty if convicted. The Minister of Justice has twice determined that Kim should be surrendered for extradition to the PRC under the Extradition Act 1999, but repeated legal challenges have so far prevented this step from taking place. Most recently, in 2019 the Court of Appeal had held that the Minister of Justice made multiple errors in assessing whether Kim could lawfully be surrendered (*Kim v Minister of Justice* [2019] NZCA 209; [2019] 3 NZLR 173; see Marcelo Rodriguez-Ferrere and Andrew Geddis "The New Zealand Court of Appeal on Extradition to the PRC", UK Constitutional Law Blog, 24 June 2019). Notably, that decision was handed down by a bench that included Winkelmann CJ and Williams J, both of whom subsequently have been elevated to the Supreme Court (but, for obvious reasons, could not then sit on the current appeal).

The Supreme Court's decision does not finally resolve matters — while dismissing Kim's cross-appeal, the judgment adjourns the Minister's appeal until 30 July 2021. However, the judgment is significant and, as we argue, concerning on one key point (while also raising numerous issues of administrative law doctrine that are beyond the scope of this short note). As we see it, the Supreme Court's judgment effectively leaves Mr Kim's future hanging on the answer to two questions: can New Zealand trust assurances from the PRC regarding how it will treat Mr Kim; and who ought to get to decide if it can?

The Court answered the first question by unanimously agreeing that Kim may be surrendered if the PRC provides appropriate assurances that he will not be tortured and will receive a fair trial. Importantly, in declining to adopt a *per se* bar against extradition, the Court assumes the possibility of reliable assurances from the PRC relating to fundamental human rights. In other words, the Court accepts that *in theory* the PRC could be trusted to respect Kim's rights, assuming the right kind of diplomatic promises are offered. It then held that as long as the Minister of Justice can obtain some further Court-directed assurances from the PRC, he ultimately is entitled to decide whether the PRC can *in practice* be trusted to keep those promises.

Our concern is that the Court's underlying assumption represents more of a politically convenient "noble lie" in terms of New Zealand-PRC bilateral relations than a reflection of current evidence. That is to say, judicial concern to leave room for a reasonable ministerial decision that the PRC can be relied on to stick to its assurances means that the Court downplays how the PRC actually has behaved in practice. Furthermore, the current structure of New Zealand's extradition laws means the Court's approach of maintaining final ministerial discretion allows the ultimate question of Kim's fate to be answered using a process that is worryingly tainted by geopolitical considerations. If nothing else, Kim's case demonstrates why the underlying statutory framework needs amending in line with recommendations from the Law Commission.

BACKGROUND

Following the PRC's 2011 extradition request, and in accordance with the Extradition Act 1999, a District Court Judge in 2013 found there was a prima facie case against Kim for conduct which would constitute an offence in New Zealand if it had occurred in this jurisdiction (*Re Kim* DC Auckland CRI-2011-004-11056, 29 November 2013). In 2015, having obtained assurances from the PRC relating to the death penalty, torture and fair trial issues, the Minister of Justice determined that Kim should be surrendered to the PRC. Kim succeeded in judicial review of that decision (*Kim v Minister of Justice* [2016] NZHC 1490). There followed a second surrender decision in 2016, which was in turn subject to further judicial review proceedings that culminated in the current Supreme Court decision.

The central legal question is whether the Minister erred in agreeing to surrender Kim to the PRC, given the Extradition Act 1999's prohibition on extraditing individuals to countries where they may be tortured or fail to gain a fair trial. The judgment does not skirt around the systemic issues in the criminal justice system of the PRC — as discussed throughout, both the use of torture and breaches of minimum fair trial standards are common occurrences in China, despite

various law reform efforts and improvements in recent years. However, the Court finds there is no blanket prohibition on extraditing persons where torture is systemic in the receiving country (at [122]–[128]); likewise, while there are systemic fair trial issues in the PRC, the focus must be on whether there is a real risk of a "flagrant denial of justice" (citing *Othman v United Kingdom* (2012) 55 EHRR 1) in the particular circumstances of the individual concerned (at [335]–[338]). In other words, even if torture and unfair trials are rife in PRC, this does not preclude the possibility of the Minister being satisfied, on the basis of assurances pertaining to those issues, that Kim personally faces no "real risk" of torture or breach of fair trial rights.

This, of course, places the focus on the PRC's diplomatic assurances already provided, or to be provided, pertaining to Kim's treatment following his potential extradition. The Court set out a three-stage process (also adopted from *Othman*) for determining whether there is a relevant "real risk", involving the assessment of (at [132] and [329]):

(a) The risk to the individual, based on their personal characteristics and situation, and in light of the general human rights situation in the receiving country;

(b) The quality of assurances offered; and

(c) Whether the assurances will be honoured.

The Court's assessment of the first matter was, in essence, that it did not really know. Kim's circumstances were thought to put him at a *comparatively* low risk of torture or breach of fair trial rights, but in circumstances where the general background frequency of such events is unclear (at [198]–[211]). As such, the Court chose to focus less on asking "how likely is it someone like Kim would be tortured or face an unfair trial in the PRC?" and more on "how likely is it that this will happen to Kim himself, given what the PRC is promising it will do with him?" That focus required a close assessment of the latter two steps in the process.

RELEVANT ASSURANCES

The judgment discusses at length the assurances already offered by the PRC over the course of lengthy and extensive diplomatic negotiations. In 2016, the High Court deemed the PRC's original assurances regarding Kim's treatment to be insufficient (*Kim v Minister of Justice* [2016] NZHC 1490). Following that decision, the Minister of Justice sought, and the PRC provided, further specific assurances intended to defuse the risk to Kim. These included, for example: that the PRC will not subject Kim to torture; diplomatic/consular access by New Zealand officials to Kim every fifteen days, with additional visits on request; and availability of full and unedited recordings of all pre-trial interrogations and court proceedings relating to Kim. In relation to fair trial rights, the assurances included: that Kim will be brought to trial without undue delay, pursuant to the Criminal Procedure Law of the PRC; diplomatic/consular access to any open court hearings; and recordings of any closed court hearings.

The Court scrutinised at great length the quality of the assurances provided, finding that yet further assurances would be required before the Minister could conclude that there was no real risk to Kim's right not to be tortured and to receive a fair trial. Such assurances relate to, for example: criminal disclosure; location of trial; and 48-hourly consular visits during the investigation phase. The Court also discussed the role of "judicial committees" (or "adjudication committees") in China, a unique and secretive feature of the Chinese judiciary which involves senior court officials, not present at trial, making a final adjudication. The Court rightly noted that adjudication committees essentially undermine the criminal trial, separating the process from the actual decision-making, and found that in the absence of further assurances relating to the operation of the judicial committee in Kim's case, it was "not possible for the Minister ... to have come to the conclusion that Mr Kim would be tried by an independent and impartial board" (at [345]). However, the Court left open the possibility that the Minister could secure and rely on further assurances from the PRC such as to satisfy the "no real risk" test and lawfully decide to surrender Kim.

THE RELIABILITY OF DIPLOMATIC ASSURANCES: UNDERLYING PREMISES

There is much that can be said about the *quality* of the assurances the Court requires from the PRC. To give just two examples-the Court's characterisation of a judicial committee decision as potentially "akin to a preliminary general appeal decided on the papers" (at [350]), as long as political representatives will not attend any committee meetings in Kim's case, glosses over a longstanding history of the Chinese Communist Party using the criminal justice system for political ends. Likewise, the PRC's assurance that Mr Kim could be visited by New Zealand consular officials on a regular basis during detention with a medical doctor as a means to detect torture is entirely undermined, in our view, by the fact that the assurance requires any attending doctor to be PRC-qualified. (Admittedly, the Court addressed the submission that there are obvious disincentives for any Chinese doctor to report suspicions of torture, but hand-wavingly concluded that consular officials could "try" to find a doctor who would be willing to brief them privately (at [244])).

Leaving aside the question of the quality of such assurances, the more fundamental problem is the Court's assessment of their reliability. The PRC might be willing to make any and all promises of good behaviour deemed necessary to secure an extradition order, but can they then be trusted to keep them?

Importantly, the Court acknowledged (as did the Minister) that "there may be extreme situations where there is no point in seeking assurances as they obviously could not be relied on" (at [57]); and there may be "rare cases where the human rights situation is so bad that assurances could not properly be given any weight at all, no matter how detailed" (at [65]). Consider, then, the human rights situation in China today. There is clear evidence of mass internment of the Uyghur minority in China, including forced sterilisation, labour, mass rape and torture. Although the New Zealand government and House of Representatives have so far avoided using the term "genocide", opting instead for the softer language of "serious human rights breaches", independent expert legal analysis of the situation in Xinjiang has determined China is violating "every single provision in the United Nations' Genocide Convention" (Newlines Institute for Strategy and Policy, "The Uyghur Genocide: An Examination of China's Breach of the 1948 Genocide Convention", 8 March 2021).

The Court's judgment makes no mention of this key feature of China's "human rights situation". Kim is not Uyghur, so that particular "human rights situation" presumably was not considered relevant to the risk of rights abuse

should he be extradited. However, clearly and directly relevant to the broader question of "reliability of assurances" in Kim's case is the fact that China has repeatedly assured the world that any allegations of crimes against humanity in Xinjiang are fabrications (Embassy of the PRC in the USA, "'Xinjiang is a Wonderful Land' Online Meeting Held in the US", 7 May 2021).

The PRC's refusal to even acknowledge the existence of rights issues in Xinjaing points to another flaw with the *Kim* decision — the assumption that the PRC generally can be trusted to honour its assurances because of the potential for "serious and diplomatic repercussions for China" if it became known said assurances had not been honoured (at [178]). As Professor Clarke points out, the claim that China is so desperate for international cooperation that it would be unwilling to incur the reputational cost of mistreating Kim is intuitively appealing. Unfortunately, it also fails upon contact with the real world (Clarke, "New Zealand's Troubling Precedent"). Clarke recounts recent instances where China has violated clear treaty commitments, including of the sort offered in Kim's case — such as by denying diplomatic access to the trials of foreign nationals. Moreover, the assurances of the sort offered in Kim's are *less*, *not more*, binding than the formal treaty commitments that the PRC already has proven prepared to ignore. In all, "[d]espite the intuitive appeal of the argument about reputational damage, history simply fails to support it" (Clarke, "New Zealand's Troubling Precedent").

As such, the Court's analysis ultimately seems to rest on several highly questionable assumptions: that Kim is not the kind of individual the PRC is likely to want to mistreat; that assurances given to New Zealand will be taken more seriously than those to other countries because of the state of bilateral relations between the two nations; and that the PRC will want to be seen to keep its word so as to be able to extradite others in the future (at [259]–[260]). Further, the Court might protest that its decision does not mean that the Minister of Justice *must* accept the credibility of any assurances from the PRC; rather, it only leaves it open to a reasonable minister to do so and decide to surrender Kim. Ultimately, however, it remains for the minister to make that final decision.

LAW, POLITICS AND EXTRADITION DECISIONS

Leaving the final decision-making power in extradition cases in ministerial hands raises obvious concerns. While the Court notes that officials from the Ministry of Foreign Affairs and Trade laud the current strength of the bilateral relationship between the PRC and New Zealand (at [178]), this is subject to well-known stress points. It also is hardly a relationship of equals, given New Zealand's relatively greater dependence on trade between the two nations. As such, any ministerial decision that Kim will not be surrendered for extradition because the PRC's assurances regarding his treatment simply cannot be trusted might have serious and far-reaching diplomatic consequences. Consequently, a ministerial decision that these assurances in fact *can* be trusted, and so Kim can be surrendered, always will be somewhat suspect. Is the Minister really assured that there is no real risk to Kim's rights, or is he rather trying to avoid upsetting an increasingly prickly diplomatic partner in a global context of growing tensions between it and our liberal-democratic global allies?

At this point we may note that adopting the Law Commission's 2016 call to repeal and replace the Extradition Act 1999 would somewhat ameliorate concern over politicisation of such decisions. First, the Law Commission recommended that the extradition process be overseen by a "Central Authority" (in effect, the Attorney-General) in order to initially assess "not just whether there is a sufficient case against the person sought to justify extradition, but also the realities of the justice system of the country that is making the request, and the degree to which concerns over the grounds of refusal are likely to be satisfied by the time the extradition hearing is completed." (Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at [2.9]) Second, the courts alone would then decide whether an individual in fact faces a real risk of torture or denial of a fair trial if extradited (Law Commission, above, at [5.6]; [8.34]). Its reasons for this recommendation are worth setting out in full (Law Commission, at 5.16):

> ... the Court is the most appropriate institution to make decisions about grounds for refusal. This is consistent with the basic starting point of the New Zealand constitution that law enforcement decisions are made by non-political actors, albeit that in the case of extradition the Minister might be acting in a non-political capacity. Moreover, it is our belief that with the exception of the death penalty, the other refusal grounds fall squarely within the kinds of decisions that courts might normally undertake domestically: considerations of fairness of trial, the nature of an offence, discrimination and the like.

However, shifting final responsibility for determining this issue to the judicial realm does not solve the problem entirely. When deciding if an extradition request from a country with a dubious human rights record creates a real risk that they will be tortured or denied a fair trial, an assessment still must be made as to the reliability of any diplomatic assurances relating to how the individual will be treated. That assessment will rely heavily on the views of the executive branch, and the Ministry of Foreign Affairs and Trade in particular. The Supreme Court described such views as constituting "'evidence' like any other evidence", with it not being "improper for the courts to take that expertise into account" (at [49], n 53). It may be hoped that should the Law Commission's recommendation be acted on and new legislation transfer such rights decisions to the courts alone, a more sceptical judicial eye would be applied to such evidence than was apparent in *Kim*.

CONCLUSION

As the Supreme Court notes (at [135]), an important aspect to *Kim's* case needs remembering. Someone killed Ms Peiyun Chen. She leaves behind her a family and a community that expects accountability for her death. There appears to be significant prima facie evidence that Kim is the individual responsible for it. Had these events occurred in, say, Auckland and had the alleged perpetrator then fled to, say, Shanghai, the New Zealand public and law enforcement officials alike would quite rightly wish him returned here to see justice done. There is then no reason to believe that the people of the PRC experience this quite human response any differently. It would then be deeply undesirable for New Zealand to become some sort of extradition-proof, South Seas version of Brazil for any modern-day Ronnie Biggs that gains the right to reside here.

However, extradition requires action by the New Zealand

Continued on page 254

still or moving image of sexual activities of a real or simulated child can constitute sexual exploitation. However, it does not cover the representation of the sexual parts of a child.

Criminalising virtual CSEM became very controversial in domestic legal systems. The United States Child Pornography Prevention Act 1996 (CPPA) prohibited the shipment, distribution, receipt, reproduction, sale, or possession of all the visual depictions of minors engaging sexually explicit conduct including virtual pornography (s 2256(8)). This statutory provision was challenged before the Supreme Court in *Ashcroft v Free Speech Coalition* [2002] 535 US 234 and the Supreme Court found it was an overly broad and illegal restriction of the freedom of speech. The Court ruled out the broader definition of child pornography in CPPA and limited the definition of child pornography to the sexual conduct of real children. However, the dissenting judgment said that virtual child pornography should be banned, excluding "youthful-adult pornography".

Accordingly, New Zealand law requires a broader legal definition for virtual child pornography under objectionable publications applying to both sexual activities and any representation of the sexual parts. It needs to extend to computer or digitally generated images and videos, cartoons, morphed images, collages, and drawings. In my opinion, production of virtual CSEM for personal consumption only is mere artistic endeavour. This consumption is inappropriate for prohibition as doing so is inconsistent with the freedom of speech. Even though art 3 of the Lanzarote Convention specifically describes virtual pornography, it gives discretion to the States Parties to decide whether to criminalise simple production and possession of these materials. However, possession with the intention of distribution, distribution, sale, export, import or transmission of virtual CSEM in any form needs to be prohibited by law, because these prohibitions may reduce the amount of the production and consumption of these materials encouraging ethical market values.

In *Department of Internal Affairs v Chadwick* [2018] NZDC 20716, Zohrab J stated (at [19]):

> Online child exploitation is not a victimless offence. It fuels the cycle of child abuse and the exploitation of real children internationally.

The international instruments regarding online child sexual exploitation and child pornography obliged States Parties to take legislative measures to protect child victims, along with their rights and interests. OPCRCSC and Lanzarote Convention emphasise these provisions to ensure the safety of the victim and the family, protect their privacy and provide appropriate support for recovery. Some of these policies are apparent in New Zealand Police 'Child protection guidelines'. But there is no proper legislative mechanism to rehabilitate and compensate New Zealand's sexually exploited child victims. The possible remedy to fill this gap is to embed those provisions into the Oranga Tamariki Act.

Reforms for other mechanisms

EUROPOL has identified some critical threats of online child sexual exploitation, including P2P networks, and the dark web networks which can be anonymously accessed. They are the principal sources of non-commercial CSEM distribution. The most common CSEM filtering system in New Zealand is the Digital Child Exploitation Filtering System (DCEFS). But it is unable to detect CSEM in the peer-to-peer networks. This filtering system has been used since 2010 by the government agents, education providers and some individuals, and the government recently advertised for a replacement of this software. It is evident that New Zealand needs a filtering system with an efficient architecture to combat ongoing online threats to protect children from online sexual exploitation. Moreover, government bodies and other social organisations need to take appropriate measures to widen social awareness. This knowledge would encourage the government to take required legal steps against CSEM producers, consumers, and dealers.

CONCLUSION

Online child sexual exploitation is an ongoing issue in every society. Based on international obligations, the New Zealand jurisdiction shaped its legal mechanism by implementing new laws and amending existing laws. However, the New Zealand legal system has a deficiency of specific children-based legislation. In deciding these matters, the judiciary had to consider several Acts, and some are inconsistent with others. Therefore, it is essential to implement specific and coherent children-based legislation in New Zealand to combat child sexual harassment, abuse and exploitation. This legislation must include specific definitions, limitations and extensions for child sexual harassment, abuse and exploitation, with proper provisions to deal with online matters. Along with a proper legal framework, it requires strong social awareness, effective filtering architecture and an ethical market to work together to prevent child sexual exploitation within cyberspace. ❐

Continued from page 228

state. Before taking such action, New Zealand is obliged, both legally and morally, to be credibly assured that surrendering an individual for extradition will not facilitate a breach of fundamental human rights. The risk of any such breach is an inherently politicised enquiry, not least when the criminal justice system in question is itself deeply flawed and politicised. As the extradition framework currently stands, our concern is that New Zealand's human rights obligations may be overlooked in pursuit of other state interests. That may not be concerning for those assured of Kim's guilt, to which two responses can be given: first, that the precedent laid out in Kim's case will have legal and political implications beyond his case and potentially beyond our borders; and second, that such utilitarian "ends justify the means" reasoning is contrary to the very idea of the right to due process which is at stake in Kim's case. ❐