IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA671/2017
[2018] NZCA 324

BETWEEN	RAYMOND JOSEPH TUKAKI Appellant
AND	THE COMMONWEALTH OF AUSTRALIA Respondent

Hearing:	19 June 2018
Court:	Winkelmann, France and Wylie JJ
Counsel:	C G Tuck and R D Butler for Appellant F R J Sinclair for Respondent
Judgment:	27 August 2018 at 12 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The appeal is dismissed.

C No order as to costs.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] The Commonwealth of Australia seeks Mr Tukaki's surrender on six counts charging serious violent and sexual offending. He is alleged to have offended in 1998 and 1999 when living in the Northern Territory. Accordingly, any trial of these charges will take place in the Supreme Court of the Northern Territory.

[2] Mr Tukaki appeals, as of right, Moore J's dismissal of his claim for judicial review of Judge Ingram's refusal to refer Mr Tukaki's case to the Minister under s 48 of the Extradition Act 1999.[1] He also appeals Moore J's dismissal of an appeal against the same judgment of Judge Ingram in which the Judge found Mr Tukaki eligible for surrender, rejecting his claim that extradition would be unjust or oppressive because of the amount of time that had passed since the alleged offending and in light of his personal circumstances.

[3] The right of appeal in respect of the finding that Mr Tukaki is eligible for surrender is limited to an appeal on a question of law only and requires the grant of leave. The Crown does not oppose the grant of leave. We are satisfied that Mr Tukaki's appeal raises important questions of law, in the extradition context, rather than issues specific to the facts of his case.[2] Accordingly, we grant leave to appeal.

Factual background

[4] Mr Tukaki is 42 years of age and currently works as a self-employed contractor at Te Kaha in the Bay of Plenty. He is Māori. We gratefully adopt Moore J's summary of the circumstances of the alleged offending:

> [6] In July 1998 Mr Tukaki met the adult complainant ("Ms M") when she was holidaying in New Zealand. They commenced an intimate relationship which was suspended when the complainant returned to her home in Darwin.
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> [7] The following month Mr Tukaki travelled to Darwin where he reconnected with Ms M. Their intimate relationship resumed resulting in Ms M becoming pregnant to Mr Tukaki, who at that time used the surname Reid. The two charges of assault and the charge of sexual intercourse without consent relate to events al1eged to have taken place between January 1999 and March 1999 involving Ms M. The remaining charges relate to offending alleged to have been committed by Mr Tukaki against J, one of Ms M's two infant children, between March and September 1999.
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> [8] Mr Tukaki went on to have two children with Ms M. It is understood they both reside in Australia.

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1 *Tukaki v District Court at Tauranga* [2017] NZHC 843. As to the appeal right, see s 20 of the Judicial Review Procedure Act 2016.

2 Criminal Procedure Act 2011, s 303(2). See *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [36] for this Court's discussion of the principles for granting leave for a further appeal on a question of law under the Criminal Procedure Act.

> [9] In 2000 or 2001 Mr Tukaki returned to New Zealand and, with the exception of a short visit to Australia in 2002, has not returned.
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> [10] The complaints were first made to the Northern Territory Police in 2009 but it was not until 2013 that the decision to charge Mr Tukaki was made.
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> [11] The charges were laid in July 2013. There then followed a number of procedural complications which finally led to an extradition request being made, warrants to arrest issued and the extradition documentation forwarded to New Zealand in May 2016.

Mr Tukaki's evidence

[5] In evidence filed in the District Court Mr Tukaki described how his return to New Zealand in 2001 followed a period of "emotional isolation in Australia" which left him wanting to return to "whānau and a place of peace and healing". Since his return he has established a new life in New Zealand with his wife and family. Mr Tukaki gives no further details of the family he has established since his return. Of his present circumstances now he says:

> I am a Māori living on my tribal land Te Whānau-ā-Apanui where I am supported by whānau in a traditional and culturally appropriate way. People initially asked who I was when I returned from Australia — as they did not recognise the name Reid. My name changed to my tipuna name of Tukaki, enabled people to know the family that I belong to. My name change had nothing to do with avoiding detection and was done openly and formally.

[6] If extradited to the Northern Territory he says he would have no ability to provide for himself or family, or adequately prepare emotionally and legally for his defence. Given this circumstance, remand in custody would probably be the result. Being uprooted from his family and being placed in those circumstances would cause him extreme hardship.

The statutory regime

[7] Part 4 of the Extradition Act reflects one of the Act's stated objects, which is to provide a simplified procedure for New Zealand to give effect to a request for extradition from Australia.[3] Extradition procedures between New Zealand and Australia proceed by a simplified "fast track", endorsed warrant procedure.

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3 Extradition Act 1999, s 12(d).

[8] Under s 45(2) of the Act, a person is eligible for surrender when the following requirements are met:

> (a) an endorsed warrant for the person's arrest has been produced to the court; and
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> (b) the court is satisfied that:
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> > (i) the person is an extraditable person in relation to the extradition country; and
> >
> > (ii) the offence or offences are extradition offences in relation to the extradition country.

[9] There are a number of grounds on which a court may find that a person is not eligible for surrender which include restrictions under ss 7 or 8 of the Act.

[10] Section 7 sets out mandatory restrictions on surrender. Section 7 is not in issue on this appeal. Section 8 sets out discretionary grounds for restriction. Mr Tukaki argues the discretionary restriction on surrender under s 8(1)(c) of the Act applies so that the District Court Judge should have determined he was not eligible for surrender under s 45(4). He bears the onus of establishing that a discretionary restriction on extradition applies in his case.[4] Section 8 of the Act relevantly provides:

> **8 Discretionary restrictions on surrender**
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> (1) A discretionary restriction on surrender exists if, because of—
>
> > (a) the trivial nature of the case; or
> >
> > (b) if the person is accused of an offence, the fact that the accusation against the person was not made in good faith in the interests of justice; or
> >
> > (c) the amount of time that has passed since the offence is alleged to have been committed or was committed,—
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> and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

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4 *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [29].

> (2) A discretionary restriction on surrender exists if the person has been accused of an offence within the jurisdiction of New Zealand (other than an offence for which his or her surrender is sought), and the proceedings against the person have not been disposed of.

[11] The focus of s 8 is whether injustice or oppression arises out of *the circumstances of the case*. Personal circumstances may be relevant where there is a clear nexus between those circumstances and the delay or the lack of good faith in the making of the accusation.[5]

[12] The two grounds, "unjust" and "oppressive", overlap. The former is directed primarily to the risk of prejudice in the conduct of the trial itself; the latter, to hardship resulting from changes in the subject's circumstances that have occurred during the period between the alleged offending and the application for extradition.[6] The reasons for delay by the requesting state may in some cases be relevant to whether there is oppression, but that issue is not pursued on appeal.[7]

[13] If a court is satisfied that a person is not eligible for surrender due to a mandatory or discretionary restriction applying, the person must be discharged unless a party indicates they will appeal the decision.[8]

[14] But even if the eligibility criteria for surrender under s 45 are met, and there are no mandatory or discretionary restrictions on surrender, the court must nevertheless assess whether the case is to be referred to the Minister of Justice under s 48.[9] The grounds for referral to the Minister extend beyond the restrictions on surrender under ss 7 and 8. They extend to personal circumstances, without the s 8 requirements that those circumstances be connected to any delay in the proceeding or lack of good faith in the making of the accusation. If the case is referred, it is for the Minister to determine if the person is to be surrendered.

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5 *Mailley v District Court at North Shore* [2013] NZCA 266 at [48].
6 *Kakis v Governor of the Republic of Cyprus* [1978] 1 WLR 779 (HL) at 782.
7 *Commonwealth of Australia v Mercer*, above n 4, at [53].
8 Extradition Act, s 46(4). We recognise that there is some difficulty in reconciling this section with s 48(a)(i), but we leave that issue of statutory interpretation for another day.
9 Normally when a New Zealand citizen is eligible for surrender the court must refer the case to the Minister under s 48(1)(a). Where Australia is the extradition country, as it is here, the court is not required to do so due to s 48(3).

[15] If there is not a basis to refer the case to the Minister, the court must immediately make a surrender order.[10]

[16] Section 48(4) is in issue in this case. It relevantly provides:

> **48 Referral of case to Minister in certain circumstances**
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> (4) If—
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> (a) it appears to the court in any proceedings under section 45 that—
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> (i) any of the restrictions on the surrender of the person under section 7 or section 8 apply or may apply; or
>
> (ii) 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; but
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> (b) in every other respect the court is satisfied that the grounds for making a surrender order exist,—
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> the court may refer the case to the Minister in accordance with subsection (5).

[17] Upon referral, s 49 applies and the Minister must then determine whether to surrender the person. The Minister may refuse to do so,[11] based on the criteria in s 30(2)–(4) or may defer extradition under s 51.

Section 8 appeal

[18] Although Mr Tukaki says that he has a wife and family in New Zealand he provides no detail of this family. He does not, for example, claim particular responsibilities to his family that will cause hardship should he be surrendered. Rather, this appeal as argued, is based squarely upon Mr Tukaki's Māori whakapapa and the fact that, since his return to New Zealand, he has built a new life for himself within the cultural context of his people, Te Whānau-ā-Apanui. He has accepted and now lives by the tikanga of Te Whānau-ā-Apanui. Ms Butler for Mr Tukaki says that

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10 Extradition Act, s 47(1).
11 Section 49(1).

by reason of his connection to his whānau, and his acceptance of tikanga as providing principles by which he should live his life, in all the circumstances of the case it is oppressive to surrender Mr Tukaki.

[19] The specific grounds of appeal advanced are that Moore J:

(a) was wrong to find that the words "because of" in s 8(1)(c) requires a causal relationship between the circumstances relied upon and the delay; and

(b) applied an incorrect standard for oppression, defining it as "oppressing, harsh or cruel", requiring that Mr Tukaki make out "unusual" circumstances, and ignoring the importance of human rights.

Did the Judge err in requiring a causal relationship between the circumstances of the case and the delay?

[20] Moore J found that there was a requirement for a "clear nexus" between the personal circumstances relied upon and the delay, in the sense that the circumstances must have come about because of the delay.[12] He said that this requirement arose from the use of the words "because of" in s 8(1). In formulating this proposition, the Judge relied upon the following passage from the decision of this Court in *Mailley v District Court at North Shore*:[13]

> As regards the health issues, it is well established following the decision of this Court in *Wolf v Federal Republic of Germany* that the personal circumstances of the alleged offender can come within the statutory phrase "all the circumstances of the case", and so be relevant to a s 8 inquiry, only if there is a clear nexus between those personal circumstances and the issues of delay and good faith. Mr Mailley's health issues in themselves could therefore never have resulted in a discretionary restriction under s 8.
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> (footnotes omitted)

[21] We see no error in the Judge's formulation of the principle. Indeed, counsel for Mr Tukaki accepts that it is well established that there must be a "clear nexus"

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12 *Tukaki v District Court at Tauranga,* above n 1, at [52].

13 *Mailley v District Court at North Shore*, above n 5, at [48] citing *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA) at 254.

between the circumstances and the delay. In reality, the issue Ms Butler takes is with the application of the principle. Moore J said that none of the personal circumstances relied upon by Mr Tukaki came about because of the delay in investigating and prosecuting the matter, and therefore could not be relied upon under s 8. Mr Tukaki's decision to return to New Zealand, he said, was not linked to any delay in commencing the prosecution but, rather, was a product of his election to change and improve his life by returning to his tūrangawaewae and his whānau.

[22] Although the Judge correctly articulated the legal principle, we agree that this analysis suggests that it is not the principle he applied. This is because it was not necessary for Mr Tukaki to show that the delay in the prosecution caused the change in his personal circumstances, only that it allowed that change to occur. It is this sense in which the word "nexus" is used — the change in circumstances would not have happened but for the delay. We do not see any basis upon which s 8 can be read down from this point. The words "all the circumstances of the case" are, on their face, words of very broad application capturing everything to do with the person and the criminal proceeding. The critical limitation is that the personal circumstance must be connected to the passage of time since the offending or to the lack of good faith in the making of the accusation. In *Mailley,* we understand the point the Court was making to be no more than that Mr Mailley's existing health conditions could not be connected to the delay in any sense.

[23] The approach we have outlined is consistent to that described by Lord Diplock in *Kakis v Republic of Cyprus*:[14]

> So one must look at the complete chronology of events … and consider whether the happening of such of those events, as would not have happened before the trial of the accused in Cypus if it had taken place with ordinary promptitude, has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now.

[24] Looking at matters afresh then, can Mr Tukaki point to the required nexus between the delay and circumstances he relies on? Mr Tukaki says he has established a new family in New Zealand since his return, although provides scant detail of those

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[14] *Kakis v Governor of the Republic of Cyprus*, above n 6, at 782.

relationships. He says also that he has found deep connection to his whānau in its broadest sense, and to living life in accordance with tikanga. The change in circumstances emphasised is the value that Mr Tukaki ascribes to whānau and to living his life in accordance with tikanga.

[25] We accept that if there had not been the delay, Mr Tukaki would not have established his new family, and would not have developed the strong bonds within Te Whānau-ā-Apanui that he has now. The real issue that arises under s 8(1)(c) is whether Mr Tukaki has established that these circumstances make it oppressive for him to be extradited.

Did the Judge err in applying a wrong legal test for what can constitute oppression for the purposes of s 8?

[26] Is extradition oppressive given Mr Tukaki's change in circumstances between the date of the alleged offending and the extradition application? Moore J was not satisfied that even if the necessary causal connection existed, the circumstances referred to would make it oppressive for Mr Tukaki to be extradited. He said:[15]

> Without in any way demeaning or devaluing the importance Mr Tukaki places in his cultural roots what he will face is what any person claiming Māori heritage, or indeed any person of non-Australian culture, might face when charged with offending alleged to have been committed during a period they chose to live in Australia. It thus follows that Mr Tukaki's identity and values as Māori do not constitute "circumstances of the case" which render his extradition oppressive in terms of s 8(1)(c).

[27] Ms Butler argues the Judge was wrong to dismiss the significance of Mr Tukaki's tikanga rights. His approach was wrong because tikanga forms part of the law of New Zealand, as authorities such as *Takamore v Clarke* make clear.[16] She argues the modern approach to customary law is to try to integrate it into the common law where possible. This approach is required in the context of extradition because of the Crown's obligations under the Treaty of Waitangi and New Zealand's commitment to international covenants which require that those tikanga rights be upheld. In particular she points to:

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15 *Tukaki v District Court at Tauranga*, above n 1, at [57].
16 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

(a) The relevance of the Treaty of Waitangi, which, in the words of the Waitangi Tribunal "entitles Māori interests to a reasonable degree of protection when those interests are affected by the international instruments that the New Zealand Government negotiates or signs up to".[17]

(b) The role of the United Nations Declaration of the Rights of Indigenous People in promoting the human rights dimension of the Treaty.[18]

(c) Article 27 of the International Covenant on Civil and Political Rights that provides:[19]

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

[28] Ms Butler argues that if Mr Tukaki is extradited he will be remanded in custody or a detention centre while he awaits trial. If he is found guilty at trial it is inevitable he will face a lengthy period of imprisonment in a Northern Territory prison. He will be deprived of his whānau connections and the ability to live a tikanga life. The fact he is Māori and identifies with tikanga, makes him inherently more vulnerable if he does not have his people with him, and giving rise to circumstances which would constitute oppression for the purposes of s 8.

Legal principles

[29] It is not appropriate to attempt a comprehensive definition of oppression for the purposes of s 8, or more broadly the Extradition Act, given the multiplicity of circumstances in which the issue may fall to be considered. It is possible to say

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17 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuatahi* (Wai 262, 2011) at 236.

18 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 A/61/L67 (2007), affirmed by New Zealand on 20 April 2010.

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

however that the threshold for oppression is high.[20] The very use of the word "oppression" signifies that. It is also implicit in the scheme of the Extradition Act that the usual and inevitable consequences of extradition are not, of themselves, "oppressive". The act of extradition is inherently disruptive and distressing. It may involve the forcible removal of an individual from their home country, and commonly involves the removal of an individual from their family.

[30] As Simon Brown LJ observed in *Woodcock v Government of New Zealand*:[21]

> I would add just this with regard to the concept of oppressiveness in section 11(3)(b). As I observed during the course of argument, it seems to me in any event puzzling in present times why someone should be able to improve their chances of escaping trial by travelling abroad and then changing their circumstances in their new country of residence. Why, say, should an Australian who has committed a series of frauds in Sydney then be better placed to escape trial (through it being found oppressive to extradite him) if he moves to England than if he moves to Darwin? The court should to my mind be wary of paying excessive heed to "hardship to the accused resulting from changes in his circumstances" following upon the accused's move to another country when equivalent hardship is likely to have occurred even had he remained in his country of origin.

[31] The public interest in extradition explains the threshold set in ss 7, 8 and 48. In *HH v Deputy Prosecutor of the Italian Republic, Genoa* Lady Hale explained the public interest as follows:[22]

> There is a constant and weighty public interest in extradition; that people accused of crimes should be brought to trial, that people convicted of crimes should serve their sentences; that [in that case] the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.

[32] To similar effect is the statement by this Court in *Radhi v District Court at Manukau* that extradition "involves an element of international reciprocity of considerable public interest to New Zealand".[23]

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20 *Commonwealth of Australia v Mercer*, above n 4, at [52].

21 *Woodcock v Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 WLR 1979 at [26].

22 *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at [8(4)].

23 *Radhi v District Court at Manukau* [2017] NZCA 157, [2017] NZAR 692 at [34].

[33] Notwithstanding the strong public interest in extradition, the Extradition Act expressly contemplates that there will be a careful consideration of the circumstances of the case to determine whether a mandatory or discretionary restriction applies.

[34] We accept Ms Butler's submission that New Zealand's international obligations are relevant to the interpretation and application of the mandatory and discretionary restrictions. It is a well-established rule of statutory interpretation that, where possible, statutes should be interpreted consistently with international treaties. That rule takes the form of a presumption articulated by this Court in this way:[24]

> We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations … That presumption may apply whether or not legislation was enacted with the purpose of implementing the relevant text … In that type to case national legislation is naturally being considered in the broader international legal context in which it increasingly operates.

[35] The Treaty of Waitangi is also relevant to issues of statutory interpretation. In New Zealand it has an elevated status owing to its constitutionally-foundational significance.[25]

[36] While some statutes expressly incorporate the principles of the Treaty of Waitangi — for example the State-Owned Enterprises Act 1986 — the absence of such a reference is not a bar to using the Treaty as an interpretive aid. That position was recently approved by this Court in *Ngaronoa v Attorney-General*:[26]

> [46] Today it can be stated with confidence that, even where the Treaty is not specifically mentioned in the text of particular legislation, it may, subject to terms of the legislation, be a permissible extrinsic aid to statutory interpretation.

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[24] *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289. See also *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]: "it is well established in New Zealand that if statutory provisions can be interpreted in a way that is consistent with New Zealand's international obligations, they should be so interpreted".

[25] On the importance of the Treaty of Waitangi as a statutory aid, see generally R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 519–533.

[26] *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 (footnotes omitted). Though it is worth noting that at [52], this Court ultimately held that the issues of interpretation at issue could not be resolved by reference to the Treaty principles.

[37] This Court in *Takamore v Clarke* more recently referred to the relevance of the Treaty of Waitangi in both statutory interpretation and in judicial review:[27]

> … as Dr Matthew Palmer discusses in his recent work, despite the fact that recently that question has not directly confronted the courts [whether the Treaty modifies common law], the courts have nonetheless enforced the Treaty indirectly in a number of ways.[28] First, the Treaty has been held to be an extrinsic aid to statutory interpretation, even where it is not itself mentioned in the text of the legislation.[29] Secondly, it may have "direct impact" in judicial review[30] — whether for example as a mandatory consideration,[31] or potentially as providing the basis for a legitimate expectation.[32]

Application to Mr Tukaki's appeal

[38] What of the circumstances Mr Tukaki points to? Although Mr Tukaki failed to provide any evidence, we are prepared to take judicial notice of the fact that whanaungatanga is one of the fundamental precepts of tikanga, and indeed Māori society. Such values can be weighed in the interpretation and application of s 8. It is not of course only in Māori society that the family unit is accorded special status. Article 10 of the United Nations International Covenant on Economic, Social and Cultural Rights records state parties' recognition that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society…"[33] Each culture defines the family unit differently. We accept for the purposes of this hearing, notwithstanding the absence of any evidence produced by Mr Tukaki, that the whānau to which he now has a deep connection and which he will suffer if separated from, is broader than his immediate family and extends to his hapū and iwi. We understand that to be the gist of his case.

[39] We do not think that Moore J was wrong to ask himself whether there was anything unusual in the consequences for Mr Tukaki. If the consequences are no more than the inevitable consequences of extradition, then to allow that they meet the

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27 *Takamore v Clarke*, above n 16, at [248] per Glazebrook and Wild JJ.

28 M S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 199–215.

29 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 223; and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

30 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

31 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA).

32 See for example Thomas J's dissent in *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA).

33 International Covenant on Civil and Political Rights, above n 19.

threshold of oppression would be to create the "safe havens" referred to in *HH v Deputy Prosecutor of the Italian Republic, Genoa*.[34]

[40] We accept that the removal of a person from their culture, cultural practices and whānau can all be factors to be weighed under s 8. Mr Tukaki can put his case no higher than that removing him from the connections and support available to him in Te Whānau-ā-Apanui, and transplanting him to a place where he has no support, will cause extreme hardship. But disruption of that type is a usual incidence of extradition. Mr Tukaki does not describe any particular hardship that will flow from that disruption, no particular relationship that will be harmed, no particular responsibility that will be foregone which makes the usual incidence of extradition so acute in his case as to reach the threshold of oppression.

[41] Mr Tukaki also raises the absence of culturally appropriate rehabilitation programmes in the Northern Territory. Again, we do not consider that could reach the level of oppression. Many who are imprisoned in New Zealand and elsewhere do not have the benefit of culturally appropriate rehabilitation programmes.

Referral to the Minister

[42] The next issue on this appeal is whether Mr Tukaki's case should have been referred to the Minister under s 48(4)(a)(ii). Multiple grounds of appeal are advanced for Mr Tukaki, but they can be reduced to the following — Moore J applied too high a standard for what could amount to oppression; he improperly placed insufficient weight on the importance of Mr Tukaki's "tikanga human rights" and improperly emphasised the principle of comity.

[43] Moore J was not satisfied that the circumstances relied upon by Mr Tukaki were extraordinary or compelling. He continued:[35]

> Neither do I accept Mr Tuck's submission that a liberal reading of the statutory grounds for refusing extradition requires priority to be given to tikanga Māori over the importance and significance of comity in international relations.

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34 *HH v Deputy Prosecutor of the Italian Republic, Genoa,* above n 22, at [8(4)] per Lady Hale.
35 *Tukaki v District Court at Tauranga*, above n 1, at [77].

[44] We see no error in the Judge's approach to whether Mr Tukaki had discharged the onus upon him to show it would be oppressive to require his surrender. There are no compelling or extraordinary circumstances Mr Tukaki can point to, and nor, as we have held, would requiring his surrender be oppressive. Again, as previously discussed, while Mr Tukaki's commitment and connection to his culture, and to his whānau in its broadest sense is something to be weighed, removing him from those connections cannot be said to be oppressive.

[45] As to Moore J's reference to international comity, we understand him to have been referring to the reciprocal international obligations involved in extradition whereby a person alleged to have offended is returned by a requested state to a requesting state to face trial. We agree with Ms Butler that the importance of those reciprocal obligations does not displace the necessary inquiry under ss 8 and 48, but it is a factor to be weighed when determining what constitutes extraordinary or compelling circumstances. We are satisfied the Judge did undertake the necessary inquiry as to whether Mr Tukaki had shown compelling or extraordinary circumstances that rendered his surrender oppressive.

[46] We make mention of a Canadian case, *United States v Leonard,* referred to us by the Crown.[36] We accept the Crown's submission that it provides a useful contrast to the claims put forward by Mr Tukaki.

[47] Under Canadian legislation, the Minister of Justice must, in every case, determine whether an eligible person should be surrendered.[37] Section 44 provides that the Minister shall refuse surrender if satisfied that "the surrender would be unjust or oppressive having regard to all the relevant circumstances". In *Leonard,* the extradition of two offenders was sought for importing drugs into the United States. Both were Aboriginal. The Minister had decided that both should be surrendered. The Ontario Court of Appeal held that in reaching that decision, the Minister made two significant errors.[38] He had concluded it was wrong to weigh what has come to be called the *Gladue* principles, which require that Canadian courts take into account

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36 *United States v Leonard* 2012 ONCA 622, 112 OR (3d) 496.
37 Extradition Act SC 1999 c 18.
38 *United States v Leonard,* above n 36, at [59].

the specific and particular problems faced by Aboriginal offenders when sentencing them.[39] There was evidence of Mr Leonard's family history over several generations. It showed that he had "suffered from the litany of disadvantages that the Supreme Court of Canada has attributed to Canada's sorry history of discrimination and neglect in relation to Aboriginal peoples".[40]

[48] The Court held that the principles for sentencing Aboriginal offenders should be considered by all decision-makers who have the power to influence the treatment of Aboriginal offenders in the justice system whenever an Aboriginal person's liberty is at stake, including extradition.[41]

[49] The second error was that the Minister had wrongly characterised his choice as being to surrender the two men to face justice elsewhere or to allow them to escape prosecution altogether.[42] But it was common ground they could both be prosecuted in Canada. If they were, and they were convicted, their status as Aboriginal offenders could be taken into account.

[50] The Court held that:

> [94] It would be contrary to the principles of fundamental justice to surrender this young Aboriginal first-offender to face a lengthy, crushing sentence in the United States that would almost certainly sever his ties to his family and Aboriginal culture and community with which he so closely identifies. Leonard's personal history corresponds precisely with the factors identified in *Gladue* and *Ipeelee* as requiring special consideration. It is clear that he will not get that consideration if surrendered to the United States and that he did not get it here from the Minister of Justice. His involvement in the alleged offence was, at worst, peripheral, and he has made substantial strides towards rehabilitation since his apprehension. I recognize that there is a considerable body of authority to the effect that extradition will not be refused simply because the person sought will receive a lengthier sentence in the foreign state: see, e.g. *United States v. K. (J.H.)* (2002), 165 C.C.C. (3d) 449 (Ont. C.A.)… However, in this case, the sentence the applicant faces in the United States — about 15 to 19 years, as compared to a conditional or short custodial sentence in Canada — is so grossly disproportionate in light of the applicant's personal circumstances that I conclude this is one of those exceptional cases where the "shocks the conscience" test outlined in *Burns* … has been met.

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39 At [60], referring to the principles set out in *R v Gladue* [1999] 1 SCR 688.
40 At [7]–[11].
41 At [85].
42 At [61].

[51] The Court did attach weight to the severing of ties to Mr Leonard's family and Aboriginal culture and community. But that was only one consideration. There were many additional matters that the Court took into account that distinguish the present case from *Leonard.* One of the more significant is that Mr Tukaki cannot be tried in New Zealand for the alleged offending. The choice here is stark. He is either surrendered for extradition, or New Zealand operates as a safe-haven for him on that charge. The Court in *Leonard* also gave weight to the gross disparity in sentencing outcomes for Mr Leonard, should he be extradited. Again, that factor is not present in this case. The personal circumstances relied upon by Mr Leonard were also compelling. He was young, he produced evidence of a life affected by the systemic discrimination and disadvantage borne by many Aboriginals, and it was accepted that his extradition would result in his young child being placed in foster care.

[52] Finally, we note that the Crown addressed submissions to us as to the meaning of the expression "for the expiration of a particular period" used in s 48(4)(a)(ii). There is an issue, discussed but not resolved by the Supreme Court in *Radhi* as to whether a court may only refer a case to the Minister if it is a temporary condition that makes it unjust or oppressive to surrender, in the sense that it will cease to exist after a particular period expires.[43] That is not an issue we need address. Whatever interpretation is correct, Mr Tukaki's case falls well short.

Result

[53] The appeal is dismissed.

[54] We make no order for costs.[44]

Solicitors:
Crown Law Office, Wellington for Respondent

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43 *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 at [26]–[27], [57], [65] and [92].

44 Crown did not seek costs.